REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL NO. E084 OF 2024

RICHARD ODINDO .... APPELLANT

VERSUS

JAMES OGUTU .... RESPONDENT

JUDGMENT

1. This appeal arises from the judgment and decree of the Hon. Susan Mutava (Resident Magistrate) in Rongo MCCC E052 of 2024, given on 6.11.2024. The appellant was the first plaintiff in the lower court. There were 5 plaintiffs in the lower court, and the court dismissed the suit with no order as to costs. However, only the first plaintiff appealed.

2. The appellant and 4 others filed a suit stating that the respondent was an administrator of the *Jok Milambo* WhatsApp group. It was stated that *Jok'Otieno* shares their family values, aspirations, encouragement, and a platform for sharing family emergencies in line with technological developments in the communication space.

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3. The parties use the group to raise funds for funerals and related calamities. The respondent is said to have removed the appellant and 4 others on 17.03.2024, hence excommunicating him from family affairs. The removal was deemed arbitrary, discriminatory, and a violation of their rights. Despite the backlash, the respondent refused to restore the appellant to the WhatsApp groups.
4. The respondent filed a defence dated 20.6.2024. The respondent denied that the appellant and the 4 others were removed without any basis. The consequences and the penalties relating to dispute resolution were indicated. It was averred that the appellant failed to mitigate any loss pursuant to section 16A of the Defamation Act. It was stated that the appellants were expelled from the Jok Milambo clan for failing to adhere to its objectives and rules.

5. The court heard the case and dismissed it. The court found that there was a contract between the parties, as there were no rules governing WhatsApp groups. The court found that the appellants were not contributing to the group and that the same was not rebutted. It was indicated that the mechanism for dispute resolution was through the elders and that this was agreed between the appellant and the respondent.

6. The court referred to the contents of the memorandum of understanding. The court found that mere admission of a

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document does not amount to proof. The court is unable to understand the last part of the judgment.

Submissions

7. The Appellant filed submissions dated 28.11.2025. He raised three issues, that is whether:
    a. The WhatsApp group of the *Jok Milambo* clan amounted to a contractual relationship.
    b. Whether the WhatsApp group association evolved into a self-help group.
    c. Whether the removal of *Jok Otieno*, who are part of the *Jok Milambo* clan, was fair and procedural and abided by the rules of natural justice.
8. On the first issue, the appellant relied on the case of the **Hatayan & another v Al-Heidy & 5 others** [2015] KECA 713 (KLR), where the court of appeal [Makhandia, Ouko & M'Inoti, JJ.A] held as follows:

    > By definition, a contract is an agreement by which one person obligates himself to another to give, to do, or permit, or not to do something express or implied by that agreement. The promise, price, right or forbearance is what is termed as consideration in a contract. As a result, for a contract to be valid, it must fulfill several requirements. Among these requirements is that the consideration must move from the promisee. This means that no one can enforce another's promise unless he has been a party to the contract. As a result, a stranger to a contract cannot sue on it, even if the contract was made

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> for his benefit. Such is the general rule on privity of contract. This rule is however subject to some exceptions; one of which arises in cases of trust.

9. It was his case that the *Jok Milambo* did not amount to a contract. It is an informal group of members in which sub-clans are brought together for clan leadership and agenda-setting, and deals with the communal agenda. Further, that there were no rules, obligations, or conditions prescribed, or members assigned duties. They stated that the association was protected under Article 36 of the Constitution which provides as follows:

> (1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.
> (2) A person shall not be compelled to join an association of any kind.
> (3) Any legislation that requires registration of an association of any kind shall provide that:-
> (a) Registration may not be withheld or withdrawn unreasonably; and
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> (b) There shall be a right to have a fair hearing before a registration is cancelled.

10. They submitted that they are protected by the Data Protection Act and have rights to privacy, dignity, freedom of association, and fair administrative action. It was submitted that members of Jok Milambo and Jok Otieno joined voluntarily and collaborated in organizing their events.

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11. The next question was whether the Jok Milambo evolved into a self-help group. They submitted that there are guidelines for forming self-help groups, and Jok Milambo does not meet the requirements of a self-help group.

12. On the last question, they stated that there were no summons before being removed. Reliance was placed on the case of **Kidero & 4 others v Waititu & 4 others** [2014] KESC 11 (KLR), where Njoki JSC, posited as follows:

> Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of audi alteram partem(hear the other side or no one is to be condemned unheard) and nemo judex in causa sua (no man shall judge his own case) otherwise referred to as the rule against bias. Peter Kaluma, Judicial Review: Law, Procedure and Practice 2nd Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural fairness in decision making. Further he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176 and 177] that it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated and noting that "although the necessity of hearing is well established, its scope and contents remain unsettled.

13. They stated that the meeting held on 18.03.2024 to remove them was done after the removal. Reliance was placed on the case of **Union Insurance Co. of Kenya Ltd. vs. Ramzan**

Abdul Dhanji Civil Application No. Nai. 179 of 1998, where the court stated that:

> "Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation.
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> The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilise it.

14. They submitted that the job often lost reputation among its clan members and denied an opportunity to participate in Joka Milambo. The appellant submitted that they prayed for the appeal to be allowed.

15. Though it was indicated that the case was for the appellants, there was only one appellant in the case, that is, Richard Odindo.

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16. There were no submissions from the respondent.

Evidence

17. The appellant testified that he was removed from a WhatsApp group Jok Milambo. It is a clan of 10 homesteads. He did not know why he was removed from the group. The group had an administrator and leadership. He stated that the group was formed by Paul Oyambo in 2016. The entire family of Otieno Odindo was removed. They stated that the group should be run by elders. The respondent was not an elder. On cross-examination by the court, the witness stated that he still spoke with members of the group, but they didn't share the discussion within the group. The appellant did no produce any evidence.

