



**Muiruri v Stanley Kinyanjui Mwaniki (As the Representative of Mwaniki Gikunga - Deceased)
(Environment and Land Appeal 43 of 2020) [2022] KEELC 3504 (KLR) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3504 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 43 OF 2020**

BM EBOSO, J

JULY 25, 2022

BETWEEN

JANE NYAMBURA MUIRURI APPELLANT

AND

**STANLEY KINYANJUI MWANIKI (AS THE REPRESENTATIVE OF MWANIKI
GIKUNGA - DECEASED) RESPONDENT**

*(Being an Appeal arising from the Judgment and Decree of Hon. P. Gichohi (CM)
delivered in Kiambu Chief Magistrate Court on 22/9/2020 in MCEL Case No 78 of 2018)*

JUDGMENT

Background

1. This appeal challenges the Judgment rendered on 22/9/2022 by Hon P. Gichohi, Chief Magistrate, in Kiambu Chief Magistrate Court Environment and Land Case Number 78 of 2018. The said suit was initially filed at the Nairobi [Milimani] Environment and Land Court as ELC Case No 1294 of 2016. On 24/9/2018, Okong'o J transferred the suit to Kiambu Chief Magistrate Court where it was registered as Kiambu CMC E & L Case No. 78 of 2018. Trial proceeded before Hon Gichohi, culminating in the impugned Judgment. I will outline a summary of the background leading to the impugned Judgment before I dispose the key issues in the appeal.
2. The respondent in this appeal, Stanley Kinyanjui Mwaniki, is a son to, and the administrator of the estate of the late Mwaniki Gikunga [hereinafter referred to as "the deceased"], who died on 20/2/2011. The deceased was the registered proprietor of land parcel number Githunguri/Githiga/2495, measuring approximately 0.142 of a hectare [0.35 of an acre]. The parcel of land is a subdivision out of land parcel number Githunguri/Githiga/2304 which belonged to the late Hannah Waiganjo. In the year 2001, the land was partitioned into four (4) parcels, Githunguri/Githiga/ 2492; Githunguri/ Githiga/ 2493; Githunguri/ Githiga/ 2494; Githunguri/ Githiga/ 2495.



Provision for a road was made during the partition. The original parcel register was closed upon completion of the partitioning exercise. Parcel number Githunguri/Githiga/2494 was registered in the name of the appellant in this appeal while Githunguri/ Githiga/ 2495 was registered in the name of the respondent's father [the deceased]. The other two partitions were registered in the names of the appellant's two siblings [Bernard Chege Waiganjo and Peter Waweru Waiganjo] respectively.

3. On 19/10/2016, the respondent on behalf of the estate of the late Mwaniki Gikunga, initiated the suit giving rise to this appeal. His case was that the deceased was the registered proprietor of land parcel number Githunguri/Githiga/2495 measuring 0.142 of a hectare, having purchased it from Bernard Chege Waiganjo and Peter Waweru Waiganjo. At the time of purchase, boundaries of the said parcel were marked by the vendors who were brothers to the appellant. The appellant had encroached on the deceased's land. He added that the appellant had placed a restriction against the deceased's title alleging fraud in the partition. He sought a permanent injunction restraining the appellant against encroaching or trespassing on the land. He further sought an order directing the appellant to vacate the land. Thirdly, he sought an order vacating the restriction.
4. On 11/7/2017, the appellant, acting in person at the time, filed a defence dated 25/7/2016 in which she averred that there had been long drawn legal battles relating to the correct acreage and boundary of the deceased's land. She added that the impugned restriction had been placed by the Land Registrar and not her. She further averred that she had entered into a memorandum of understanding with the respondent pursuant to which they had agreed to end the legal battles by the respondent agreeing to let her utilize her portion of the land as demarcated by the Land Registrar. She urged the court to dismiss the suit.
5. On 17/7/2017, the firm of Njoroge Baiya & Co Advocates filed a notice of appointment of advocates on behalf of the appellant. On 26/7/2017, the said firm filed a defence and counterclaim dated 25/7/2017 on behalf of the appellant. In her second defence, the appellant averred that the registration of the deceased as proprietor of parcel number Githunguri/Githiga/2495 measuring 0.142 of a hectare [0.35 of an acre] was procured fraudulently during the partitioning of the original title, Githunguri/ Githiga/ 2304. She alleged that the deceased had fraudulently reduced the acreage of her land, Githunguri/Githiga/2304, from 0.36 acres to 0.25 acres and increased his own partition from 0.25 of an acre to 0.36 of an acre. She further alleged the deceased had, during the partition, tampered with the application for consent of the Land Control Board and the Mutation Form. Lastly, she alleged that the deceased had uttered fraudulent changes to the Kiambu Land Registry. It was her case that her two siblings were each entitled to 0.5 of an acre while she was entitled to 0.36 of an acre. She contended that, by reason of what remained of their respective portions after they sold parts of their portions to the deceased, and taking into account the road, the deceased did not buy 0.36 of an acre from her siblings as alleged in the plaint.
6. Through the counterclaim, she sought, among other reliefs, a declaration that the reduction of her land from 0.36 to 0.25 acres was illegal; a declaration that the increase of the deceased's land from 0.25 to 0.36 acres and the attendant boundary adjustment were fraudulent and unlawful; an order directing the parties to the suit to surrender their titles for destruction; and an order directing the Land Registrar to correct the errors and/or fraudulent changes.
7. It is observed from the court record that on 17/7/2017, Gitumbi J allowed the appellant to withdraw her 1st defence together with the replying affidavit which she had already filed in the matter. It is at that point that the above second defence which also contained the counterclaim was subsequently filed. Following the subsequent transfer of the suit to Kiambu CMC, hearing proceeded before Hon Gichohi, Chief Magistrate. The respondent testified as PW1 and closed his case. Similarly, the



appellant testified as DW1 and closed her case. The appellant's two siblings who were parties to the impugned partition were not called as witnesses. The surveyor who prepared the mutation leading to the impugned partition was similarly not called as a witness. The Land Registrar was not called as a witness.

8. Upon receiving submissions from the parties' advocates, the learned magistrate rendered the impugned Judgment in which she found that the respondent had proved his case against the appellant. She further found that the appellant had failed to prove her counterclaim and dismissed it. She granted the respondent the reliefs sought in the plaint.

Appeal

9. Aggrieved by the Judgment of the trial court, the appellant brought this appeal, contending that the trial magistrate erred in:
 - i) failing to consider the list of issues filed by the appellant;
 - ii) adopting the list of issues framed by the respondent in relation to the counterclaim in disregard of absence of defence to counterclaim as a basis for framing the issues;
 - iii) failing to consider and evaluate the effect of failure by the respondent to file reply to defence and defence to counterclaim;
 - iv) allowing and considering "defence" by the respondent when none was pleaded or admissible in evidence.
 - v) allowing and admitting the evidence adduced outside of pleadings and from the bar and using the same to award judgment in favour of the respondent;
 - vi) holding that the appellant counterclaim was not proved to the required standard;
 - vii) ignoring documentary evidence of transfer, partition, Land Control Board and extract of title that demonstrated fraudulent alterations of acreage consistent with fraud as pleaded by the appellant;
 - viii) disregarding evidence of fraud from which the disputed acreage of parcel number Githunguri/ Githiga/ 2495 was derived;
 - ix) holding that the appellant's counterclaim was unverified when it was filed with an affidavit of same date verifying the same facts;
 - x) granting the relief sought by the respondent and dismissing the relief sought by the appellant.
10. The appellant contended that the impugned Judgment was a travesty of justice, undermined the rule of law and condoned impunity by allowing the respondent to retain the benefits of fraudulent acquisition of land through fraudulent alterations and cancellations of transfer documents. She urged the court to allow the appeal and set aside the orders issued by the trial court; grant the reliefs sought in the counterclaim; and award costs of the appeal and the suit in the trial court, to the appellant.

Appellant's Submissions

11. The appeal was canvassed through written submissions dated 8/2/2022, filed by the firm of Njoroge Baiya & Company Advocates. Counsel for the appellant identified the following as the issues that fell for determination in the appeal; (i) Whether in the absence of a reply to defence and defence to counterclaim, the court could rightly proceed to consider any "defence" to the counterclaim,



- evidence or submissions, to challenge the assertions by the appellant in the defence and counterclaim, without undermining fundamental tenets of fair trial and occasioning miscarriage of justice; and (ii) the question whether the court's adoption of issues proceeded as required by the procedure (sic).
12. Counsel for the appellant submitted that the procedure adopted by the court was arbitrary and against the law. Counsel argued that in framing the issues for determination, the trial court did not comply with the requirements of order 15 rule 1 and subrules 1, 3 and 4 and rule 2 of the *Civil Procedure Rules* which require a court to consider the pleadings and the material propositions affirmed and denied by the respective parties. Counsel contended that the procedure adopted by the trial court in framing the issues allowed the respondent a defence to counterclaim that he did not have and subjected the appellant to a standard of proof inapplicable in the absence of a reply to defence and defence to counterclaim. Citing the decision in *Dakianga Distributors (K) Ltd v Kenya Seed Company Ltd* [2015] eKLR, counsel submitted that the parties were bound by their pleadings and that evidence led outside of pleadings should have been disregarded. Counsel added that the role of courts in an adversarial system is restricted to issues pleaded by the parties.
 13. Counsel submitted that the trial court failed to evaluate the effect of failure by the respondent to file a reply to defence and defence to counterclaim. Counsel argued that order 2 rule 11 of the *Civil Procedure Rules* deemed as admitted facts and allegations in the defence and counterclaim that were not traversed. Counsel submitted that, had the trial court evaluated the case on the basis of the pleadings and the applicable rules of procedure, the appellant's case on fraud was admitted and therefore no evidence to the contrary was admissible.
 14. On the trial court's finding to the effect that the appellant's failure to file an affidavit verifying the averments in the counterclaim, counsel submitted that the finding was unmerited because at the time of filing the defence and counterclaim, the appellant filed an affidavit titled "replying affidavit" and the said affidavit replicated what was contained in the counterclaim. Counsel cited article 159(1) of *the Constitution* and submitted that the replying affidavit sufficiently verified the counterclaim. Counsel urged the court to allow the appeal.

Respondent's Submissions

15. The respondent filed written submissions dated 14/3/2022 through the firm of Maina Ngaruiya & Company Advocates. Counsel identified the following as the three issues that fell for determination in the appeal: (i) Whether this court should set aside the order issued by the subordinate court; (ii) Whether the reliefs prayed for in the counterclaim should be allowed; and (iii) Who should bear the costs of the appeal.
16. On whether the orders of the trial court should be set aside, counsel submitted that there was no basis for faulting the trial court in the manner it identified the issues that fell for determination. Counsel submitted that in making a judgment, the court acts as an independent and unbiased tribunal. Counsel added that the court is not obligated to use any of the parties' set of issues.
17. On the effect of the respondent's failure to file a reply to defence, counsel cited order 6 rule 10 (1) of the *Civil Procedure Rules* and the decision in *Katiba Wholesalers Agency (K) Ltd v United Insurance Co. Ltd*, Civil Appeal No 140 of 2002 and submitted that there was joinder of issues on the appellant's defence and not an admission of the averments made in the appellant's defence, as contended by the appellant.
18. Counsel added that the allegation that the trial court admitted and used evidence adduced outside of pleadings was false. On the appellant's contention that the trial court ignored documentary evidence



relating to fraud by the respondent, counsel cited sections 107 and 108 of the Evidence Act and submitted that the appellant had failed to prove the allegation of fraud.

19. On whether the reliefs sought in the counterclaim should be allowed, counsel submitted that the reliefs sought in the counterclaim were not available because the trial court made a finding that the appellant's failure to file a verifying affidavit in support of the counterclaim was fatal.
20. On costs, counsel cited section 27(1) of the Civil Procedure Act and submitted that the appellant should bear costs of the appeal.

Analysis and Determination

Par eleven grounds of appeal. However, when canvassing the appeal through A 21.

I have considered the entire record of the trial court, the grounds of appeal, and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence on the issues that fall for determination in this appeal. The appellant itemized her written submissions, her counsel submitted at paragraph 9 of the written submissions that two key issues fell for determination in the appeal. On his part, counsel for the respondent identified three issues.

22. Taking into account the grounds of appeal and the parties' submissions, the following are, in my view, the key issues that fall for determination in this appeal: (i) Whether the trial court erred in finding that the appellant's counterclaim was fatally defective for lack of a verifying affidavit; (ii) Whether there were presumed admissions of the allegations in the appellant's pleadings; (iii) Whether the trial magistrate erred in the manner she identified the issues that fell for determination; (iv) Whether the appellant proved fraud in the partition exercise which culminated in the acquisition of the deceased's title measuring 0.35 of an acre [0.142 of a hectare]; (v) Whether the respondent proved his case on the balance of probabilities; and (vi) What order should be made in relation to costs? Before I analyze and make determinations on the six issues, it is important to outline the principle upon which this court exercises appellate jurisdiction.
23. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction was summed up by the Court of Appeal in the case of Susan Munyi v Kesbar Shiani (2013) eKLR as follows:

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
24. The Court of Appeal similarly outlined the above principle in Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority vs Kustron (Kenya) Limited 2000 2EA 212.”
25. The first issue in this appeal is whether the trial court erred in finding that the appellant's counterclaim was fatally defective for lack of a verifying affidavit. The counterclaim was dated 25/7/2017 and it was filed on 26/7/2017. Order 7 rule 5 of the Civil Procedure Rules required that a counterclaim



be accompanied with a verifying affidavit similar to the one required to accompany a plaint under order 4 rule 2 of the Civil Procedure Rules. I have looked at the original record of the trial court. No verifying affidavit was filed alongside the counterclaim. Counsel for the appellant contended that the replying affidavit filed in response to the notice of motion dated 19/10/2016 satisfied the requirements of a verifying affidavit. I have looked at the said supporting affidavit. It did not in any way verify the correctness of the averments made in the counterclaim. Secondly, a replying affidavit sworn in response to an application is not the verifying affidavit contemplated under order 4 rule 2 and order 7 rule 5 of the Civil Procedure Rules. A verifying affidavit under the above rules is intended to verify the correctness of the averments contained in the plaint or counterclaim. There would have been no need for the requirement of a verifying affidavit if a supporting or replying affidavit to an interlocutory motion were to be accepted as serving the purpose of a verifying affidavit. The position, therefore, is that the counterclaim did not satisfy the mandatory requirements of order 7 rule 5 of the Civil Procedure Rules, requiring that it be accompanied with a verifying affidavit.

26. What are the consequences of failure to file a verifying affidavit?

There is sufficient jurisprudence to the effect that if a litigant makes an application to remedy the defect prior to hearing and determination of the suit, the court would properly exercise discretion to grant the litigant leave to file the verifying affidavit.

27. Where the suit has been fully heard and the question of lack of a verifying affidavit is one of the issues to be determined in the Judgment, our courts have been categorical that at that point, the defect cannot be remedied and that the pleadings that are unverified are fatally defective. [See the decision in Kenya Women Microfinance Ltd v Martha Wangari Kamau [2021]eKLR].

28. Counsel for the appellant cited article 159(1) of the Constitution and urged the court to treat the supporting affidavit filed in support of the notice of motion dated 19/10/2016 as a verifying affidavit under order 7 rule 5 of the Civil Procedure Rules. I do not agree with that contention. The centrality of rules of procedure in Kenya's post – 2010 legal system cannot be gainsaid.

29. The Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR made the following emphasis on the centrality of rules of procedure:

“In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party.”

30. The respondent raised the issue of lack of a verifying affidavit in relation to the counterclaim and the trial court properly considered the issue and came to the finding that the counterclaim was fatally defective. I entirely agree with the finding of the trial court. My finding on the first issue, therefore, is that the trial court did not err in finding that the appellant's counterclaim was fatally defective for lack of a verifying affidavit.

31. The second issue is whether there were presumed admissions of the allegations made in the appellant's pleadings. The appellant contended in this appeal that because the respondent did not file a reply to the appellant's defence and a defence to the appellant's counterclaim, the law presumed the respondent to have admitted the averments made in the appellant's defence and counterclaim. First, the court has made a finding that there was no valid counterclaim because what the appellant presented as a



counterclaim was unverified, hence fatally defective and a nullity. The only valid pleadings which the appellant had before the trial court was the defence.

32. What is the position in law in a situation where a plaintiff does not file a reply to defence? order 2 rule 12 of the *Civil Procedure Rules* provides the following answer to the above question:

- “(1) If there is no reply to a defence, there is a joinder of issue on that defence. (2) Subject to subrule (3)—
- (a) there is at the close of pleadings a joinder of issue on the pleading last filed; and
 - (b) a party may in his pleading expressly join issue on the immediately preceding pleading.
- (3) There can be no joinder of issue on a plaint or counterclaim.
- (4) A joinder of issue operates as a denial of every material allegation of fact made in the pleading on which there is a joinder of issue unless, in the case of an express joinder of issue, any such allegation is excepted from the joinder and is stated to be admitted, in which case the express joinder of issue operates as a denial of every other such allegation.”

33. Suffice it to say, in the absence of a reply to the appellant’s defence, there was deemed to be a joinder of issues on the material allegations that were made in the defence, except those that were admitted by the appellant. The appellant’s contention that the respondent was to be deemed to have admitted the allegations made in the defence is a misapprehension of the law. Indeed, the Court of Appeal emphasized this position in *Katiba Wholesalers Agency (K) Ltd v United Insurance Co Ltd* in the following words:

“... where a defence contains an allegation of fact, and a reply is filed, ... it is necessary for the plaintiff to deny in the reply any allegation in the defence which he intends to dispute. If he fails to do so then he is deemed to have admitted the defence allegations.

It is only if the plaintiff does not file any reply that there is a joinder of issue on the defence which operates as a denial of all allegations contained in the defence.”

34. Consequently, my finding on the second issue is that there were no presumed admissions in the appellant’s pleadings. There was presumed joinder of issues on the appellant’s defence.

35. The third issue is whether the trial magistrate erred in the manner she identified the issues that fell for determination in the suit. Counsel for the appellant contended that the trial court failed to comply with the requirements of order 15 of the *Civil Procedure Rules* when framing the issues that fell for determination. Counsel contended that the respondent did not have a reply to defence and a defence to the counterclaim, hence the issues which the trial court framed were not anchored on the pleadings.

36. I have reflected on the appellant’s argument. First, the appellant’s argument does not take into account the fact that the appellant did not have a valid counterclaim because what she presented as a counterclaim was fatally defective and had been declared so. Secondly, the appellant’s argument is premised on a misapprehension of the legal position that ensues whenever a plaintiff does not file a reply to defence. I have observed in one of the preceding paragraphs that when no reply to defence is filed, there is deemed to be joinder of issues on the averments made in the defence. The appellant



erroneously believes that the respondent should have been regarded as having admitted the averments made in the appellant's statement of defence.

37. Thirdly, I have examined the three issues that were framed by the trial court. The first issue related to the legal validity of the counterclaim presented by the appellant. This was a purely legal issue raised in the written submissions of the respondent. The court properly identified and disposed the issue before dealing with the other issues in the suit. The second issue identified by the trial court related to the question as to whether the deceased's title was obtained fraudulently. Fraud was pleaded by the appellant in his defence. The trial court therefore properly identified and disposed the issue. The third issue identified and disposed by the trial court related to the question as to whether the respondent had trespassed on the appellant's land, parcel number Githunguri Githiga 2494. Again this issue was framed out of the appellant's contention in her defence that the deceased had reduced the acreage of her land and that the deceased had manipulated boundaries to annex a portion of her land. The issue was properly framed out of the pleadings that were before court. I do not, in the circumstances, find an error in the manner in which the trial court identified issues that fell for determination in the suit.
38. The fourth issue that falls for determination in this appeal is whether the appellant proved fraud in the partition exercise that culminated in the registration of the deceased's title measuring 0.35 of an acre [0.142 hectares]. The appellant pleaded fraud and particularized the fraud in paragraph 3 of her defence. During trial, she testified but did not lead evidence by any other witness. She produced: (i) a transfer of undivided shares dated 18/1/2001; (ii) green card [parcel register] relating to Githunguri/Githiga 2304; (iii) application for partition dated 19/9/2001; (iv) mutation form; (v) pleadings in miscellaneous application No 371 of 2006; and (vi) memorandum of understanding dated 15/9/2016.
39. The transfer and the application for partition involved four parties: (i) the appellant; (ii) the respondent; and (iii) the two brothers of the appellant – Peter Waweru Waiganjo and Bernard Chege Waiganjo. Neither of the two siblings of the appellant was called as a witness of the appellant to corroborate the allegations of fraud. The surveyor involved was not called as a witness. The Land Registrar was not a party to the suit and was not called as a witness. She did not sue her two siblings. The letter of consent from the Land Control Board clearly showed that the deceased was entitled to 0.35 of an acre which translates to 0.142 of a hectare. The same letter shows that the appellant was entitled to 0.25 of an acre. The mutation form bears the same acreage.
40. From the proceedings of the trial court, the appellant confirmed that she signed the application for partition which bore the acreage that she was contesting. She also confirmed that she participated in the entire process leading to issuance of the titles. She did not seek a nullification of the entire partition exercise if indeed there was fraud in the exercise. She only brought the rejected counterclaim to counter the respondent's suit.
41. From the foregoing, it is clear that no serious attempt was made by the appellant to prove fraud by the deceased in the partition exercise. Our courts have umpteen times stated that a party alleging fraud has a duty to prove fraud to the required standard. The Court of Appeal in *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR stated as follows:

“.....It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that:

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove of that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of



probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”)

42. The appellant having failed to lead evidence to prove fraud on part of the deceased, the trial magistrate properly rejected her defence. Consequently, my finding on the fourth issue is that the appellant did not prove fraud in the partition exercise that culminated in the acquisition of the deceased’s title.
43. The fifth issue is whether the respondent proved his case on a balance of probabilities. The respondent testified as PW1. He is the administrator of the estate of Mwaniki Gakunga. He informed the court that his late father [the deceased] bought land from the appellant’s two siblings. He demonstrated that the partition exercise was carried out jointly by the three siblings together with his late father. Upon conclusion of the partition exercise, parties were issued with their respective titles. The deceased’s portion measured 0.142 of a hectare.
44. In my view, in the absence of an annulment of the joint partition exercise that was carried out in 2001, the deceased’s estate was entitled to quiet possession and enjoyment of the deceased’s portion of land measuring 0.142 of a hectare. The appellant had no right to encroach on the deceased’s portion while the partition titles subsisted. The court is therefore satisfied that the respondent proved his case on a balance of probabilities.
45. On costs, the principle which guides our courts when disposing questions relating to costs of a suit is contained in section 27 of the *Civil Procedure Act*. The general principle is that costs follow the event. No special circumstances have been disclosed in this appeal to warrant a departure from the above general principle. The appellant will, in the circumstances, bear costs of this appeal.
46. In the end, this court does not find merit in this appeal. The appeal is rejected. The appellant shall bear costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 25TH DAY OF JULY 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Baiya for the Appellant

Ms Mwaluko for the Respondent

Court Assistant: Ms Lucy Muthoni

