

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
APPELLATE DIVISION
CIVIL APPEAL NO. E378 OF 2025

MORRIS NJAGI..... APPELLANT

VERSUS

**COMMISSIONER FOR COOPERATIVE
DEVELOPMENT.....1st
RESPONDENT**

**STIMA INVESTMENT COOPERATIVE
SOCIETY.....2nd
RESPONDENT**

**(BEING AN APPEAL FROM THE RULING MADE BY HON .B.
KIMEMIA-CHAIRPERSON, HON .J. MWATSAMA-DEPUTY
CHAIRPERSON, HON. F LUTUIYA-MEMBER, HON. P GICHUKI-
MEMBER, HON. M.CHESIKAW-MEMBER AND HON.P.AOL-
MEMBER ON THE 28th NOVEMBER 2024 IN NAIROBI TRIBUNAL
APPEAL NO 31 OF 2019**

BETWEEN

MORRIS NJAGI..... APPELLANT

VERSUS

**COMMISSIONER FOR COOPERATIVE
DEVELOPMENT.....1st RESPONDENT**

J U D G M E N T

A. Introduction

1. This Appeal arises from the ruling/order of the tribunal dated 28th November 2024 dismissing the Appellant's Application dated 9th November 2023, where he had sought to review and set aside the tribunal's earlier judgment issued against him dated 21st September 2023, which judgment had dismissed his appeal against the Commissioner's surcharge orders earlier issued against him.
2. The background facts were that on 21st September 2023 in the absence of the Appellant and/or his counsel the tribunal had issued judgment against the Appellant dismissing his Appeal against the Commissioner's surcharge orders and upon receipt of the said judgment they were shocked to find that the court was not in receipt of the Memorandum of Appeal, the inquiry order and the inspection report, the minutes of the general meeting whose decision was appealed against, the notice of intention to surcharge and the surcharge order itself. The appeal was thus held to lack merit and the same was dismissed.

3. Being dissatisfied by the said Judgment, the Appellant opted to file an application to review the said judgment and have it set-aside on grounds that his advocate had complied with **Rule 8(3) of the Cooperative Tribunal (Practice and Procedure) Rules 2009** by filing the said documents on 11th October 2019 and thus it was an error for the tribunal to hold that the same had not been lodged as was expected of them. The tribunal had thus made an error, which was clear on the face of the said proceedings and he therefore urged them review and set aside the earlier issued adverse findings.
4. The tribunal in its considered ruling concurred that the said documents had been filed apart from the minutes of the general meeting which deliberated and adopted the surcharge, and they could not overlook his failure to file such a critical document. They thus held that the motion before them was incompetent and proceeded to dismiss the same.
5. Being aggrieved by the said decision the Appellant filed his Memorandum of Appeal, which raised four (4) grounds of Appeal namely that;
 - a) ***THAT the tribunal erred in law by dismissing the appellants application for review without considering that the absence of the minutes of the meeting was an inadvertent procedural***

omission amounting to a mere technicality that should not have defeated substantive justice contrary to Articles 159(2)(d) of the Constitution of Kenya 2010.

b) THAT the Tribunal misapplied the principles of fair hearing under Article 50(1) of the Constitution by failing to consider substantively the record of Appeal as filed.

c) THAT the Tribunal erred in failing to exercise its discretion judiciously as required under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, 2010 leading to an unjust dismissal of the review application.

d) THAT the tribunal misdirected itself in law by imposing a burden of proof beyond what is legally required, thus unfairly holding the Appellant responsible for an alleged omission that was not conclusively established in the record.

6. The Appellant thus urged this court to allow the Appeal, set aside the ruling Appealed against dated 28th November

2024 and proceed to allow his Appeal before the tribunal to be heard on Merit. He also prayed for the costs of this suit.

B. ANALYSIS AND DETERMINATION

7. I have considered this appeal, submissions, and the impugned ruling. I have also considered the decisions relied on and perused the trial court's record. This being a first appeal, it is by way of a retrial, and this court, as the first appellate court, must re-evaluate, re-analyze, and re-consider the evidence afresh and draw its conclusions on it. The court should, however, bear in mind that it did not see the witnesses as they testified and give due allowance for that. (see **Selle v Associated Motor Boat Co Ltd & Others [1968] EA 123**) & **Peters Vs Sunday Post Limited(1968) EA 123**

8. A first appellate court is also the final court of fact, and litigants are entitled to full, fair, independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of **Section 78 of the Civil Procedure Act**, a court of first appeal can appreciate the entire evidence and come to a different conclusion. See **Kurian Chacko Vs Varkey Ouseph AIR 1969 Kerala 316.**

9. The only question that arises in this Appeal is whether the tribunal rightly considered the parameters of allowing a review Application and the effect if any of the Appellant not having filed the minutes of the general meeting which deliberated on and adopted the Commissioner's surcharge report.
10. On the first issue, **Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules**

provides as follows: -

Section 80. Review

“Any person who considers himself aggrieved—

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

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

[Order 45, rule 1.] Application for review of decree or order.

“1. (1) 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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can

present to the appellate court the case on which he applies for the review”`

11. From the above provisions, it is clear that while **Section 80 of the Civil Procedure Act** grants the court the power to make orders for review, **Order 45** sets out the jurisdiction and scope of review by hinging review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.
12. The Court of Appeal had the following to say in an application for review in the case of **National Bank of Kenya Ltd vs Ndungu Njau.**

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

13. Beyond statutory grounds, may also be added instances where the applicant was wrongly deprived of an opportunity to be heard or where the impugned decision or order was procured illegally or by fraud or perjury: see **Serengeti Road Services -v- CRBD Bank Limited [2011] 2 EA 395.**

Also, to be included as part of sufficient reason is where the impugned order if reviewed, would lead the court in promoting public interest and enhancing public confidence in the rule of law and the system of justice: see **Benjoh Amalgamated Limited & Another vs. Kenya Commercial Bank Limited (supra).**

14. The tribunal erred in dismissing the Appellant's appeal, yet he had filed his appeal together with supporting documents, a fact confirmed by the tribunal in its impugned ruling and thus, ***"an error on the face of the record had been established."*** Secondly even though the minutes of the crucial meeting leading to the surcharge were not filed, the same was not fatal in light of the provisions of ***Article 159(2)(d) of the Constitution*** and also considering the fact that the initial Appeal had not been heard, no prejudice would be occasioned if the said documents were filed later before hearing of the said Appeal.

15. Secondly, to have shut out the Appellant without giving him a chance to be heard too, was an affront on the

Appellant's right to access justice and right be heard as enshrined under **Article 48 and 50(1),(2) of the Constitution of Kenya 2010.**

C. DISPOSITION

16. This Appeal therefore has Merit and the Ruling/Order of the Tribunal dated 28th November 2024 is hereby set aside and the Appellant's Notice of Motion Application dated 9th November 2023 is allowed in terms of prayer (2) and (3) thereof.
17. The Appellant's Appeal is hereby remitted for hearing on merit before a different constituted bench of the tribunal.
18. Each party will bear their own costs of this Appeal.
19. It is so ordered.

Dated, signed, and delivered in open court at **MARSABIT** this **26th** day of **JANUARY, 2026.**

**FRANCIS RAYOLA OLEL
JUDGE**

Delivered on the virtual platform, Team this **26th** day of
JANUARY, 2026.

In the presence of: -

.....Appellant
..... Respondent
..... Court Assistant

ORIGINAL