



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, SICHALE & J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO. 208 OF 2015

BETWEEN

PETERSON NDUNG’U1ST APPELLANT

STEPHEN GICHANGA GITURO 2ND APPELLANT

N. OJWANG3RD APPELLANT

PETER KARIUKI4TH APPELLANT

JOSEPH M. KYAVI5TH APPELLANT

JAMES KIMANI 6TH APPELLANT

AND

THE KENYA POWER & LIGHTING COMPANY LTD.....RESPONDENT

*(Being an appeal from the Ruling and Order of the Employment and Labour Relations Court at Nairobi
(Abuodha, J.) dated 26th June, 2015*

in

Employment and Labour Relations Court No. 1149 of 2011)

JUDGMENT OF THE COURT

Background

1. This is an appeal against the ruling and order of the Employment and Labour Relations Court (E.L.R.C), (Abuodha J.) dated 26th June, 2015, whereby the learned Judge allowed the notice of motion dated 17th September, 2014 filed by **The Kenya Power and Lighting Company Limited**, (the respondent) against **Peterson Ndungu, Stephen Gichanga Gituro, N. Ojwang, Peter Kariuki, Joseph M. Kyavi** and **James Kimani**, (the appellants). The said motion sought a stay of execution of the Award of 23rd July, 2014 (Rika, J) pending the hearing and determination of the application and that the

Statement of Claim together with all proceedings in the Cause and the Award of 23rd July, 2014 be struck out.

2. A brief background of the appeal as can be gleaned from the Statement of Claim dated 8th July, 2011 is that the appellants were all former employees of the respondent whose employment was terminated. The appellants claimed that their termination was unfair and unlawful and sought *inter alia* orders of reinstatement.

3. The respondent filed a Memorandum of Defence on 20th June, 2012 and conceded that the appellants were its employees who were employed in various positions within the respondent company. The respondent stated that all the appellants (save for the 5th appellant whose contract was regularly terminated) were retired early on 3rd September, 2009 based on the appellants' implication in an Audit Report of gross negligence; that the respondent lost a total of Kshs 60,286,976/49 resulting from the fraud; that the appellants were granted an opportunity to defend themselves but did not do so satisfactorily and the termination and early retirement were therefore just, fair and reasonable.

4. Rika J. in an award delivered on 23rd July, 2014 (the Award), determined that the appellants' contracts of employment were terminated on fair and valid grounds but based on unfair procedure. Consequently, he proceeded to calculate compensation due to each of the appellants and entered judgment against the respondent.

5. Aggrieved by that decision the respondent filed a notice of motion dated 17th September, 2014 supported by the affidavit of Ms Janet Boit, the respondent's Assistant Legal Officer on the grounds that the statement of claim was filed and signed by an advocate who did not have a valid practising certificate under the Advocates Act and further, that the proceedings were conducted on behalf of the appellants by advocates who did not have valid practising certificates under the Advocates Act. The application was expressed to be brought pursuant to Section 12 and 22 of the Industrial Court Act. The respondent sought an order of stay of execution of the Award pending the hearing and determination of the Motion and that the appellant's statement of claim together with all proceedings in the cause and that the Award be struck out.

6. In response to the motion, the appellants filed grounds of opposition and a notice of preliminary objection both dated 10th March, 2015. Therein, the appellants contested the jurisdiction of the ELRC to hear the application and grant the orders sought. The appellants through their newly appointed firm of advocates, Nchogu, Omwanza & Nyasimi, Advocates, submitted that the court had no jurisdiction to strike out pleadings, proceedings and /or its award having become *functus officio*, that the motion was bad in law and an abuse of the process of court as the proceedings were highly contested, both parties were represented by counsel but the issue that the statement of claim was filed by Advocates who did not have valid practising certificates was not raised therein.

7. Abuodha J. heard the rival arguments between the parties and allowed the application, struck out the statement of claim, all proceedings and the Award with no orders as to costs. The learned Judge stated as follows:

“The requirement that if a party cannot represent themselves before the Court, they be represented by persons provided under Section 22 of the Industrial Court Act is intended to bring order over who should have audience before the Court...It would therefore be wrong to permit persons not authorized by law to have audience before this Court and indeed any other Court in our judicial hierarchy. This would not only be unfair to those who regularly renew their practice licenses but also a recipe for quacks to appear before the Court and fleece innocent litigants in form of fees while offering substandard services...”

