

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL APPEAL NO. E378 OF 2023**

**SHADRACK MUTINDA KIMONYO**

**T/A KITUI MASTAS CENTRE.....APPELLANT**

**VERSUS**

**ATTA KENYA LIMITED.....RESPONDENT**

*(Being an appeal against the ruling and order of Hon. Gatambia Ndungu (RM)*

*delivered on 15<sup>th</sup> December 2023 in Mombasa Small Claims Court Commercial Claim*

*No. E003 of 2023, Atta Kenya Limited v Shadrack Mutinda Kimonyo t/a Kitui Mastas*

*Centre)*

**JUDGMENT**

1. The background of the appeal herein is an award of interest of 3% in favour of the Respondent in the sum of Kshs. 204,948.00. Aggrieved by the order, the Appellant filed a Notice of Motion application dated 4<sup>th</sup> October 2023 seeking review and setting aside. The application was amended by the Amended Notice of Motion on 31<sup>st</sup> October 2023.

2. The trial court delivered its ruling on 15<sup>th</sup> December 2023 dismissing the application and declaring the court *functus officio*.
3. Being dissatisfied, the Appellant appealed the ruling and order through the Memorandum of Appeal dated 22<sup>nd</sup> December 2023 on the following grounds: -

*(1) THAT the learned magistrate erred in law in failing to find that there was no agreement or contract between the Appellant and the Respondent for the payment of the alleged interest at the rate of 3% nor the sum of Kshs. 204,948.00*

*(2) THAT the learned magistrate erred in law in relying on 'Invoice Cum Delivery Note' to base his finding despite the fact that under SPECIAL INSTRUCTION, on the left lower bottom thereof, the Appellant had not signed, inserted his name and identity Card, the same was blank, which proved that the said document was never received nor executed by the Appellant.*

*(3) THAT the learned magistrate while holding that contracting parties are bound by their contract misdirected himself in failing to find that there was no contract between the Appellant and the Respondent with regard to the payment of interest at 3% per month and consequently that the award of Kshs. 204,948.00 in that regard was untenable.*

*(4) THAT the learned magistrate erred in law in failing to find that the document purporting to be the basis of charging interest at 3% per month, was never served upon nor executed by the Appellant and thus the same could not be binding upon him nor the basis for charging the said interest.*

*(5) THAT the learned magistrate misdirected himself in taking a partisan position in an endeavor to justify his earlier decision with regard to interest awarded which the Appellant sought to review.*

*(6) THAT the learned magistrate erred in law in failing to find that there was error on record in his earlier Ruling because the said decision had been reached without any document in support of agreement and/or contract to pay interest.*

*(7) THAT the learned magistrate erred in law in wholly relying on explanation advanced by the Respondent and in wholly rejecting the Appellant's position and thus arrived at an unsafe and unbalanced conclusion and decision.*

*(8) THAT the learned magistrate erred in law in finding that the contract between the parties was valid, when no contract existed as alleged or at all.*

4. The Appellant prayed for orders that the appeal herein be allowed, that the ruling and orders issued on 15<sup>th</sup> December 2023 in the Small Claims Court be set aside

in its entirety, that this court do find that the Appellant's Amended Notice of Motion amended on 31<sup>st</sup> October 2023 was meritorious and proceed to allow the same and effectively set aside the ruling issued on 19<sup>th</sup> September 2023 and consequent decree thereon with regard to interest of Kshs. 204,948, and that costs of this appeal and the Amended Notice of Motion amended in the subordinate court be awarded to the Appellant.

5. The court gave directions for the appeal to be canvassed by way of written submissions. As at the time of writing the judgment herein, only the Appellant had filed their submissions.

### ***Submissions***

6. The Appellant in their submissions dated 21<sup>st</sup> May 2025 argued that the trial court made its determination on an incorrect basis that there was an agreement to pay interest between the parties. The Appellant stated that a claim for interest can only be based on evidence tendered by the party seeking the same but since none was availed to court, the award of Kshs. 204,948.00 was an error and a candidate for setting aside. The Appellant stated that the Respondent annexed an 'Invoice Cum Delivery Note' to their Replying Affidavit to support the claim for interest but the Appellant neither signed nor was served with the card.
7. The Appellant cited **Section 3 (1)** of the **Law of Contract Act** and **Section 107** of the **Evidence Act** to disapprove validity of the document relied upon by the

Respondent to claim interest. The Appellant also relied on the cases of *Packfuels Limited v Elite Earthmovers Ltd* (2008) eKLR and *C. K. Patel Limited v Recco Builders Limited* [2010] KEHC 2488 (KLR) where the courts held that execution of documents forming the basis for the claim of interest is mandatory.

