Mutyaene v KCB Bank Limited (Civil Appeal 399 of 2018)
[2023] KECA 313 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KECA 313 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 399 OF 2018

DK MUSINGA, KI LAIBUTA & PM GACHOKA, JJA

MARCH 17, 2023

BETWEEN

REUBEN KIOKO MUTYAENE ..... APPELLANT

AND

KCB BANK LIMITED ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of the Employment and Labour Relations Court in Nairobi (H. Wasilwa, J.) delivered on 30th May 2018 in ELRC Case No. 859 of 2012)

JUDGMENT

1. The genesis of the dispute between the parties can be traced way back to the year 2012 when the appellant filed a statement of claim dated May 10, 2012 seeking the following orders:

    a. A declaration that the claimant's termination from his employment was wrongful and unlawful.

    b. The claimant be reinstated to his previous employment without loss of benefits and continuity of service, and all salaries and allowances due to him during the period of suspension and dismissal be restored to him.

    c. In the alternative to b above, the claimant be paid his full terminal dues for unfair dismissal.

    d. The respondent be ordered to compensate the claimant for wrongful termination at the equivalent of twelve (12) months gross salary 12 x 145,327 = 1,743,924/=

2. According to the appellant, he was employed on February 4, 1991 as a clerical staff and worked for over twenty (20) years until April 29, 2011 when the respondent wrongfully dismissed him on allegations of gross misconduct.

3. According to the respondent, the appellant's termination was lawful and fair since the appellant was found guilty of gross misconduct after it was discovered that he had been accounting for imprest using false receipts.

4. The learned Judge opined the issues for determination to be whether the summary dismissal of the appellant was fair, both procedurally and in substance and whether the appellant was entitled to the prayers sought.

5. On June 28, 2016 Odero, J. signed the judgment and the same was delivered by Nduma, J. on July 11, 2016 where it was held as follows:

> " "I find and declare that the dismissal of the claimant was unfair for reasons that there was no proof of valid reason for his dismissal, he was not subjected to a disciplinary hearing and an opportunity to defend himself and his letter of dismissal did not state the grounds for dismissal.
>
> Remedies
>
> The claimant prayed for several remedies. His prayers for reinstatement cannot be granted as it is more than 3 years since he was dismissed...The claimant in the alternative to reinstatement prayed for payment of terminal dues for unfair dismissal. In the written submissions the claimant prayed for half salary withheld for the months of March and April 2011 in the sum of Kshs. 157,506, one months' salary in lieu of notice in the sum of Kshs. 157,506, performance bonus for 2010 in the sum of Kshs. 200,000 and Employee Share Ownership Scheme (ESOP). I find that no evidence was adduced in respect of performance bonus and ESOP.
>
> The claimant is however entitled to any salary withheld as a result of the circumstances leading to his dismissal and to pay in lieu of notice as provided in section 49(1) of the *Employment Act*. The respondents did not contest the sums prayed for and I award the claimant Kshs. 147,506 being withheld salary for March and April 2011 and a further Kshs. 147,506 being one months' salary in lieu of notice.
>
> The claimant also prayed for maximum compensation of kshs. 1,746,072. Taking into account the facts that his dismissal was unfair and that he had worked for the respondent for about 20 years, it is my opinion that it is reasonable to award him maximum compensation of 12 months' gross salary which I hereby do.
>
> Conclusion
>
> In conclusion, I find and declare the dismissal of the claimant unfair and award him a total of Kshs. 2,041,084. The respondent shall also pay claimant's costs of this suit. The decretal sum shall attract interest at court rated from date of judgment."

6. Aggrieved by the judgment and consequent award, the appellant filed an application dated May 15, 2017 seeking a review of the award. He filed an amended application dated October 10, 2017 seeking the following orders:

> "a. The Court do grant orders to review the judgment and award dated June 28, 2016;
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> b. In view of the fact that the Hon. Judge who heard the suit was transferred to ELRC Kisumu, an order for re – hearing to be conducted by a different judge sitting in Nairobi;
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> c. The Court do grant leave to amend pleadings dated May 10, 2012 in accordance with the *Industrial Court (Procedure) Rules* section 14(6), *CPA* sections 99 and 100 and *CPR* order 8 rule 3 and 5;
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> d. The Court do grant orders to enjoin 1st, 2nd and 3rd Interested parties and to be served with the amended plaint;
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> e. The Court do issue orders for re – hearing of the suit to proceed on the basis of the amended plaint;
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> f. In accordance to CPA section 22, an Order be issued to the respondent to avail the Voluntary Early Retirement Scheme Human Resource Circular to aid in determining the entire terms of the scheme;
>
> g. That the Court be pleased to re – hear the suit on priority basis as espoused in the certificate of urgency application."

