Githaiga v Mwangi (Civil Appeal E064 of 2022)
[2024] KEHC 13449 (KLR) (30 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13449 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E064 OF 2022

DKN MAGARE, J

OCTOBER 30, 2024

BETWEEN

ESTHER WAMUYU GITHAIGA ..... APPELLANT

AND

GRACE WANGARI MWANGI ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. V.S. Kosgei – SRM, dated 28/10/2022 arising from Karatina SRMCC No. E049 of 2021. The Appellant was the defendant in the lower court. The parties stated that they were to proceed by way of written submissions. The court delivered its judgment on 28/10/2022 and gave interest at 10% from 31/10/2019, and interest on the decretal sum at 6% from the date of decree. Where the court got evidence in support of the judgment remains a mystery to date. No single document was produced in evidence.

2. Aggrieved by the whole of the said judgment, the Appellant filed a 9-paragrpah Memorandum of Appeal and set out grounds as follows: -

    a. That the learned magistrate erred in law and fact in allowing the Respondent's suit despite having not proved the amount of Kshs. 470,000/- as disbursed.

    b. That the learned magistrate erred in law and fact in relying on the soft loan agreement dated 10/6/2019 without evidence.

    c. That the learned magistrate erred in law and fact in disregarding the Appellant's forensic evidence.

    d. That the learned magistrate erred in law and fact in failing to apply the in duplum rule in favour of the Appellant.

e. That the learned magistrate erred in law and fact in failing to find the interest rate of 10% per month unconscionable, unfair, harsh and oppressive.

f. That the learned magistrate erred in law and fact in not finding that interest rate of 10% per month would translate to 120 % per annum.

g. That the learned magistrate erred in law and fact in applying two interest rates, 10% from 31/10/2019 and 6% from date of decree.

h. That the learned magistrate erred in law and fact in finding that the plaintiff had proved her claim.

3. There are only 2 issues raised in the aforementioned grounds: -

a. That the learned magistrate erred in law and fact in relying on the soft loan agreement dated 10/6/2019 without evidence.

b. That the learned magistrate erred in law and fact in finding that the plaintiff had proved her claim.

Pleadings

4. In the plaint, the Respondent averred that on 10/6/2019, the Appellant borrowed Kshs. 470,000/- advanced on condition that it would be repaid within 3 months at 10% monthly interest. It was the pleaded case of the Respondent that the Appellant failed to repay both the loaned amount and the accrued interest hence the suit.

5. The Respondent sought the following reliefs in the suit in the court below:

i. Payment of Kshs. 470,000/- with interest at the contractual rate of 10% per month effective 10/6/2019.

ii. Cost and interest

6. The Appellant entered appearance and also filed defence denying the averments in the plaint and also pleaded that the soft loan agreement dated 10/6/2019 was procured by forgery. The Appellant denied liability to pay Kshs. 470,000/= and avowed to have the alleged agreement subjected to forensic examination by the dci government examiner. (sic).

7. The Appellant wrote a comprehensive statement dated 2/08/2021. An order was issued on 11/1/2022 for examination of the loan agreement dated 10/6/2019. The forensic examination was carried out by Emanuel Karisa Kenga on 1/6/2022, where the witness stated that there were no similarities between the signatures as the questioned signature was of a poor quality with formation and pattern different. There appears to be another examination by the DCI Karatina. It was to the contrary opinion. However, it does not have a single attachment, but for the reasons hereinafter given, I will have rejected the same.

8. The learned magistrate considered the case and rendered her Judgment on 28/10/2022 allowing the Respondent's suit with costs. Aggrieved, the Appellant filed this appeal.

Evidence

9. No evidence was tendered. Parties proceeded in a strange way, by written submissions. There is no single evidence tendered and no witness was cross examined. There were two forensic documents filed.

The one by DCI is a copy and has no annextures. If it were an exhibit, it could have been useless. It relates to an offence on 31/10/2021. It has no specimen signature and the known signature.

10. On the other hand, there is a forensic examination report, which is in the original with specified signatures. There was however, no evidence tendered or documents produced. Until I saw this file, I could have thought that the legislature enacted a superfluous provision in the *Evidence Act*, that is, Section 108 of the *Evidence Act*, which states as follows:-

    108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

11. From perusing the documents filed but not produced, there is no single document ever filed to show that the Respondent had money to give or indeed she gave the Appellant any money. In this case the Respondent's goose was cooked when she failed to tender evidence. The Appellant had no qualms agreeing to proceed by way of submissions. Submissions are not evidence and cannot take place of evidence. Without evidence, pleadings are bare. A party with a burden of proof loses in a scenario where no evidence is tendered. There was even no attempt to produce even a single document.

12. There is no evidence tendered by both parties. It is the duty of the Respondent to tender evidence to prove her case. She failed to do so.

Submissions

13. The Appellant in this appeal filed submissions dated 27/6/2024. It was submitted that the lower court erred in its finding that the Respondent had proved her case on a balance of probabilities. The Appellant also submitted that the interest rate of 10% was unconscionable and commercially oppressive and ought to have been declined by the lower court. Reliance was placed on the case of Muraguri Njeri Muiruri v Bank of Baroda (K) Limited (2014) eKLR and Ajay Shah v Guilders International Bank Ltd (2002) EA 269. She submitted that the court failed to apply the in duplum rule and occasioned injustice to her.

14. The Respondent also filed submissions dated 15/7/2014. It was submitted that the lower court judgment was well researched, reasonable and well laid out and does not warrant to be interfered with. No authorities were cited.

Analysis

15. 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.

16. 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."

17. The duty of the first appellate court was set out in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the court 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."

18. The Court is to bear in in mind that it had 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 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, 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..."

19. I now proceed to establish whether the Respondent was entitled to the reliefs awarded. In David Bagine v Martin Bundi [1997] eKLR, the Court of Appeal cited the judgment by Lord Goddard CJ. in Bonham Carter v Hyde Park Hotel Limited (1948) 64 TLR 177), where it was held that:

> [The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it.
>
> in Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell), Cooke, J.A. delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness.

20. The issues raised herein are germane to the issue before court. The question of the in dupulum rule and interest were not raised in the pleadings. I shall dismiss them first hand. A party must before proving a case, plead the same since pleadings are paramount. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, A C Mrima stated as follows: -

> " 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: -

"…..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 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."

21. 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 respect to the essence of pleadings in an election petition:-

> " 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……'"

22. The Respondent pleaded that she agreed with the Appellant and loaned the Appellant Kshs. 470,000/- to be refunded within a period of 3 months at monthly interest of 10%. The Appellant refuted the loan and alleged forgery of her signature on the impugned loan agreement. It is thus her case that the loan agreement was procured through forgery on the part of the Respondent.

23. Before we go to the execution of the agreement as pleaded, we must then proceed to the question of whether, the Ksh 470,000/= was loaned to the Appellant. The court has to triangulate on 2 aspects - evidence that the Respondent had the money and the money left the Respondent to the Appellant on 10/6/2019 and whether there is such an agreement. This is based on the principle of Nemo dat quod non habet. Though used in relation of transfer of ownership, the term means that there needs to be evidence that the Respondent had money and capacity to transfer the money, did indeed transfer on the said date to the Appellant, since no one can give what they do not have. The Respondent could not give that which she did not have. There was no witness testimony that the amount pleaded was given. Though pleaded as a debt, the Respondent did not tender any evidence in support of her case.

24. This is informed by a proactive I have seen where a party receives Kshs 360,000/= where 10% interest per month is applied together with interest on interest compounded daily and applied monthly resulting in a huge figure of Kshs 477,160/-, which then purports to be the mount given. The court needs to confirm the actual amount given. Failing to disclose this means the case is not proved. Alternatively, an agreement can be given for illegal purposes, for example camouflaging a bribe or other illegal considerations.

25. As a fact, the Appellant and Respondent commissioned two reports. Both of which were favourable to the instructing client. The Appellant is said to have been summoned over the money to the DCI

Mathira in June 2021. There is no testimony to support both sides. The burden of proof is set out in Sections 107-109 of the *Evidence Act*; Cap 80 Laws of Kenya which provides that:

> " 107.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

26. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

27. It follows that the Respondent herein had the duty to prove her claim against the Appellant. Courts have belabored the burden and standard of proof in civil cases which I find necessary to lay down as below. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under Section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

28. It follows that the initial burden of proof was with the Plaintiff, but the same may shift to the Defendant, depending on the circumstances of the case and the evidence tendered. In Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as

Section 108 of the *Evidence Act* provides the burden lies in that person who would fail fi no evidence at all were given as either side."

29. The court must have evidence in terms of exhibits to rely on as well as testimony. A practice in constitutional review where parties rely on submissions is not useful in cases of this nature. This is because, in those cases, there is already affidavit evidence. In this case there was no evidence produced. The civil standard cannot thus be met since courts are not soothsayers or traditional seers to receive facts from the world beyond. In this court, there should be evidence, not conjecture, surmise, hyperbole and guesswork. A balance of probability standard means that a court is satisfied an event occurred if the court considers that on the evidence, the occurrence of the event was more likely than not, as Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

30. The balance of probability means that the court thinks it more probable than not, the burden is discharged. However, where the odds are equal, that is to say that the probabilities are equal, then the burden is not discharged. It may well be that there are chances that the court is wrong. However, it will not break a bone and the probabilities do not involve liberty, which is sacrosanct. In Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un)convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained."

31. Even if this court were to base its decision on the documents filed in court which were however not produced as exhibits, the Respondent did not have evidence of money or any agreement. The alleged agreement is said to have surfaced when the suit was filed. It was necessary to question witnesses from both sides to establish who is telling the truth. There is no basis for accepting one report over another, in absence of any evidence on record. Even if the documents were produced, there was no evidence that actual money left the Respondent's account to the Appellant. The agreement is not evidence of payment of money.

32. Section 35 of the *Evidence Act* covers what evidence is as follows: -

    1. In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—

(a) if the maker of the statement either—

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

33. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 as follows:-

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

34. How can one re-hear a matter where no scintilla of evidence is tendered? Such are short cuts people take that are wide and lead to damnation. They must stick to the straight and narrow road of having evidence on record.

35. Before the Respondent is called to answer questions and deal with fraud, there should be evidence on record duly tendered. It is cavalier to expect a court to imagine or otherwise encompass what documents mean without testimony. No evidence was tendered in support of the Respondent's case. Ipso, facto, there was nothing for the Appellant to rebut. A Mere fact that a defendant does not tender evidence does not mean that the case is unrebutted. The burden remains on the Respondent to tender some credible evidence, which was not tendered. In the case of Raila Odinga & 5 Others Vs Independent Electoral Boundaries Commission & 3 Others [2013] eKLR the Supreme Court of Kenya cited dicta in a Nigerian case as follows:-

He who asserts is required to prove such fact by adducing credible evidence. If a party fails to do so, its case will fail. On the other hand if he party succeeds in adducing evidence to prove the pleaded fact it is said to have discharged the burden of proof that rests on it. The burden is then said to have shifted to the party's adversary to prove that the fact established by the evidence adduced could not on the preponderance of the evidence result in the court giving judgment in favour of the party.

36. It is only after the credible evidence is tendered, that the Respondent could be required to tender evidence to prove fraud. The Respondent did not appear interested in proving her case. It is irrelevant that she was pro se. When a party choose to descend into litigation, the court will treat them with equality. The court does not become the legal advisor of the pro se party.

37. The need to prove and the burden of proof of such allegations of forgery, fraud, falsehood or dishonesty was elaborated by the court in Christopher Ndaru Kagina vs. Esther Mbandi Kagina & Another [2016] eKLR where the court stated that –

'He who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care needs to be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the Case Central Bank of Kenya Ltd -Vs- Trust Bank Ltd & 4 Others [26] the Court of Appeal in considering the standard of proof required where fraud is alleged stated that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case. The burden of proof lies on the applicant in establishing the fraud that he alleges....

38. The bottom line is that submissions are marketing tools. They do not take place of evidence. While addressing a scenario similar to the case herein in Robert Ngande Kathathi v Francis Kivuva Kitonde [2020] eKLR, Odunga J stated as follows:

> 17. In this case, however, instead of producing the exhibits by consent or otherwise, the parties proceeded to file submissions instead. No exhibits were produced before the trial court. The law is clear on how exhibits are to be produced. Even in a full-fledged trial, if documents are simply referred to by witnesses but not formally produced they do not acquire the status of exhibits in the case. This was the position in Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others (2015) eKLR where the court held;-
>
> SUBPARA "16
>
> . The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence" What weight should be placed on a document not marked as an exhibit"
>
> > 17. The respondents' contention is that the appellant by failing to object to the three documents marked as "MFI 1", "MFI 2" and MFI 3" must be taken to have accepted their admissibility; that at no time did the appellant contest the documents or allege that they were forgeries.
> >
> > 18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not became part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is

called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.

19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which document was before the witness. The marking of the document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or it authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account.

21. In Des Raj Sharma –vs- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa –vs- The state (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decision cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production o the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they were simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa –vs- The state (1994) 7-8-SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

24. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on 'MFI 2' which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification....."

39. In this case no witness was called and no document was referred to. It was not indicated that the parties were consenting to the production of certain documents filed with the pleadings. In fact, no reference at all was made to any such document. The Court was not addressed on what documents to rely on. However, the court relied on the copies of documents filed with the plaint as if there was a consent by the parties that the same were agreed documents. It also relied on submissions of the parties to which no agreed documents were annexed. Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions. As was held by Mwera, J (as he then was) in Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007:

> " Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."

40. The same court proceeded as follows; -

> 25. Whereas parties are at liberty in civil proceedings to consent to the manner of proceeding and even to compromise a suit, any compromise whose effect is to amount to the court abdicating its adjudicatory duty or one that amounts to abuse of the court's process or exposes the adjudicatory process to ridicule ought not to be accepted by the Court hook, line and sinker, simply because it is consensual. In my view whereas in adversarial systems like ours parties are at liberty to conduct their matters in a manner they deem fit, the process of doing so ought to lawful and procedural. A consent that leaves the court in a dilemma on how to make a final decision ought not to be countenanced. To quote Oder, JSC in the case of Gokaldas Tanna vs. Rosemary Muyinza & DAPCB SCCA No. 12 of 1992 (SCU):
>
> "An agreement on the terms that upon finding the issue in the positive judgement should be entered in favour of the plaintiff and that upon finding the issue in the negative judgement should be entered in favour of the defendants was objectionable on at least two grounds. The first is that by doing so the parties sought to tie in advance the hands of the learned Judge in his judgement. The parties also appeared to have attempted to oust the functions of the court to arbitrate fairly the dispute between the parties and to come out with decisions that appeared just in the opinion of the court. This, parties cannot and should not do. The second objection is that the agreement would have the effect of asking for a judgement in favour of one or other of the parties whether or not such a judgement was contrary to any legal provisions".

41. Similarly, Mwera J posited as follows when postulating on what is the role of submissions. He stated that they are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim in the case of Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993:

> " Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

42. Therefore, it is settled that submissions are not, strictly speaking, part of the case. Their absence may not do prejudice to a party. Their presence or absence does not in any way prejudice a case as held in Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, that:

> "As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

43. The Court of Appeal was more succinct that submissions cannot take the place of evidence when they addressed the question in the case of Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

> "Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

44. Without evidence, the court is bound to dismiss the suit in the lower court for lack of proof pursuant to Section 108 of the *Evidence Act*. The next question is whether the court can invoke Order 42 rule 26 to remit the case for re-hearing or re-trial. In this case the parties deliberately failed to even produce the documents. There was no evidence filed that money exchanged hands. A court cannot help indolent parties. In this case the appeal is merited and is accordingly allowed. The suit in the lower court was not proved and is accordingly dismissed with costs. The appeal is merited and is allowed.

45. Award of costs in this court are governed by Section 27 of the *Civil Procedure Act*. They are discretionally. The Supreme Court has 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.

46. The rain started beating the parties on the prompting of the Appellant's counsel. The Supreme Court recently posited that even a split margin victory is victory. It stated as follows in Baridi Felix Mbevo v Musee Mati, Petition of Appeal No. 22 of 2019 [Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki, & Lenaola, SCJJ]

> " 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."

47. In the circumstances, Section 27 of the *Civil Procedure Act* places discretion in my hands but I must exercise the same judiciously. In the circumstances, I shall not order costs for the appeal. Nevertheless, the Appellant is entitled to costs of the dismissed suit.

Determination

48. The upshot of the foregoing, I make the following orders: -

    a. The appeal is merited and is accordingly allowed. The judgment and decree given in Karatina CMCC E049 of 2021 is set aside and in lieu thereof, the Respondent's suit is dismissed for lack of evidence with costs on the lower scale.

    b. Each party to bear their own cost in the appeal.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 30TH DAY OF OCTOBER, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Maina for the Appellant

Pro se Respondent

Court Assistant – Jedidah