REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL NO. E023 OF 2023

CALEB ODHIAMBO OKUMU……

APPELLANT

VERSUS

FRANCIS OUMA ……
RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. A.C. Munyuny, Resident Magistrate, given on 30.03.2023 in Migori CMCC No. 227 of 2019.

2. The lower court dismissed an application dated 12.01.2023. It sought the following orders:
   (a) The judgment delivered on 24.02.2022 be reviewed.
   (b) Upon the grant of the prayer above, appropriate further directions and orders do issue.

3. The main ground is that there is a new important matter and evidence which, with all due diligence, could not be produced when the decree was passed. The main ground was that at the

time of the accident on 6.4.2018, the vehicle was registered in the name of David William Ouma, who was also the insured. He is said to be in control of the vehicle as an employee of David William Ouma. He was driving as an agent. In short he is saying that he was the tortfeasor and there is need to join someone who was vicariously liable.

4. The court heard the parties and proceeded to render its decision.
5. The Appellant was aggrieved by the judgment and filed a Memorandum of Appeal dated 24.5.2024, which was later amended on 5.06.2023. The court will not set the same out herein as it is prolix and anathema to good pleadings. Order 42 Rule 1 of the Civil Procedure Rules provides as follows:

> **(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.**
>
> **(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.**

6. The Court of Appeal [Nambuye, Karanja & M'Inoti, JJ.A.] had this to say about compliance with Rule 86 (now Rule 88) of the Court of Appeal Rules (which is *pari materia* with Order 42 Rule 1 of the Civil Procedure Rules) in the case of **Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] KECA 224 (KLR):**

"We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:

"We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric…A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues…"

Submissions

7. The appellant posited that he is aware of decision of this Court in **Kenindia Assurance Company Limited v IG (Minor suing thro' next friend and mother PBO) [2024] KEHC 1207 (KLR)**, on the scope of a contract of insurance made under the Insurance (Motor Vehicle Third Party Risks) Act, as aspects of the motion at the court below touched on it. It was his submissions that he proved a sufficient reason for the review of the decree of the subordinate court, within the parameters of Order 45(1) of the Civil Procedure Rules.

8. He posited that he was never the owner or the insured of the suit motor vehicle, but was merely driving the vehicle at that time. He posited that there was no pleading that he was an agent of a known principal. He stated that the points that constituted the gravamen of the Appellant's application that resulted in this appeal could not have been raised on appeal, as they had not been raised and argued before the subordinate court before the judgment was delivered. They all constituted fresh material. Reliance was placed on the case of **Muli v Pan Africa Chemicals Ltd (Civil Appeal 236 of 2018) [2023] KECA 573 (KLR)**.

9. The Respondent filed submissions dated 16.12.2025. He submitted that they laid their foundation on the maxim *equity favours the vigilant and not the indolent*. It was their case that

the application was time-barred and the court was *functus officio*. They relied on Black's Law Dictionary, 6th edition, at page 956. Reliance was placed on the case of **Ochanda (Suing on his Behalf and on Behalf of 996 Former Employees of Telkom Limited) v Telkom Kenya Limited** (Motion 24 of 2014) [2014] KESC 7 (KLR) (25 November 2014) (Ruling), where the court of appeal [EM Githinji, W Karanja & Po Kiage, JJ] held as follows:

> 21.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. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of Chandler Vs Alberta Association of Architects [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);
>
> 22.The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal In re St. Nazaire Co., (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:
>
> 23.Where there had been a slip in drawing it up, and,Where there was an error in expressing the manifest intention of the court. SeePaper Machinery Ltd. vs. J.O. Rose Engineering Corp., [1934] S.C.R. 186"The Supreme Court in Raila Odinga v IEBC cited

with approval an excerpt from an article by Daniel Malan Pretorius entitled, "The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law" (2005) 122 SALJ 832 in which the learned author stated;...

> "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 superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

24.The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in Jersey Evening Post Ltd Vs Ai Thani [2002] JLR 542 at 550, also cited and applied by the Supreme Court;

10. He also relied on the case of **Menginya Salim Murgani v Kenya Revenue Authority [2014] eKLR** on functus officio. The Surpreme Court posited as follows:

> 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. In Lakhamshi Brothers v. Raja & Sons [1966] EA 313 the then Court of Appeal held as follows:
> " This court is now the final Court of Appeal and when this court delivers its judgement, that judgement is, so far as the particular proceedings are concerned, the end of the litigation. It determines in respect of the parties to the particular proceedings their final legal position, subject as I have said to the limited application of the slip rule."