7. The application was brought under rules 3(1) and 16 of the *Employment and Labour Relations Court Act*, sections 25(2), 32(1) (a), (b), (c), (d) and (e) of the *Employment and Labour Relations Court Procedure Rules*, section 5(2) (b) and (c) of the *Fair Administrative Action Act*, section 47(3) of the *Employment Act*, seeking orders as prayed for the following reasons:

> "i. that there was mistake/error in calculating the award;
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> ii. that the award and judgment was in breach of law in as far as gratuity or service pay was not considered in the award;
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> iii. that the Hon. Judge failed to consider all facts and evidence in making her decision;
>
> iv. that the Hon. Judge did not consider violation of the claimant's fundamental rights including discrimination at place of work;
>
> v. that the award of Kshs 2,041,084.00 was not commensurate/proportionate with the claimant's legitimate expectations;
>
> vi. that the lawsuit occasioned unwarranted legal costs and expenses totaling to Kshs 378,759.00;
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> vii. that in ordering the award the Judge did not take into account all relevant factors stipulated in the *Employment Act* section 49(4);
>
> viii. that Justice was delayed;

ix. that the Collective Bargaining Agreement applicable was defective, illegal and unconstitutional in as far as the termination and suspension clauses are concerned;

x. that the respondent's failure to issue certificate of service is wanting and detrimental to the claimant."

8. The appellant went ahead to file his list of witnesses dated May 15, 2017 and 4 witness statements together with an amended statement of claim seeking a raft of declarations and orders as follows:

a. A declaration that the claimant's termination from his employment was wrongful and unlawful;

b. the claimant be reinstated to his previous employment without loss of benefits;

c. in the alternative to the above, the claimant be paid his full terminal dues for unfair dismissal and gratuity/ severance pay;

d. compensation for wrongful termination at the equivalent of 12 months' gross salary at Kshs. 157,506 x 12 months = Kshs. 1,890,072.00;

e. one months' salary in lieu of notice at Kshs. 157.506.00 and Kshs. 179,685.00 being salary held for the months of March and April 2011.

f. a declaration that the claimant's fundamental and constitutional rights were violated;

g. an order for damages for violation of the claimant's fundamental rights;

h. a declaration that the respondent occasioned unwarranted loan interest totaling to Kshs. 469,024.55;

i. an order for the respondent to refund loan interest totaling to Kshs. 469,024.55;

j. a declaration that the respondent occasioned unwarranted legal costs and expenses totaling to Kshs. 378,759.00;

k. an order for the respondent to refund loan interest totaling to Kshs. 378,759.00;

l. a declaration that the CBA's of 2011 – 2013 and the current one for 2015 – 2017 are illegal and unconstitutional;

m. a declaration that the claimant's rights were prejudiced by application of defective provisions of the CBA;

n. an order for compensation arising from the respondent's application of an illegitimate CBA;

o. costs and expenses;

p. an order to the respondent to issue a certificate of service and be reprimanded to pay Kshs. 100,000/- should reinstatement and re-engagement fail.

9. The appellant also filed an application dated November 9, 2017 seeking leave to amend the memorandum of review dated May 15, 2017, an order for production of documents by the respondent, and for admission of supplementary documents.

10. The respondent opposed the application and filed grounds of opposition together with written submissions dated October 11, 2017. The respondent opposed the review on grounds that the application was bad in law, incompetent, misconceived and an abuse of the Court process, as the application failed to meet the requirements as set out under rule 33(1) (a), (b), (c), and (d) of the *Employment and Labour Relations Court Procedure Rules*; and that the appellant was guilty of inordinate delay, and had not shown any other sufficient reason why the award should be reviewed.

11. Upon considering the parties' respective submissions, the trial Judge (Wasilwa, J.) delivered her ruling on May 30, 2018 dismissing the application. The learned Judge observed as follows:

> " 14. In case of this application, the applicant contends that the application for review be allowed on account of an error on the record in the calculations of the award. The applicant avers that the judgement was based on his basic pay and not gross pay as envisaged and in this case a wrong figure was computed for his judgement.
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> 15. In the evidence adduced the claimant stated that his last salary was 135,327 and owner-occupier house allowance of 10,000/= making total to be 145,327/= as per his last payslip of 24/2/2011. However, as per the collective bargaining agreement of 1/3/2011, this amount rose to 147,506/=.
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> 16. In calculating his salary Hon. Judge Onyango used the figure of 147,506 (page 11 of judgement) to calculate his dues. The error being alleged by the claimant is not visible.
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> 17. On failure to award damages for fundamental rights including discrimination at work, this is an issue that is appealable and cannot be handled as a review.
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> 18. I do not find any error on the record as alleged. I therefore find this application has no merit. I dismiss it accordingly with no order as to costs."