8. Aggrieved by that decision, the appellants filed an appeal predicated on 5 grounds contained in their memorandum of appeal. In essence, the grounds of appeal are that the learned Judge erred in law and in fact:

“1) in failing to consider the notice of preliminary objection filed by the appellants dated 10th October 2015 which raised the issue of jurisdiction of the court to strike out the Award.

2) in striking out an Award/judgment of a court of competent jurisdiction which is incapable of being struck out.

3) in failing to consider the appellants’ submissions dated 8th April, 2015 and thereby denied the appellants a chance to be heard contrary to the principles of natural justice.

4) in going beyond the court’s jurisdiction and suo moto recalled, reviewed and struck out the statement of claim, proceedings and the award without a prayer for review or recall.

5) in failing to find that litigation must come to an end and having failed to raise the issue of the practising certificate during the trial until after the judgment had been delivered and failing to make an application for review or appeal of the award/judgment thus the court was *functus officio*.”

The appellants sought for an order striking out the statement of claim together with all the proceedings in cause 1149 of 2011 and the award dated 23rd July 2014 be reversed, set aside and/or overturned and the award dated 23rd day of July 2014 be reinstated and/or restored.

Submissions by counsel

9. When the appeal came up for hearing both parties were represented by counsel and had filed written submissions and list of authorities. The firm of Nchogu, Omwanza & Nyasimi Advocates represented the appellants while the firm of Hamilton Harrison & Mathews Advocates represented the respondent. Expounding on their grounds of appeal in their written submissions, the appellants assailed the learned Judge’s decision for failing to consider the appellants’ Notice of preliminary objection and grounds of opposition to the respondent’s application and submitted that the learned judge lacked jurisdiction to entertain the application that from the time the matter was filed, the respondent had acquiesced for four years in bringing up the issue of the practising certificates; that an award is not a pleading that can be struck out, that a court can only set aside its own decision on application for review by the aggrieved party; that this was not done by the respondent and the court had granted itself jurisdiction it did not have in granting the orders sought; that the learned Judge had failed to consider that the court was *functus officio* as a final award had already been rendered. This court was urged, in light of these arguments, to allow the appeal, set aside the ruling and reinstate the Award.

10. Counsel for the respondent opposed the appeal and argued that the appellants had not denied that at the material time their advocates lacked valid practising certificates and that the proceedings were therefore void *ab initio*; that even though the learned Judge did not make direct reference to the appellants’ Notice of Preliminary Objection and Grounds of Opposition, he dealt with all the issues raised therein; that Rule 27(1)(g) of the Industrial Court (Procedure) Rules, 2010 (the Rules) permitted the learned Judge to grant any order to meet the ends of justice at any time in the conduct of the court’s proceedings; that since the proceedings were a nullity, the court retained the right to strike out the award and could not, therefore be regarded as being *functus officio*; that the Supreme Court of Kenya in the case of **Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR** held that a court becomes *functus officio* only after a judgment or award has been perfected by a decree or formal order, which had not been done in this case. Counsel urged us to dismiss the appeal with costs.

Determination

11. We have considered the record, the submissions by the respective parties, the authorities cited and the law. This is a first appeal. In the case of **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** this Court stated as follows regarding the duty of first appellate

court:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, inter alia, that:-

“On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

12. This appeal is against the decision of the trial court in striking out proceedings. It is trite that striking out **pleadings** and orders ensuing are discretionary orders. Whenever this Court is called upon to interfere with the exercise of judicial discretion, as in this case, it is guided by the principles enunciated in the case of **Coffee Board of Kenya V Thika Coffee Mills Limited & 2 Others [2014] eKLR**. The court ought not to interfere with the exercise of such discretion unless it is satisfied that the judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.

13. It was the appellants' contention that the court was *functus officio* when it made its decision on 26th June, 2015 and that it had no jurisdiction to hear and determine the motion dated 17th September, 2014. As was succinctly stated by Nyarangi, JA in the oft cited case of **Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd (1989) KLR 1** :

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence.”

From the record, we note that the appellants filed a notice of preliminary objection and grounds of opposition on 10th March, 2015 *inter alia* on the grounds that; the Court did not have jurisdiction to adjudicate over the notice of motion dated 17th September, 2014 after the Award was delivered and that the court became *functus officio* once it delivered the Award.