***Analysis***

8. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in ***Selle v Associated Motor Boat Co. (1968) E.A 123*** as follows: -

*“... Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ...”*

9. I have considered the Record of Appeal dated 18<sup>th</sup> February 2025 and submissions by the Appellant. The issues for determination are: -

*(a) Whether there existed a contractual basis for the award of interest at*

*3% per month*

*(b) Whether the trial court properly declined to review its earlier ruling*

*(c) Whether the court correctly invoked the doctrine of *functus officio**

*(d) What are the orders on costs*

10. On whether there existed a contractual basis for the award of interest, the award of interest prior to judgment must be grounded in contract, statute, mercantile usage, or established practice. In *Prem Lata v Peter Musa Mbiyu* [1965] EA 592, the Court held that interest prior to filing suit is only awardable where there is a contractual provision, statutory right, or established custom.
11. The Respondent relied on an 'Invoice cum Delivery Note' indicating interest at 3% per month. The Appellant contends that the said document was neither signed nor acknowledged. **Section 107** of the **Evidence Act** places the burden of proof upon the party asserting a fact. In *Kirugi & Another v Kabiya & 3 Others* [1983] *KECA 38 (KLR)*, the Court stated that: -

*“The burden on the plaintiff to prove his case remains the same, though it is true that, where the matter is not defended, or, as here, validly defended that burden may become easier to discharge.”*

12. Further, parties are bound by their contracts and courts will not imply terms not agreed upon. In *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] *KECA 362 (KLR)*, the Court of Appeal affirmed that: -

*“The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”*

13. Upon perusal of the record, there is no signed agreement demonstrating mutual assent to pay interest at 3% per month. An unsigned invoice, without proof of service, acknowledgment, or acceptance, cannot by itself constitute a binding

contractual term imposing penal interest. The finding that a binding contractual term for 3% monthly interest existed was therefore not supported by sufficient evidentiary foundation.

14. On whether the trial court properly declined to review its earlier ruling, review is governed by **Order 45** of the **Civil Procedure Rules**. A court may review its decision on account of discovery of new evidence, mistake or error apparent on the face of the record, or any other sufficient reason. **Order 45 (1)** of the **Civil Procedure Rules** provides: -

Any person considering himself aggrieved: -

*(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

*(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.*

15. An award of interest without proof of contractual or statutory basis constitutes an error apparent on the face of the record. The absence of documentary proof of agreement to pay 3% monthly interest was a fundamental omission. The trial magistrate, instead of interrogating whether such evidentiary error existed, dismissed the application on the premise that the ruling was ‘regular’ and declined to revisit the matter. This amounted to a misdirection on the principles governing review.
16. On whether the court correctly invoked the doctrine of *functus officio*, the doctrine bars a court from revisiting its final decision except as provided by law. However, statutory provisions permitting review constitute recognized exceptions.
17. In *Telkom Kenya Ltd v Ochanda (Suing on His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Ltd) [2014] KECA 600 (KLR)*, the Court of Appeal explained that *functus officio* does not prevent a court from exercising jurisdiction expressly provided for by statute, such as review. The court held: -

*“The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in*

*Jersey Evening Post Ltd Vs Ai Thani [2002] JLR 542 at 550, also cited and applied by the Supreme Court;*

*A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”*

18. By prematurely declaring itself *functus officio* without properly considering the statutory grounds for review, the trial court fell into error.
19. On costs, I exercise the discretion of this court and direct that each party bear its own costs considering the nature of the appeal.

***Determination***

20. In the upshot, this court makes the following orders –

***a. The appeal has merits and is allowed on the following terms;***

- i. The ruling and orders issued on 15<sup>th</sup> December 2023 are hereby set aside*
  - ii. The Appellant's Amended Notice of Motion dated 31<sup>st</sup> October 2023 is allowed*
  - iii. The portion of the ruling delivered on 19<sup>th</sup> September 2023 awarding interest at 3% per month amounting to Kshs. 204,948/= is hereby set aside*
- b. Each party to bear its own costs*

**Dated, signed and delivered virtually at Mombasa this 5<sup>th</sup> day of March, 2026**

.....

**HON. F. WANGARI**

**JUDGE OF THE HIGH COURT**

*In the presence of: -*

N/A by the Appellant

N/A by the Respondent

Ms. Salwa, Court Assistant

***NB: Parties be notified of the judgment through the registry and CTS***