12. Aggrieved by the above findings of the Court, the appellant herein proffered the instant appeal by filing a memorandum of appeal dated November 1, 2018 containing thirteen (13) grounds that are prolix. The grounds may be summarized as follows: that the learned judge erred by dismissing the review application; that the learned judge erred in basing her findings on erroneous facts which were not served upon the appellant, hence denying him a right of reply; that the learned judge ignored the appellant's evidence; that the learned judge erred in finding that there was no mistake in the amount awarded in the judgment; that the learned judge failed to recognize that the ELRC has power to review its judgments; and that the learned judge failed to acknowledge that the appellant, acting in person, required more time to prosecute his case. The appellant prays that the appeal be allowed as prayed with costs and that orders be granted as per the amended memorandum of review dated October 10, 2017.

13. Further, the appellant prays that the orders sought in the chamber summons dated November 9, 2017 be granted, and that the Court orders the suit to be heard afresh, and the file be transferred to, and the suit be heard at, the ELRC at Nakuru.

14. The appellant filed written submissions dated August 15, 2019, which he sought to withdraw during the hearing of this appeal, and also filed lengthy submissions dated December 14, 2021. The respondent has not filed any submissions.

15. The appellant submitted that the judge erred in relying on the grounds of opposition and submissions by the respondent, as the same was filed out of time and not served upon the appellant; that the appellant's right to reply and in effect to be heard was infringed; that this was the reason he did not explain the 9 months' delay in filing his review application; that the ruling therefrom was biased; that the "Notice of address for service" was filed outside the 14 days; that the respondent is guilty of non–compliance of the rules of procedure, and had failed to offer a plausible reason.

16. The appellant further submitted that, in the computation of his damages, the court erroneously used his basic salary as Kshs. 147, 506 and not Kshs. 157, 506/-; that the court should quash the award of Kshs. 2,041,084/- and substitute it with Kshs. 2,227,263/-; that the appellant should be issued with his certificate of service; that the appellant is entitled to gratuity/severance pay; that the appellant was entitled to a refund of excess loan interest paid on existing loan facilities of Kshs. 469,024.55; that the appellant was entitled to a refund of unwarranted expenses of Kshs. 378,779/- incurred by the appellant in the course of litigation; that the appellant, having abandoned his advocates and taking the mantle to act in person, his approach to the case may have changed, and hence the need for amendments in the original statement of claim; that he was entitled to damages for violation of his constitutional rights; and that the validity and constitutionality of the provisions of the CBA need to be interrogated.

17. The matter came up in court on December 19, 2022 for a hearing when the appellant appeared in person. He informed the Court that he wished to rely on his written submissions. He admitted that he had filed two sets of submissions but withdrew the earlier ones and relied on the submissions dated December 14, 2021. The respondent was not represented even though it was duly served with a hearing notice.

18. We have carefully read the record of appeal, the supplementary record of appeal, the appellant's submissions and the authorities. The legal issue arising for determination can be discerned to be: whether the learned judge misdirected herself in dismissing the application for review.

19. We note that in ground 8 of his memorandum of appeal, the appellant avers that the learned Judge failed to recognize that the ELRC had broad and unrestricted power to review its rulings or judgments on far much broader grounds than the High Court is allowed under order 45 of the *Civil Procedure Rules*. The grounds upon which an application for review can be based are as provided for under order 45 rule 1 of the *Civil Procedure Rules*, which states as follows:

> "(1) Any person considering himself aggrieved-
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> a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> 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."

20. In the case of *Peterson Ndung'u & 5 others v Kenya Power & Lighting Company Ltd* [2018] eKLR, this Court held, inter alia:

> " 15. The *Industrial Court Act*, 2011 and the *Industrial Court (Procedure) Rules* made thereunder confer wide jurisdiction on the court to review and set aside its judgment/Award. Section 16 of the Act provides as follows:
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> > 'The Court shall have power to review its judgments, awards, orders or decrees in accordance with the Rules.'
>
> Rule 32 (1) of the Procedure Rules, on the other hand provides as follows:
>
> > "1) A person who is aggrieved by a decree or an order of the Court may apply for review of the award, judgment or ruling-
> >
> > a. if there is a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made; or
> >
> > b. on account of some mistake or error apparent on the face of the record; or
> >
> > c. on account of the award, judgment or ruling being in breach of any written law; or
> >
> > d. if the award, the judgment or ruling requires clarification; or
> >
> > e. for any other sufficient reasons.'
>
> 16. On the powers of the ELRC to review its decisions, we are guided by the case of *JMK v MWM* & another [2015] eKLR where this Court rendered itself thus:
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> > "It does not take much imagination to see that under section 16 as read with rule 32, the Industrial Court is empowered to exercise its review jurisdiction on far much broader grounds than the High Court is allowed under order 45 of the *Civil Procedure Rules*. Under rule 36 (6), if the court allows an application for review, it is empowered to review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again."

21. We further note that, in ground 6 of his memorandum of appeal, the appellant gives seven (7) grounds which, according to him, fall under the limb of 'other sufficient reasons', which include: failure by the respondent to issue him with a certificate of service; the court's failure to consider damages for violation of the appellant's constitutional rights; the court's failure to consider that he had a legitimate expectation of receiving a better gratuity than the amount awarded; failure by the court to acknowledge

that the CBA was defective, and that the respondent was in breach of it; and the court not considering that the appellant paid excess bank interest rates and incurred expenses amounting to Kshs. 378,759 in pursuing his claim.

22. It is important to note that the court's power to review its orders is an exercise of discretion. In this case, the appellant failed to demonstrate why this Court should interfere with the trial court's exercise of discretion without demonstrating cogent reasons. It is trite law that the principles are now well settled, and that this Court can only interfere with the discretion of the trial judge if: the trial court misdirected itself in some matter and, as a result, reached the wrong decision; or if the judge was clearly wrong in the exercise of his or her discretion and, as a result, there has been a miscarriage of justice.

23. In *Mbogo & Another v Shah* [1968] EA 93, the Court held that the principles governing the exercise of judicial discretion are twofold. Firstly, there are no limits or restrictions on the judge's discretion except that, if the judge does so, it must be on such terms as may be just. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. Secondly, this discretion is intended to be so exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

24. We note as an example that the appellant submits that he is entitled to gratuity/severance pay, and yet the learned judge did not assign any reason for ignoring this plea and, according to him, this was a reason for setting aside the judgment on the ground of "error apparent on the face of the record". These submissions cannot be entertained under a review application but are ground for appeal. He also submitted that it was a good ground to set aside the judgment, yet the application sought review. The appellant seems to have a warped perspective as to which order he seeks and the avenue for achieving the same.

25. The learned judge exercised her discretion and opined that these were matters for appeal and not review. We do not hesitate to agree with the learned judge and find that the issues raised were proper for an appellate court, and not suitable for review. On the same point, the learned authors of *Chittaley & Rao in the Code of Civil Procedure (4th Edn) Vol. 3*, pg 3227 explain the distinction between a review and an appeal in the following words:

> "A point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal."

26. This Court in *Mary Wambui Njuguna v William Ole Nabala & 9 others* [2018]eKLR held:

> "In the present case, the appellant faulted the Judge's appreciation of the law as far as her joinder to the suit was concerned. She also faulted his finding that by filing the application for joinder, she had effectively revived the suit. These are matters touching on the Judge's deliberate understanding and interpretation of the law and cannot be entertained on review by the same Judge or another one of equal jurisdiction.
>
> 20 We also need to underscore the fact that when a court is sitting on review, it is not sitting on appeal of its own decision. It is for that reason that the alleged errors must be apparent on the face of the record without inviting any interrogation or protracted arguments thereon. It therefore follows that the propriety of the appellant's joinder to the suit was not an issue to be

entertained by way of a review application. This therefore dispenses with not just the first issue, but with the second one as well."