14. The learned Judge rendered himself thus:

“Counsel for the claimants submitted that this Court once (sic) renders a judgment or award becomes *functus officio*. This to some extent may be true but only in so far as the judgment or decision of the Court was made in accordance with the law and procedure and the Court is not being called upon to sit on appeal on its own judgment or of a Court of concurrent jurisdiction. But the rules of this Court permit review of its judgments or decisions where the same may have been made contrary to law in existence at the time they were made. The commencement and prosecution of a suit before this Court by an unauthorized person is a matter of law for which this Court can recall and review its judgment or decision.” (Emphasis supplied).

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:

“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:

“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.”

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].”

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.”

19. Applying the laid down principles to the circumstances of this case, the learned Judge made a correct finding that the Court was not *functus officio* and had the jurisdiction to entertain the application as a review under the Industrial Court Act and the Industrial Court (Procedure) Rules made thereunder.

20. On the appellants’ contention that the learned Judge erred in striking out the appellants’ statement of claim, the proceedings in the cause and the Award on the ground that the appellants’ counsel who filed the statement of claim and conducted the proceedings did not have valid practising certificates,

21. **Section 9 of the Advocates Act** provides as follows:

Subject to this Act, no person shall be qualified to act as an advocate unless-

- (a) he has been admitted as an advocate; and**
- (b) his name is for the time being on the Roll ; and**
- (c) he has in force a practising certificate;**

and for the purpose of this Act a practising certificate shall be deemed not to be in force at any time while he is suspended by virtue of section 27 or by an order under **section 60 (4)**.

Section 31 of the Advocates Act provides as follows:

Unqualified person not to act as advocate -

(1) subject to section 83, no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction.

(2) any person who contravenes subsection (1) shall –

- (a) be deemed to be in contempt of the court in which he so acts or in which the suit or matter in relation to which he so acts is brought or taken, and may be punished accordingly; and**
- (b) be incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting; and**
- (c) in addition be guilty of an offence.**

Section 34 thereof stipulates that:

No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument—

“a) relating to the conveyancing of property; or

b) for, or in relation to, the formation of any limited liability company, whether private or public; or

- c) for, or in relation to, an agreement of partnership or the dissolution thereof; or
- d) for the purpose of filing or opposing a grant of probate or letters of administration; or
- e) for which a fee is prescribed by any order made by the Chief Justice under section 44; or
- f). relating to any other legal proceedings; nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument.”

Provided that this subsection shall not apply to-

- “i) any public officer drawing or preparing documents or instruments in the course of his duty; or
- ii) any person employed by an advocate and acting within the scope of that employment; or
- iii) any person employed merely to engross any document or instrument.

(2) Any money received by an unqualified person in contravention of this section may be recovered by the person by whom the same was paid as a civil debt recoverable summarily.

(3) Any person who contravenes subsection (1) shall be guilty of an offence.

(4) This section shall not apply to-

- (a) a will or other testamentary instrument; or
- (b) a transfer of stock or shares containing no trust or limitation thereof.”

22. We are guided by the decision of the Supreme Court of Kenya in the case of National Bank Limited v Anaj Warehousing Limited (2015) eKLR (the Anaj Warehousing Case) at paragraph 60 where the Court rendered itself thus:

“...Even as stare decisis assures orderly and systematic approaches to dispute resolution, the common law retains its inherent flexibility, which empowers the courts, as the custodians of justice under the Constitution, to proceed on a case-by-case basis, invoking and applying equitable principles in relation to every dispute coming up.”

At paragraph 68 of the Judgment the Supreme Court found as follows:

“The facts of this case, and its clear merits, lead us to a finding and the proper direction in law, that, no instrument or document of conveyance becomes invalid under Section 34 (1) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practising certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes.” (Emphasis Supplied).”

