REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL NO. E024 OF 2023

CALEB ODHIAMBO OKUMU..... APPELLANT

VERSUS

COLLINS OMONDI alias CHARLES OGUTU OGWARI..... RESPONDENT

JUDGMENT

1. This is an appeal from the Ruling and Order of Honourable A.C. Munyuny (Resident Magistrate) delivered in Migori CMCC No. 225 of 2019 on 30.3.2023.
2. The appeal is on a singular question of law, that is, review under Order 45 of the Civil Procedure Rules. In the Amended Memorandum of Appeal dated 5.6.2023, the Appellant raised humongous 12-paragraph in terms of the grounds of appeal. It is certainly not edifying for advocates to present 12 argumentative grounds of appeal, and end up arguing only one or two issues. This is anathema the provisions of Order 42 Rule 1 of the Civil Procedure Rules, which posits as doth: -

> **(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.**

3. A memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. The grounds should not be unconcise, imprecise and argumentative. The Court of Appeal had this to say about compliance with Rule 86 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] eKLR: -**

> "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…"

4. Repetitive grounds of appeal tend to cloud the key issues in dispute for determination by the court. The same issue was addressed succinctly court of appeal in the case of **Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR** as follows:

> "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:
>
> > **"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."

5. The grounds are thus ancillary, repetitive, prolixious and a waste of judicial time. This court will have to deal with whether the magistrate erred in dismissing the Appellant's Application for review.

6. The impugned ruling arose from the application by the Appellant dated 12.1.2023 seeking the following orders:

   (a) Spent

   (b) Spent

   (c) The judgement dated and delivered on 24.2.2022 be reviewed.

   (d) Upon prayer (c), appropriate further directions and orders to issue.

   (e) Costs be provided for.

7. The application was supported by the Affidavit of the Appellant sworn on 12.1.2023 by which it was deposed in material thus:

   (i) Judgment was entered against the Appellant for Ksh. 1,444,649/=.

   (ii) The Appellant was held 100% liable for the accident.

(iii) The Appellant was in control of the accident motorvehicle as employee of David William Ouma and was driving it as agent of the owner.

(iv) The Appellant should not be liable for damages.

(v) The orders will not prejudice Respondent.

(vi) There was sufficient reason for review.

8. In response to the application, the Respondent filed his sworn replying affidavit dated 25.1.2023 on the following grounds:

(a) The suit was filed on 31.12.2019 and summons were duly served.

(b) The Appellant never entered appearance or filed defence and there was default judgment on 15.9.2020.

(c) Vide consent of the parties dated 2.12.2020, the default judgment was set aside and Appellant granted leave to file defence.

(d) The court granted the Applicant 7 days to file third party proceedings on 30.3.2021 which was never filed.

(e) The impugned judgment was delivered in the presence of both parties.

(f) There was inordinate delay of 11 months in filing the application.

(g) Misjoinder or nonjoinder cannot defeat a decree.

9. Vide its Ruling dated 30.3.2023, the lower court dismissed the application on the ground that the Applicant had not demonstrated a ground for review and was an afterthought.

Analysis

12. The jurisdiction of this Court to grant review is well set out in the law. 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".

13. 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. 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."

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 24.2.2022. The rationale is clearly on account of 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. 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 24.2.2022. The Appellant did not cite any error on the face of the record. The matter hinges on capacity to sue in which the Appellant contended that he was not the owner of the accident motor vehicle as he was driving the motorvehicle as employee of one David William Ouma. The impugned judgment followed a hearing of the parties on merits. The issue of being wrongly sued cannot be an issue emerging as a new matter of evidence or fact. Once he was sued, he ought to have immediately known whether or not he was an agent or principal. The Appellant preferred no appeal on the merits of the judgment. The lower court could not sit on a disguised appeal to itself. 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. I am consequently 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:**
> **"The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is 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".

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

19. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR**, 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, before, during, and subsequent to the actual process of litigation.... 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.

20. 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.

21. 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

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

a) The appeal lacks merit, and it 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/Martin