18. The Respondent testified and produced 6 documents. He stated that he was accused of removing the appellant from a WhatsApp wall. He stated that the memorandum of understanding was proposed and agreed. The plaintiffs were troublesome and had no cooperation as a family. There was a meeting of elders who then expelled the Otieno family from the meeting and group. The members expelled did not contribute or participate in meetings.

19. On cross-examination, he stated that the minutes are usually in the group. He said minutes were written on 29.03.2024. They did not write letters, but sent a communique

inviting the plaintiffs to attend, but they did not attend. The expulsion letters were served on them. They were permanently removed from the group. A demand letter brought a lot of confrontation, resulting in the temporary removal to facilitate the elders' discussion.

20. On re-examination, he stated that minutes were written on 23.02.2024 and typed later to be forwarded to the appellant.

Analysis

21. The appellant filed humongous grounds of appeal. It is unnecessary to set the same verbatim in the judgment. The memorandum of appeal is repetitive and unseemly. memorandum of appeal should be concise as set out in Order 42 Rule 1 of the Civil Procedure Rules which provides:

> **(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.**
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> **(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.**

22. 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:
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> > "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

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> Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues…"

23. The court abhors repetitiveness of grounds of appeal which tend to cloud the key issues in dispute for determination. In **the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] KECA 472 (KLR)**, the court of appeal [Nambuye, M. Warsame & Otieno-Odek JJA] observed that:

> "Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether *Section 62* of the **Kenya Ports Authority Act** ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In **William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013**, this Court stated:
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> > **"The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."**

24. The appellant raised only one issue, that the court misapprehended the case before her and, as a result, reached

a wrong conclusion. The rest of the issues are ancillary, repetitive, prolix, and a waste of judicial time.

25. 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 first hand. However, the treatment of findings of fact by the lower court was addressed in the case of **Peters vs Sunday Post Limited [1958] EA 424**, where the court therein rendered itself as follows:-

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"**

26. 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 first hand. In the case of *Mbogo and Another vs. Shah [1968] EA 93* 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."

27. The duty of the first appellate court was settled long ago 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."

28. This court has neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the

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same as the lower court as parties cannot read into those documents matters extrinsic to them. In the case of **Peters vs Sunday Post Limited [1958] EA 424**, the court therein rendered itself as follows:-

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"**

29. I agree with the appellant that the WhatsApp group does not amount to a contract, nor is it a self-help group. It is an informal voluntary association of members of the Jok Milambo clan. Therefore, the court was plainly wrong to equate the WhatsApp group with a contract. The finding is thus set aside.

30. The members of Jok Milambo set their own rules. The elders decided to remove Jok Otieno from the group; the court had not been invited to set aside the elders' decision. The respondent is just an administrator of the Jok Milambo WhatsApp group. I agree with the appellant that they have a right of association. This also goes hand in hand with the right not to associate. The members decided not to associate with the appellant and his siblings. The court cannot force them to associate.

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31. Further there are no pleadings against the group leadership. The clan minutes have not been set aside. The appellant, being a non-member after expulsion, cannot participate in the group activities. Parties are bound to plead their cases fully. In the case of **Migore v South Nyanza Sugar Co Ltd [2018] KEHC 5465 (KLR)**, A C Mrima, J, stated as follows:

> 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
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> *.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the*

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pleadings goes to no issue and must be disregarded……

…In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.

32. In the case of **Malawi Railways Ltd vs Nyasulu [1998] MWSC 3**, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled *The Present Importance of Pleadings* published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings …….for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the

pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called Any Other Business in the sense that points other than those specific may be raised without notice.

33. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** found and held as follows in an election petition:

58. In the case of Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & anr, Civil Appeal Nos 5710-5711 of 2012; [2014] 2 SCR the Supreme Court of India held that [paragraph 8]:

….

52.Further, the court went on and observed that:

"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It

> is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings. The court cannot exercise discretion of ordering recounting of ballots just to enable the election petitioner to indulge in a roving inquiry with a view to fish material for dealing the election to be void. The order of recounting can be passed only if the petitioner sets out his case with precision supported by averments of material facts.

34. There are no pleadings challenging the decision of the members. Officials of the Jok Milambo were not sued. There are no prayers to reverse the elders' decision. Indeed, the appellant confirmed that there was no agreement to contribute or form a self-help group. This is in consonance with the evidence on record that they were not contributing. The appellant should form a group of like-minded members of Jok Milambo or Jok Otieno, as the members allied to the leaders form theirs.

35. The appellant is entitled to be heard before adverse action is taken. However, this was done. In any case, it is the elders who made the decision. The respondent was simply, for lack of a better word, the elders' spanner boy. Filing suit against a person who is not a decision-maker is not helpful. A decision of this nature must be made against the decision maker, not the implementer. In the circumstances, the appeal lacks merit. It is accordingly dismissed. The issue of costs 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.

36. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah**

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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.**

37. 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
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> 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.

38. Costs follow the event. The event is the dismissal of the appeal. The parties are related. However this is not the only consideration. The appellant has subjected the respondent to unnecessary costs. A sum of Ksh. 85,000/= will suffice as costs.

<u>Determination</u>

39. In the circumstances, I make the following orders:-

a) The appeal herein lacks merit and is consequently dismissed.

b) The respondent shall have costs of Ksh. 85,000/=.

c) 30 days stay of execution.

d) The file is closed.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **11th** day of **March, 2026**. Judgment delivered through Microsoft Teams Online Platform.

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KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for the Appellant

Mr. Achola for the Respondent

Court Assistant – Michael

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