23. Regarding the validity of instruments or documents other than of conveyance, prepared by an advocate who at the time was not holding a current practising certificate, we are persuaded by the decision of Ngugi, J. in the case of R V Resident Magistrate’s Court at Kiambu Ex-Parte Geoffrey Kariuki Njuguna & 9 Others [2016] eKLR where the learned Judge stated as follows:

“The narrow question then is whether the reasoning of the Supreme Court respecting documents and instruments drawn by an advocate without a practicing certificate under

section 34 should apply to pleadings, documents and submissions made by such an advocate under section 31 of the Advocates Act. In my view the reasoning applies and, hence, it should be extended to the interpretation of section 31 of the Advocates Act... the Supreme Court based its decision in Anaj Warehousing Limited Case on the policy objectives and public interest considerations of the case. The Supreme Court reasoned that the basis for the Court of Appeal reasoning in the Wilson Ndolo Ayah Case was not the text of the statute but public policy – public policy that declaring all documents signed by a lawyer without a practicing certificate as null and void creates a disincentive for lawyers to defy statutory provisions on taking of practicing certificates and creates a general public disposition that courts do not condone or encourage illegalities. The Supreme Court faulted this reasoning as applied to the case of admitted lawyers (who are in the roll of advocates) because it exacts a huge penalty on innocent clients who had plausible and reasonable basis for believing that the lawyer in question was duly qualified. Instead, the Supreme Court urges the Court, in line with the new Constitutional ethos, to take the lived realities of Kenyans into consideration in interpreting the statutory provision in question.”

The learned Judge continued as follows:

“ The Supreme Court held that since the statute did not expressly state that any documents signed by a lawyer who did not have a practicing certificate were invalid, that interpretation was unwarranted. The court called on the overriding principles of equity in reaching the opposite conclusion. Even then, it is important to note, the Supreme Court neither limited nor announced the outer limits of the categories of documents which would be covered by the flexible rule the court announced in Anaj Warehousing Limited Case. First, the Court announced that with respect to conveyancing or other contractual documents identified in section 34 of the Advocates Act, even the flexible interpretation it had embraced would not cover documents drawn by non-lawyers or advocates who had been disbarred or suspended from practice. Secondly, the Court did not expressly provide that the flexible interpretation it announced would cover pleadings and submissions drawn by a lawyer who did not have a practicing certificate. This latter question is, of course, the question squarely facing us in the present application...As I stated above, however, I believe that the reasoning of the Supreme Court in the Anaj Warehousing Limited Case can easily be extended to the situation presented by application of section 31 of the Advocates Act where a lawyer instructed by a client who is acting in good faith draws pleadings and addresses the court on a matter only for it to be discovered later that the lawyer did not have a practicing certificate.”

24. By parity of reasoning of the Supreme Court decision in the Anaj Warehousing Case, we find and hold that no pleadings, documents or submissions become invalid under **Section 31** of the Advocates Act only by dint of their having been prepared by an advocate who at the time was not holding a current practising certificate. The contrary effect is that documents prepared by other categories of unqualified persons such as non-advocates whose names have been struck off the roll of advocates shall be void for all purposes.

25. In the circumstances of this case, we find and hold that the learned Judge erred in striking out the statement of claim together with all the proceedings in the cause and the award of 23rd July, 2014 on the grounds that the advocates who filed the statement of claim and those who conducted the proceedings did not have valid practising certificates at the time when they filed the statement of claim and conducted the proceedings.

26. Accordingly, the appeal is allowed. We direct that the ruling of Abuodha J. dated 26th June 2015 is hereby set aside and the Award of Rika J dated 23rd July, 2014 is hereby reinstated with the effect that the respondent shall pay the appellants the amounts awarded to them by Rika J. as follows:

a) **PETERSON NDUNGU, (the 1st appellant) Kshs 2,708,306/=.**

b) STEPHEN GICHAGA GITURO, (the 2nd appellant) Kshs 3,562,865/=.

c) NICHOLAS OJWANG, (the 3rd appellant) Kshs 2,932,204/=.

d) PETER KARIUKI, (the 4th appellant) Kshs 2,921,852/=.

e) JOSEPH M. KYAVI, (the 5th appellant) Kshs 730,740/=.

f) JAMES KIMANI, (the 6th appellant) Kshs 2,675,955/=

27. We think the appropriate order regarding costs is that each party should bear its own costs both in the ELRC and in this Court. We so order.

28. We wish to apologize for the delay in the delivery of this judgment; it was occasioned by challenges presented by the transfer of all three members of the bench to new Duty Stations and the delay and inconvenience caused to the parties is highly regretted.

Dated and delivered at Nairobi this 4th day of May, 2018.

M. K. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR