REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL NO. E134 OF 2022

NDEGE WIDOWS AND ORPHĀNS SUPPORT GROUP……. APPELLANT

VERSUS

COUNTY GOVERNMENT OF MIGORI……. RESPONDENT

JUDGMENT

1. This is an appeal from the Ruling and order of Honourable D.O. Onyango (Chief Magistrate) delivered in Migori CMCC No. 12 of 2020 on 22.6.2022.
2. In the Memorandum of Appeal dated 24.10.2022, the Appellant raised the following grounds of appeal:

   (a) The learned magistrate erred in law and fact in finding the Applicant's application unmerited when it raised substantial grounds for review of the judgment dated 14.12.2020.

   (b) The learned magistrate erred in law and fact when he failed to review his decision despite the mistake and

error apparent and which error had been brought to his notice.

(c) The learned magistrate erred in law and fact in relying on authorities involving societies when the Appellant was not a society.

(d) The learned magistrate erred in law and fact by failing to consider the provisions of Order 1 Rule 9 which required no suit to be defeated by misjoinder or nonjoinder.

3. The impugned ruling arose from the application by the Appellant dated 24.8.2021 seeking to review the Judgment of the lower court dated 14.12.2020.
4. The Appellant also sought prayer in the terms that upon reviewing the judgment, the Plaint be amended by substitution with the proper Plaintiff.
5. The application was premised on the grounds that there was an error apparent on the face of the record, as indeed the Plaintiff's misjoinder on the plaint was curable by amendment ordered *suo moto* by the court.
6. In response to the application, the Respondent filed grounds of opposition dated 10.1.2022 on the grounds that the application was a misnomer, an afterthought, and a clear abuse of the court process. It violated the law and was frivolous and vexatious. The court was already *functus officio*, having rendered its final determination, and therefore lacked jurisdiction to revisit the matter. In any event, no sufficient

grounds were laid to warrant a review of the decision. Further, there was an inordinate and unexplained eight-month delay in filing the application, which was prejudicial and inexcusable.

7. Vide its ruling dated 25.8.2021, the lower court dismissed the application on the ground that to allow the application was to permit the court to sit on appeal in its own decision.

Analysis

8. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. In the case of *Mbogo and Another vs. Shah [1968] EA 93* where the court stated:

> *"…that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."*

9. The duty of the first appellate Court was discussed by Clement De Lestang, VP, Duffus and Law JJA, in the locus *classicus case* of **Selle and another Vs Associated Motor Board Company and Others [1968]EA 123**, where the Judges in their usual gusto, held by as follows:

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

10. The jurisdiction of this Court to grant review is well set out in the law under Section 80. However, having proceeded by way of an application, the two courts have the same jurisdiction as there was no demeanor to observe. In the case of **Sugut v Jemutai & 3 others** (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR Kiage JA stated as doth: -

> "I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our

own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; Selle Vs Associated Motor Boat Co [1968] EA 123). I do accord due respect to the factual fndings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge."

12. The jurisdiction for review is set out in section 80 of the Civil Procedure Act which states that:

> "Any person who considers himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> (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".
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> Section 63 (e) of the Civil Procedure Act states that:

> “In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient

13. The foregoing is buttressed under Order 45 of the Civil Procedure Rules which provides for review and it 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.
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> (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."

14. The rationale for the discretionary power of review is to find whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. This power inheres in every court of plenary jurisdiction and is premised on preventing miscarriage of justice or an injustice. I associate myself with the reasoning of Kuloba J (as he then was) in **Lakesteel Supplies vs. Dr. Badia and Anor Kisumu HCCC No. 191 of 1994** where he opined that:

> **"The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the Civil Procedure Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the**

> **first one is wrong…On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the ruling was made."**

15. The Appellant sought to review and set aside the judgment of 14.12.2020 and to be allowed to substitute the Plaintiff therein. The error apparent on the face of the record appears to be that the Appellant erroneously sued in its name, and it needed a chance to amend the pleadings and introduce a member or official of the Appellant. The Court of Appeal in **Mahinda vs. Kenya Power & Lighting Co. Ltd [2005] 2 KLR 418** expressed itself as follows:

> **"The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on**

the basis of arguments thought of long after the judgement or decision was delivered or made."

16. The lower court rendered its judgment dated 14.12.2020. The Appellant did not cite any error on the face of the record. Such an error need not be seen by reading between the lines of the judgment. The error ought to have been manifest and easily ruled out. The court dismissed the suit on account of a lack of capacity to sue. This was a finding on a question of law, and it was not proper for the Appellant to seek to review it as an error apparent on the face of the record. It was a final finding and determination that would only be appealable. The Appellant preferred no appeal. The lower court could not sit as a disguised appellate court. The Code of Civil Procedure*, Volume III Pages 3652*-3653 by **Sir Dinshaw Fardunji Mulla** states:

> **"*... The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code of Civil Procedure...The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper."**

17. Before I pen off, another thing the Appellant failed to utilize was the fact that the lower court only struck out the suit. The suit was not determined on the merits. Nothing prevented the Appellant from filing a fresh suit. The less I say about this, the better.

18. Finally, the court is not in any way suggesting that the judgment given is correct in issues of law. It is that there was no appeal from it. The question of review herein did not meet the threshold needed.

19. The court is unable to fault the finding of the lower court because the court exercised its unfettered discretion within the bounds of the law. I cannot strain my discretion beyond the bounds of the law in the circumstances. In the case of **Ramakant Rai vs. Madan Rai, Cr LJ 2004 SC 36**, the Supreme Court of India rendered itself thus on the issue of judicial discretion:

> *"Judicial discretion is canalized authority not arbitrary eccentricity. Cardozo, with elegant accuracy, has observed:*
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> *"The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He s not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not a yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by*

tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains".

20. This leaves the issue of costs, which is governed by Section 27 of the Civil Procedure Act, which provides as follows:

> **(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.**
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> **(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.**

21. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR**) had this to say:

"It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

22. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Rai & 3 others v Rai & 4 others [2014] KESC 31 (KLR),** as follows:

18. It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation

22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs

> do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

23. In the circumstances, I am inclined to dismiss the appeal with costs to the Respondent.

Determination

24. The upshot of the foregoing is that I make the following orders:

a) The appeal lacks merit and is dismissed.

b) The Respondent shall have costs of this appeal assessed at Ksh. 35,000/=.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **9th** day of **March, 2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for the Appellant

Ms. Chihuyo for the Respondent

Court Assistant – M. Nderitu