Kenya Commercial Bank Ltd v Kuboka t/a Airport Africana Restaurant (Civil Appeal E081 of 2022) [2025] KECA 57 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 57 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E081 OF 2022

AK MURGOR, S OLE KANTAI & GV ODUNGA, JJA

JANUARY 24, 2025

BETWEEN

KENYA COMMERCIAL BANK LTD ..... APPELLANT

AND

BRYCESON N KUBOKA T/A AIRPORT AFRICANA RESTAURANT ..... RESPONDENT

(Being appeal from the ruling and or decision of the High Court of Kenya at Mombasa (N. Mwangi, J.) dated 28th January, 2022 in HCCA No. 101 of 2015 Mombasa)

JUDGMENT

1. The respondent, Bryceson N. Kuboka T/A Airport Africana Restaurant filed this suit against the appellant, Kenya Commercial Bank Ltd for the reason that without proof of any wrongdoing the appellant had frozen its account thereby occasioning the respondent to suffer loss and damage.
2. The respondent sought judgment against the appellant in the following terms;
    a. The defendant to render an account on all the transactions and payments through account number 113399XXXX.
    b. Loss of income from June 1, 2013 to date.
    c. Costs and interest.
3. The respondent stated that he holds account number 113399XXXX with the appellant through which he transacted his business, and that the appellant agreed to hire to him a PDQ machine through a Merchant Agreement and under Merchant machine number 2287XXXX. The machine would enable the respondent's customers make payments for services offered at Airport Africana through the use of Visa Cards, Smart Cards and Master card. However, the appellant without cause, froze the

respondent's bank account alleging fraud, the details of which were not disclosed to the respondent; that the appellant had declined to release the monies held in the bank account hence the suit.

4. On its part, the appellant denied any wrong doing and alleged that it froze the account in exercise of its rights under the Merchant Agreement of Visa Cards that being, a banker's right and charge back rights in the event of fraud. It admitted to having withheld the respondent's funds to the tune of Kshs.1,577,088. It further demanded monies owed amounting to Kshs.1,851,742 bringing the total to Kshs. 3,428,8301 charged back as a result of fraudulent transactions by the respondent using machine cards. They claimed that a routine review had revealed that there had been several fraudulent Visa Card and Master Card transactions as a consequence of which the bank was charged back Kshs.3,428,830. For this reason, the appellant withheld Kshs.1,577,088 in the respondent's bank account. It is observed that no counter-claim was filed until the matter was heard and determined.

5. The trial Magistrate upon considering the matter allowed the claim and held inter alia that, there was no proof of any fraud or fraudulent transactions and therefore there is no justification to continue to freezing the respondent's account. The court ordered the lifting of the freezing order forthwith and for the respondent to be supplied with and updated account of all the transactions and payments into and through account number 113:3994XXXX with immediate effect and within 48hours of the order being served upon the appellant.

6. The appellant was aggrieved and filed an appeal to the High Court on the grounds that the trial Magistrate was in error in law and fact in holding that the appellant was culpable for the purported loss by the respondent when no evidence was tendered to that effect; that the learned Magistrate wholly disregarded the appellant's submissions and authorities and proceeded to rely on his own views not backed by law; in completely ignoring the practice and customary operations between the appellant and respondent in operation system of PDQ machines and in failing to analyse and synthesis the evidence before him and as a result, arrived at a completely erroneous and ambiguous finding.

7. The first appellate Judge upon considering the appeal in the Judgment dated October 14, 2016 allowed the appeal in part, and observed regarding the frozen bank accounts that;

> " This was all the evidence the Appellant availed before the court to prove that there had been fraud committed by use of PDQ Machine. I find that it did not amount to a scintilla of evidence towards proof. The Appellant totally failed to justify their resort to the provisions of the agreement between the parties. To say that they were entitled to debit the Respondents account with the sum of Kshs.1,557,088 or just withhold it without proof of wrong doing would be to say the very least, unjust. It would be to open a flood gate that once a customer deposits money in his account, the bank can at whim debit the same account, withdraw from it or just withheld the sum therein by caprice".

8. After a period of time, the respondent filed a Notice of motion dated 10th May 2018 seeking orders that; the court interpret the judgment delivered on 14th October 2016 in respect of Kshs.1,577,088 that the appellant withheld from the respondent's account on account of fraud; and make an order with respect to the withheld Kshs. 1,577,088. The affidavit in support was sworn by Francis Kadima Advocate on 10th May 2018.

9. The appellant opposed the application in grounds of opposition dated 21st May 2018 and on 24th April 2019, it filed a replying affidavit sworn on the same day by Tom Okoth Ogola the appellant's Legal Manager arguing that the court was functus officio; that the respondent understood the judgment and that they had not demonstrated any ambiguity that would warrant an interpretation. The appellant further submitted that upon the trial Magistrate's orders, the accounts were unfrozen and that the

respondent withdrew all the monies in the account; that the respondent was supplied with the account statements of the accounts which he has not disputed and consequently, the application had no basis.

10. In determining the application in a ruling dated 28th January 2022 the learned Judge determined two issues. Firstly, whether the application was functus officio, and secondly whether the application was merited.

11. On the first issue, the learned Judge found that the application was not functus officio for the reason that there was a need to express the manifest intention of the court in relation to the sum of Kshs. 1,577,088 held by the appellant in the frozen account. On the second issue the court held that the effect of the Judgment of 14th October 2016 is that "...after unfreezing the applicant bank account the respondent shall release the sum of Kshs. 1,577,088.00 to the applicant that it admitted having withheld from the applicant's bank account as per its letter dated 11th November 2013..."

12. Aggrieved the appellant filed an appeal to this Court on the grounds that; the learned Judge was in error in law in entertaining the application dated 10th May, 2018 that purported to seek the interpretation of the Judgment delivered by the High Court on 14th October, 2016 when there was no ambiguity in the Judgment requiring interpretation by the court; in ordering that Kshs.1,577,088 be paid to the respondent when the sum was neither pleaded nor tried in the primary suit in CMCC No. 1514 of 2014 between the parties and or the appeal before the High Court; in ordering the appellant to pay the respondent Kshs. l,577,088 when the evidence on record demonstrated that the respondent withdrew all the money in the account upon unfreezing of its account, pursuant to the Judgment and court order issued in CMCC No. 1514 of 2014 and therefore, by the time of the ruling the subject of this appeal, the appellant was not holding any funds for the respondent or on the respondent's account; in allowing the application when the only issue that was before the trial Magistrate and the High Court related to the unfreezing of the respondent's account on which matters the courts had rendered a final judgment; in holding that the court was not functus officio yet, the court lacked jurisdiction to entertain the application.

13. In their written submissions, learned counsel for the appellant submitted that the trial court and the High Court on first appeal were bound by the pleading and the claims framed by the respondent in the Plaint; that the respondent did not at any time plead or pray for any specific amount to be paid to him by the appellant; that the respondent did not amend his pleading, and that the Court did not assess any amount as payable to the respondent. It was submitted that all the court ordered was for the respondent's account be unfrozen forthwith and that the respondent submits to the court an assessment of his loss.

14. Counsel submitted that there was no order for payment for any specific sums of money to the respondent and clearly there was no ambiguity in the Judgment of the court that required interpretation as sought by the application dated 10th May 2018; that it is common ground that the High Court delivered its final judgment on 14th October 2016 and that no appeal was lodged against the Judgment; that upon its delivery the court was functus officio; that the purported interpretation of Judgment application was filed over one and half years after the final judgment of the court, and therefore, the court lacked a basis for purporting to reopen the proceedings.

15. On their part counsel for the respondent submitted that the court was not functus officio and that section 99 of the *Civil Procedure Act* empowered the court to interfere with the Judgment where there was a manifest error in interpretation of the court's intentions to which an intervention was required; that the court was entitled to clarify its intentions in the Judgment and that the High Court expressly held that in withholding Kshs.1,577,088, the appellant had acted in an unlawful manner.

16. This being a first appeal, from the ruling by the Judge on the motion brought by the respondent seeking interpretation of the Judgment of the High Court, this Court's mandate was espoused in Ng'ati Farmers' Co-Operative Society Ltd. vs. Ledidi & 15 Others [2009] KLR 331 as follows:

> "An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. 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 witness and should make due allowance in that respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

17. We have considered the record, the parties' submissions and the law and, the issues that falls for determination are;

i) whether the 1st appellate court was functus officio after it rendered the Judgment of 14th October 2016; and

ii) whether the learned Judge rightly concluded that there was a manifest intention for payment of Kshs. 1,577,088 to the respondent.

18. Regarding whether the court was functus officio, Black's Law Dictionary, 11th Edition defines the term"Functus officio" as:

> " The general meaning of the term has historically been understood to be that an officer or official body once having accomplished its intended task loses its authority or legal competence..."

19. This Court in the case of Telkom Kenya Limited vs John Ochanda (Suing On his own behalf and on behalf of 996 former Employees of Telkom Kenya Limited) [2014] eKLR defined the term "functus officio"as:

> " Functus officio is an enduring principle of law that prevents the re - opening of a matter before a court that rendered the final decision thereon."

20. In the case of Menginya Salim Murgani vs Kenya Revenue Authority [2014] eKLR the Supreme Court held that:

> "It is a general principle of law that a Court after passing Judgment, becomes functus officio and cannot revisit the Judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law."
>
> Essentially therefore, the above cited authorities are clear that a court is functus officio after passing or delivering a judgment, and it is estopped from revisiting or interfering with the

judgment, save for the circumstances specified within the confines of section 99 of the *Civil Procedure Act* which provides:

> " Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties."

21. In other words, the provision limits interference with a judgment from a court that is functus officio to corrections of clerical or arithmetical mistakes in judgments, decrees or orders, or errors.

22. Furthermore, Order 21 rule 3 of the Civil Procedure Code is categoric. It clearly states that, "...A judgment once signed shall not afterwards be altered or added to save as provided by section 99 of the Act or on review."

23. This Court in the case of Kenya Broadcasting Corporation vs Geoffrey Wakio [2019] KECA 65 (KLR) held that:

> "under Order 21 Rule 3 (3) of the Civil Procedure Rules, a judgment once drawn up, issued and entered cannot afterwards be altered or added to, save as provided by section 99 of the *Civil procedure Act* which allows correction of a judgment only where there are clerical or arithmetic mistakes; or errors arising therein from an accidental slip or omission. The law only allows the corrections of mistakes, errors or slips, but not merit-based decisional re-engagement with the case.
>
> This was reiterated in Attorney General vs W.O.I Samuel Chege Gitau & 283 others [2023] KECA 1386 (KLR) where this Court held:
>
> > " The only time the court could interfere with the merits of the case would be in exercise of powers of review under section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules, 2010 or within the two exceptions to the functus officio doctrine which were inferred from section 99 of the *Civil Procedure Act* that either there had been a slip in drawing up the judgment or there was an error in expressing the manifest intention of the court."

24. In effect, the only available way in which a court can interfere with a judgment that has already been delivered is to correct a slip in the judgment or an error in the expression of the court's intention as envisioned in section 99 of the *Civil Procedure Act*. See also Erick Kimingichi Wapang'ana t/a Magharibi Machineries Limited vs Equity Bank Limited & another [2023] KECA 305 (KLR).

25. In finding that the court was not functus officio the learned Judge concluded that there was a manifest error in interpretation of the court's intentions in the Judgment, and in so finding, the court stated thus:

> "28. The wording of the judgment that was delivered on 14th October 2016 by the learned Judge affirmed the Trial Magistrate's decision and held that the applicant had has every right to access and withdraw money from his account for as long as there is a credit balance including the Kshs. 1,577,088.00. that was withheld by the respondent. The respondent's assertions that the said amount cited in the letter dated 11th November 2013 was done in error and that the correct amount in the applicant's bank account was Kshs.1,096,274.00 amounts to an afterthought which has been made too late in the day as the same is not raised in any pleadings in the primary suit but only came up after the application herein was filed. If indeed that was the case, the respondent had every opportunity to bring it to the Trial

Court's attention but chose not to do so. The respondent has all along been in possession of the applicant's bank account statement and has knowledge of the transactions carried out in the said account to the point that it made a decision to freeze the said account and withhold funds."

> The Judge went on to conclude that, the effect of the Judgment of 14th October 2016 is that "...after unfreezing the applicant bank account the respondent shall release the sum of Kshs. 1,577,088.00 to the applicant that it admitted having withheld from the applicant's bank account as per its letter dated 11th November 2013..."

26. At this juncture, the question that begs is whether there was indeed an error in the manifest intention of the court for an order that the appellant pay the respondent the withheld sums? Put another way, was it at all times the intention of the Judgment to order the appellant to pay the respondent the sums withheld in the latter's bank accounts? In order to answer this question, it is imperative that we refer back to the orders that the respondent sought in the Plaint. In the prayers as set out above the applicant sought for orders that:

    a. The defendant to render an accounton all the transactions and payments through account number 113399XXXX.

    b. Loss of income from 1st June 2013 to date.

    c. Costs and interest.

27. In granting the orders the trial court stated:

> "...I find that there is no justification to continue to freezing the plaintiffs account and the freezing is therefore ordered to be lifted forthwith and the Plaintiff be supplied with and updated account of all the transactions and payments into and through account number 113:3994XXXX --with immediate effect -within 48hours of this order being served upon it".

28. Whereupon, in upholding the trial court's decision that there was no justification for the respondent's accounts to be frozen, the High Court observed:

> "...To say that they were entitled to debit the Respondents account with the sum of Kshs.1,557,088 or just withhold it without proof of wrong doing would be to say the very least, unjust. It would be to open a flood gate that once a customer deposits money in his account, the bank can at whim debit the same account, withdraw from it or just withheld the sum therein by caprice...
>
> > ....As it were the bank merely keeps the money safe on behalf of the customer. It has no right or indeed any claim over the property in the money. The money simply doesn't belong to it to deal with it as it pleases. That to me is all the trial court found in the judgment challenged before me..."

29. In analysing the above excerpts, it is clear beyond peradventure that at all times what the respondent sought was for the appellant to unfreeze its bank accounts and for the respondent to be allowed to freely access to its accounts with the appellant. There was no prayer sought for payment to the respondent of the amounts held by the appellant. And in its Judgment, the trial court granted orders for unfreezing of the bank accounts, but did not issue any orders for payment of monies to the respondent.

It is also explicit that the High Court Judgment upheld the trial court's decision for unfreezing of the respondent's bank account. And once again, there were no orders for the appellant to pay the respondent any monies.

30. However, in the ruling, the learned Judge deviated from the Judgment of 14th October 2016 by interpreting the reference to Kshs. 1,577,088 to mean that "...after unfreezing the respondent's bank account the appellant shall release the sum of Kshs. 1,577,088.00 to the applicant...". Yet, as emphasis above, at no point in either Judgment were there express orders for payment or release of funds to the respondent. The two courts merely ordered that the respondent's accounts be unfrozen, and the matter ended there.

31. Given the plain, clear and unambiguous conclusions of the Judgments of the two courts below, our interrogation of the wording does not reveal that there was any manifest error in interpretation of the court's intentions. The Judgments were crystal clear, and we find that in concluding that the manifest error in the interpretation of the court's intentions, comprised the payment of the sums withheld to the respondent, the learned judge misdirected herself so as to interfere with the Judgment of 14th October 2016 in a manner that was contrary to the stringent specifications of section 99. With much respect, had the learned Judge properly construed the pleadings, and the two judgments of the courts below, she would have come to the conclusion that the court was functus officio ab initio as, no corrections or clerical or arithmetical mistakes or any manifest error in interpretation of the court's intentions were extant. In the result, we find it necessary to interfere with the decision in the ruling of the High Court of 28th January 2022.

32. In sum the appeal is merited and is allowed and we order that:

    i. The ruling and order of the High Court of January 28, 2022 allowing the Notice of motion dated May 10, 2018 be and is hereby set aside and is substituted herewith an order dismissing the application.

    ii. Costs to the appellant.

    It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF JANUARY 2025.

A.K MURGOR

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar

G. V. ODUNGA

.....

JUDGE OF APPEAL