11. Further reliance was placed on the Supreme Court decision of **Odinga v Independent Electoral & Boundaries Commission & 3 others [2013] KESC 8 (KLR)** cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, **"***The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law*" (2005) 122 SALJ 832 which reads: -

> "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 superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

21. Section 99 of the Civil Procedure Act provides exceptions to the doctrine of functus officio in the following terms-

"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."

12. They concluded that the appellant is asking the court to reopen the case, analyse evidence, and make a determination.

Analysis and Determination

13. 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."*

14. 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 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."

15. However, being an application, there is no demeanor to watch. Therefore the court below and this court has the same bird's eye view of the affidavit. The question where the court did not hear evidence was addressed 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 where 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."

16. Section 80 of the Civil Procedure Act states that:

"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".

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

17. Order 45 of the Civil Procedure Rules provides for Review and it states as follows:

"(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"

18. Kuloba J (as he then was) addressed the question of review in the case of **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."

19. The appellant based his case on what he calls sufficient cause. In **Nasibwa Wakenya Moses v University of Nairobi & another [2019] eKLR**, it was held as follows regarding sufficient cause:

> 28. An application for review may be allowed on any other "sufficient reason." The phrase 'sufficient reason' within the meaning of the above rule means analogous or ejusdem generis to the other reasons stipulated in Order 45 Rule 1. This position was illuminated in Sadar Mohamed vs Charan Singh and Another where the court held that:-
> "Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter)."
>
> 29. Mulla in the Code of Civil Procedure[14] (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that the expression 'any other

> sufficient reason'...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out in the rules, would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement.

20. Given the close relationship between the first two grounds in Order 45(1) of the Civil Procedure Rules, a nexus must exist with sufficient cause. Further, there must be a cause. It cannot be in vacuo.

21. The tragedy is that the appellant is involved in legal gymnastics, subterfuge, and hyperbole. The appellant was the one in control of the vehicle. He did not tender evidence after the court declined to grant him leave to file documents after the closure of his case. He then became non-suited. He is again in court with an application that was insulting to the court below and was intended to obfuscate the issues. This reminds me of the lamentation of Odunga J (as he then was) in **Kioko Peter v Kisakwa Ndolo Kingóku [2019] eKLR**, while referring to the reasoning of Madan J (as he then was) in **N vs. N [1991] KLR 685**. The learned Judge lamented as follows:

> Parties and Counsel ought to give the courts some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or no iota of truth.

> It is these kinds of allegations that Madan, J (as he then was) had in mind when in N vs. N [1991] KLR 685 when he expressed himself in the following terms:
>
> "I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted."

22. The appellant must give the court a little credit that it can decipher the games he is playing. The appellant filed a third-party notice against Collins Omondi Molo dated 25.08.2021. He did not pursue this. Secondly, the appellant admits to being the driver and in control. He was not a stranger in paradise. Surely, he knew whose vehicle he was driving. Secondly, he was the primary tortfeasor and cannot escape liability by introducing these late-in-the-day questions between him and his employer, who is to be liable.

23. The court below concluded that she was entitled to carry out the work. There is no new material to work with. The court below found that the delay was inordinate. This was 11 months late. I have perused the so-called sufficient evidence. It is not

just insufficient, but there is no new evidence. The appellant knew before the accident happened which vehicle he was driving. He also opted not to testify. To contextualize the lack of material in the application, I will do nothing more than quote with approval the ruling of the court below at paragraph 15:

> **I find it hard to comprehend how the existence of the alleged owner of motor vehicle, David William Ouma amounts to discovery of new and important evidence. In my mind, if the applicant was employed as a driver by the owner of motor vehicle then he knew his alleged Principal. The applicant had knowledge of the agent and agency relationship alluded to in this application from the onset and at all material times. There is no doubt to me that the information was readily available to the applicant and could have been produced even without the exercise of due diligence.**

24. There is actually no material placed before the court to warrant review. It is thus unnecessary to find whether the material is insufficient. It is simply not there. The net effect is that I find the appeal lacks merit and I accordingly dismiss it. 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.**
>
> **(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.**

25. 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.

26. 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.

27. The Respondent has unnecessarily been vexed on non-existent material. The costs of the appeal will be paid. A sum of Kshs. 85,000/= will suffice.

Determination

28. In the upshot, I make the following orders: -

a) The appeal lacks merit, and is accordingly dismissed with costs of Ksh. 85,000/= to the Respondent.

b) 30 days stay of execution on costs only.

c) The file is closed.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **16th** day of **March, 2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Odero for the Appellant

Mr. Abisai for the Respondent

Court Assistant – Michael