27. It is not in dispute that the order in which pleadings have been filed in the matter, in general, is remiss. From the record, it is evident that:

    a. the appellant initially filed the Statement of Claim dated May 10, 2012 on May 22, 2012 and all attendant pleadings;

    b. judgment was delivered on July 11, 2016;

    c. the appellant post-judgment, filed his pre–trial documents to wit: claimant's list of witnesses dated May 15, 2017; witness statement by Irene Kabua Mugo dated May 12, 2017; witness statement by Jackson Cheruiyot Suter dated July 14, 2015; and the witness statement by George Craven Mmbaya dated December 16, 2016, and all these documents were filed on May 31, 2017;

    d. on May 31, 2017, the appellant filed a pleading by the name "review of award" dated May 15, 2017. He further amended the same and filed an amended memorandum of review dated October 10, 2017. In that pleading, he sought review of the judgment and award but went on to seek: the file be transferred to Kisumu for rehearing; leave to amend his statement of claim dated May 10, 2015; leave to enjoin interested parties; for the suit to proceed on the basis of the amended plaint; an order compelling the respondent to avail to him the voluntary early retirement scheme human resource circular; and that the suit be heard on a priority basis;

    e. without leave of the Court, the appellant proceeded to file an amended plaint dated May 15, 2017.

    f. even after filing the amended memorandum of review on October 10, 2017, the appellant filed a chamber summons application dated November 9, 2017 on November 11, 2017 seeking leave to amend the memorandum of review dated May 15, 2017 for the production of documents by the respondent and for admission of supplementary documents;

    g. the appellant then filed a notice of motion application seeking the same orders sought in the chamber summons application. The notice of motion is dated November 14, 2017 and is filed on November 14, 2017;

    h. the respondent, in response, filed grounds of opposition and submissions dated October 11, 2017.

28. Parties must appreciate that a trial judge is the master of the proceedings, and courts cannot be run at the whim of the parties. Before a party files pleadings out of time, the judge must grant leave before parties proceed. The appellant testified as early as May 22, 2014 and judgment was delivered on July 11, 2016. The general rule is that a party cannot file pleadings or amend existing ones in a matter where the court has already rendered its final decision. Once the court has made a determination on a suit, a party cannot, with or without leave, purport to file further pleadings as it would be otiose, given that the court in that instance is *functus officio*. Accordingly, any subsequent amendment of pleadings to re-open the issues already determined with finality, or to introduce new claims, is grossly misconceived, to say the least.

29. In *Peterson Ndung'u & 5 others v Kenya Power & Lighting Company Ltd* [2018] eKLR, this Court held:

> " 17. On the principle of *functus officio*, we are guided by the case of *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* (supra) where the Supreme Court of Kenya rendered itself thus:
>
> > "[18] ...Daniel Malan Pretorius, in "*The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832*, has thus explicated this concept:
> >
> > 'The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality.
> >
> > According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter....The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.'
> >
> > [19] This principle has been aptly summarized further in *Jersey Evening Post Limited v. A1 Thani* [2002] JLR 542 at 550:
> >
> > '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 on adjudication must be taken to a higher court if that right is available" [emphasis supplied].'
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> 18. Similarly, in *Menginya Salim Murgani v Kenya Revenue Authority* [2014] eKLR the Supreme Court of Kenya 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."

30. The next issue to consider is whether the court failed to consider that the appellant was acting in person. We note that the appellant was represented before, but later opted to act in person. However, acting in person is not a blank cheque for parties to proceed whimsically and without regard to the

law. Interestingly, in the authority selectively relied on by the appellant - *Ann Wanjunu v Mwihaki Waruiru & 2 others* [2018] eKLR, this Court held:

> " It is now trite that rules of procedure should be obeyed by parties seeking to avail themselves of procedures provided for under those rules in the pursuit of their rights before Court. In fact the overriding objective principle highlighted above has explicitly stated that its application is not meant to oust the need to comply with rules of procedure but to embolden the court and give it greater latitude in the interpretation of those Rules.
>
> The need for parties to respect rules of procedure has been crystallized by case law. See *Jaldesa Tuke Dabelo v IEBC* (supra). These exist to aid the Courts in conducting orderly business. It was therefore the duty of the applicant to comply with those rules."

31. The appellant, regardless of whether he acted in person, acted against well- known rules of procedure by filing an amended plaint way after judgment had been delivered. This has nothing to do with technicalities but goes to the root of the matter as a major lapse of the procedure. After a careful reading of all the grounds and the submissions, it is clear to us that the attempt by the appellant to review the judgement was a misguided adventure for which the learned judge properly stopped him in his tracks. We conclude by stating that a party, whether represented by an advocate or not, must act in accordance with the law and the rules of procedure. In this case, the proper avenue for the appellant was an appeal but, having elected to act in person, he must be prepared for the consequences.

32. The upshot of the foregoing is that we find that this appeal lacks merit and fails. Accordingly, the appeal is hereby dismissed. In view of the fact that the respondent did not file any submissions or attend the hearing, we make no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023.

D. K. MUSINGA, (P).

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR