Getembe Prime Distributors v Orangi (Civil Appeal E056 of 2024)
[2025] KEHC 3312 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3312 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E056 OF 2024

DKN MAGARE, J

MARCH 6, 2025

BETWEEN

GETEMBE PRIME DISTRIBUTORS ..... APPELLANT

AND

DOMINIC KEPHA ORANGI ..... RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of subordinate court delivered by Hon. P.K Mutai (PM) on 29.1.2024 in Kisii CMCC No. E601 of 2021. Aggrieved by the lower court's finding, the Appellant lodged the Memorandum of Appeal dated 27.3.2024. The same raises the following grounds:

    a. The learned trial magistrate erred in fact and law in not appreciating sufficiently, or at all, that the Respondent was a fraudulent complainant when there was such evidence tendered by the Appellant, especially challenging the authenticity and management of the injuries he sustained.

    b. The learned trial magistrate erred in law and in fact in failing to make determination on allegations of fraud on the part of the Respondent despite the same having been specifically pleaded in the defendant's amended statement of defence.

    c. The learned trial magistrate's judgment was thus unjust against the weight of evidence, submissions and authorities relied upon by the Appellant and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.

    d. The learned trial magistrate erred in fact and in law in not appreciating sufficiently or at all that the appellant had raised matters of a fundamental nature to warrant the dismissal of the suit against the Appellant.

e. The learned trial magistrate erred in fixing liability at 100% in favour of the respondent at all, whereas the accident the subject of the accident was solely caused by the negligence of the respondent.

f. The award of general damages awarded to the respondent was manifestly and inordinately excessive in the circumstances.

g. That the learned trial magistrate erred in law and in fact when the same relied on extraneous issues as a basis on her determination on liability.

2. The memorandum of appeal raised only three issues;

i. Fraud

ii. Liability

iii. General damages

3. In the Plaint amended on 4.3.2022, the Respondent claimed damages for an accident pleaded to have occurred on 3.4.2021. The same involved the Appellant's motor vehicle registration No. KCC 306L. The respondent pleaded that the Appellant drove the said motor vehicle registration No. KCC 306L that that it lost control and hit the Respondent who was waiting for customers at Kerina boda boda stage.

4. The Respondent set forth particulars of negligence and injuries and pleaded Special damages. The injuries were pleaded follows:

i. Neck injuries

ii. Chest contusion

iii. Fracture of the right clavicle

iv. Bruises on the right-hand palm and fingers

v. Bruises on the right elbow

vi. Fracture of the right tibia

5. The special damages were also pleaded as follows:

Police abstract Ksh. 200/=

Medical report Ksh. 5,000/=

Motor vehicle search Ksh. 500/=

Treatment expenses Ksh. 15,560/=

Total Ksh. 22,150/=

6. The Appellant entered appearance and filed defence dated 15.9.2022 denying the particulars of negligence and injuries pleaded in the plaint. The Appellant blamed the Respondent for negligence, including jumping onto the path of the said motor vehicle. The Appellant amended its defence on 30.5.2023 and introduced what they called particulars of fraud.

7. The lower court heard the parties and proceeded to render the impugned judgment against the Appellant as follows:

i. Liability 100%

ii. General damages Ksh. 550,000/=

iii. Special damages Ksh. 22,100/=

iv. Costs and interest

Evidence

8. PW1 was No. 87122, Corporal Inter Saoke of Gesonso Police Station. He testified that the accident occurred at a junction of a feeder road. KCJ 845R slowed down to accommodate a motorcycle entering the road, and it was hit by another motor vehicle coming from behind. It is KCC 306L that caused the accident.

9. The Respondent testified as PW2. He stated that he was a rider and had recorded a statement dated 3.06.2021, which he produced in evidence. He produced the exhibits in the matter. He stated that he had been injured but had not healed. On cross examination he stated that the vehicle went to where he was and hit him as a result, he suffered multiple injuries. His case was that he had not fully healed.

10. Daniel Nyameino testified as PW3 and produced a medical report dated 14.4.2021 and testified that the Respondent suffered the injuries as pleaded. On cross examination, he stated that he had not re-examined the Respondent. There was no cross examination on the nature and extent of injuries.

11. The Appellant closed their case without calling a witness.

Analysis

12. This being a first appeal, this court is under a duty to reevaluate and assess the evidence and make its own conclusions. It must, however, remember that a subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand.

13. This Court will not interfere with an inferior court's exercise of judicial discretion unless it is satisfied that its decision is clearly wrong. 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."

14. The duty of the first appellate court was set out in the 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-subordinate and the Court of Appeal is not bound to follow the subordinate Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

15. The Court is to remember that it has neither seen nor heard the witnesses. It is the subordinate court that has observed the demeanor and truthfulness of those witnesses. However, the documents still

speak for themselves. The observation of documents is the same as that of the lower court, as parties cannot read into those documents matters extrinsic to them.

16. This court's jurisdiction to review the evidence should be exercised with caution. 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..."

17. This court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet it must reconsider the evidence, evaluate it itself and draw its own conclusions. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...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 retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

18. The Appellant urged the court to find that the lower court erred in finding 100% liability against the Respondent. On the other hand, the Respondents' case is that the judgement of the lower court was correct on both quantum and liability and should not be disturbed. The tragedy is that the Appellant proceeded as if they tendered evidence.

19. The court is asked to establish whether the lower court erred in finding on a balance of probabilities that the Appellant was 100% liable for the accident. The legal burden of proof lies upon the party who invokes the aid of the law and asserts an issue based thereon. 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."

20. The evidential burden lay on the party alleging any fact. This is espoused in Sections 107 to 109 of the *Evidence act*.

> " 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."

21. In other words, 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. In this case, the burden of proving fraud was on the Appellant. They did not tender evidence. The consequence of such non-tendering of evidence is that the question of fraud falls flat on its belly. In the case of 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 if no evidence at all were given as either side."

22. The question of proof of fraud is not an idle one. When fraud is pleaded, it must be specifically proved by the party alleging. The Respondent has no duty to prove that they did not engage in fraud. In other words, there is no duty to prove the negative. In the case of Orieny & another v *National Bank Of Kenya (Civil Appeal E016 of 2023*) [2024] KEHC 6002 (KLR) (20 May 2024) (Judgment), RE Aburili, J stated as follows:

The first principle is that an allegation of fraud must be specifically pleaded and proved. In Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR, Tunoi, JA (as he then was) stated as follows:

"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from facts."

The second principle is that the burden of proof of an allegation of fraud is on the person alleging. In Ndolo v Ndolo [2008] 1KLR (G &F) 742 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 that allegation lay squarely on him...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

The third principle is that the burden of proof of allegation of fraud is higher than that required in civil cases, that of proof on a balance of probabilities; and lower than that required in criminal case that is beyond reasonable doubt. In Ndolo v Ndolo [2008] 1KLR (G &F) 742 the Court stated that:

"...Since the Respondent was making 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....."

23. In Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020] eKLR, the Court of Appeal posited as hereunder:

> " In the instant case, the appellants needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the Court would make a finding that indeed there was fraud ...
>
> Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities....."

24. In that regard the claim for fraud is otiose without evidence to back it up. It is untenable and the court below was right in disregarding allegations.

25. Turning to the two other issues of liability and quantum, the burden lay at the doorstep of the Respondent to prove negligence on part of the Appellant. The same burden was on the heels of the Respondent to prove the degree of injury. However, the burden is on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 addressed the question of the burden of proof in civil case as hereunder:

> " 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 that 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."

26. The balance of probabilities is also about what is likely to have happened than the other. In cases where only one side speaks, there is no rival evidence to contradict the same. However, even in formal proof, the claimant must discharge the burden of proof with credible evidence. In the case of Samson S. Maitai & Another -vs- African Safari Club Ltd & Another [2010] eKLR, the High Court in trying to define Formal Proof stated thus:

> " ..... I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption."

27. 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. Can a man well informed and sitting in Igare market, hearing the evidence of the parties, conclude that the event occurred? 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 even 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....."

28. Furthermore, the standard of proof in civil cases must carry a reasonable degree of probability, but not so high as is required in a criminal case for such standard is based on a preponderance of probabilities. 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 lose because the requisite standard will not have been attained."

29. The Appellant did not adduce any evidence in court to contradict the Respondent's version of pleadings and evidence. The evidence of the Respondents as to the occurrence of the accident was largely uncontroverted. In the case of Janet Kaphiphe Ouma & Another –vs- Maries Stopes International (Kenya), Kisumu HCCC No. 68 of 2007, Ali Aroni, J citing the decision in Edward Muriga suing through *Stanley Muriga –vs- Nathaniel D. Schulter, Civil Appeal No. 23 of 1997* that:

> " In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Respondent and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence."
>
> 16. Guided by the above case, I find the statements in the defence filed on 10th December 2014 remain mere allegations having not been substantiated orally in court by the Appellant to controvert the Respondents testimony."

30. Therefore, the Appellant's defense in the lower court thus contained mere allegations that were not substantiated in evidence and I so find. However, even if there were no defence filed, the Respondent still retained the duty to prove his case on the balance of probabilities. The Court of Appeal's position in Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR espouses the correct legal position that:

> " It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."

31. Having found that the Respondent proved his case to the required standard, and in the absence of any explanation from the Appellant, there is no basis to disturb the finding of the lower court on liability. In a court room situation, we deal with empirical evidence on what is more probable than the other. In the case of Embu Road Services v Riimi (1968) EA 22, the courts held inter alia as doth; -

> " Where the circumstances of the accident gave rise to the inference of negligence, the defendant, in order to escape liability, has to show that there was a probable cause of the accident, which does not create negligence or that the explanation for the accident was consistent only with absence of negligence. The essential point in this case, therefore is a question of fact, that is whether the explanation given by the Respondent shows that the probable cause of the accident was not due to his negligence or that it was consistent only with absence of negligence". See also Odungas Digest on Civil case law and Procedure 3rd Edition Vol 7 page 5789 at paragraph (D).

32. The Respondent proved breach of the duty of care on the part of the Appellant, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused as against the Appellants. In the case of Caparo Industries PLC v Dickman {1990} 1 ALL ER 568 and Chun Pui v Lee Chuen Tal {1988} RTR 298 the determinants of negligence were stated as follows:

> " The requirements of the tort of negligence are, as Mr. Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused."
>
> In Caparo case (supra) the Court stated:
>
> "What emerges is that, in addition to the foreseeability of the damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the Law as one of proximity or neighborhood, and that the situation should be one in which the Court considers it fair, just and reasonable that the Law should influence a duty of a given scope upon the one party for the benefit of the other. As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case."

33. Without proper defence of contributory negligence, the court could not determine whether the act or acts of negligence that caused the damage were caused by the negligent acts of different persons to so as to assess the degree of their respective responsibility and blame-worthiness, and apportion liability between or among them accordingly. The Appellant failed in this duty. The lower court was correct in its finding on liability and the same is upheld. In Masembe vs. Sugar Corporation and Another [2002] 2 EA 434, it was held that:

> " Negligence is not actionable per se but is only actionable where it has caused damage and in that regard the primary task of the court in a trial of a negligence suit is to consider whether the act or acts of negligence caused the damage was caused by the negligent acts of different persons to assess the degree of their respective responsibility and blame-worthiness, and apportion liability between or among them accordingly... There is no act or omission that has static blameworthiness and therefore each case must be assessed on its own circumstances and the apportionment ought to be a result of comparing the negligent

conduct of the tortfeasor, to determine the degree to which each one was in fault, both in regard to causation of the wrong and unreasonableness of conduct."

34. On quantum, the lower court awarded Ksh. 550,000/- in general damages. I have to establish whether the award was excessive. The lower court based its award on Jitan Nagra v Abednego Nyandusi Oigo (2018) eKLR. In the said case, the injuries were stated as deep cut to the back, right knee, blunt trauma to the chest, bruises to the elbow, compound fracture of the right tibia and fibula and distal fracture of the femur. In this case, the only medical report produced was one by Dr. Daniel Nyameino and which confirmed the injuries as pleaded by the Respondent.

35. There are no similar fact scenarios though bearing in mind that no two cases are precisely the same and that it is inevitable that there will be disparity in awards made by different courts for similar injuries as established in Southern Engineering Company Ltd. vs. Musingi Mutia Civil Appeal No 46 of 1983 [1985]eKLR. However, the Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards"

36. The principle on the award of damages is settled. In Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

    1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

    2) The award should be commensurable with the injuries sustained.

    3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

    4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

    5) The awards should not be inordinately low or high.

37. Circumstances in which an Appellate court will interfere with the quantum of damages awarded by a trial court were clearly laid out in the case of Kenya Bus Services Limited vs. Jane Karambu Gituma Civil Appeal Case No. 241 of 2000 where the Court of Appeal stated as follows:

> " ...in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages."

38. The Court of Appeal pronounced itself succinctly on the principles of disturbing awards of damages in Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR as follows:

> The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant

one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

39. The words of Lord Denning were reiterated by Nyarangi, JA. in Kigaragari v Aya [1985] eKLR thus:

> "I would express firmly the opinion that awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must bear heavily upon the court. The largest application should be given to that approach. As large amounts are awarded, they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover (in the case of accident cases) or increased fees."

40. It is common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry as well as the economy. See the case of H. West and Son Ltd v. Shepherd [1964] AC.326 (supra) where it was stated that:

> "...but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.
>
> In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional....."

41. With the above guide, if the award is inordinately high, then I will have to set it aside. If, however, it is just high but not inordinately high, I will not do so. For the appellate court to interfere with the award, it is not enough to show that the award is high or had I handled the case in the subordinate court I would have awarded a different figure.

42. In *Kiama v Mutiso (Civil Appeal 40 of 2023)* [2024] KEHC 5135 (KLR) (13 May 2024) (Judgment) the Respondent suffered a fracture of the upper 1/3 of the left tibia bone and related soft tissue injuries. The High Court reduced an award of Ksh. 700,000 to Ksh. 400,000/=.

43. In Gladys Lyaka Mwombe v Francis Namatsi and 2 Others [2019] eKLR the court sustained an award of Ksh. 300,000/= for the claimant who had suffered a cut wound on the anterior part of the scalp, a head injury, spinal cord injury, neck injury, fracture of the lower tibia and fibula. The authority is over 6 years old.

44. Based on the authorities, I find the award by the lower court of Ksh. 550,000/= to be proper. In the circumstances the appeal on quantum is equally dismissed.

45. 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.

(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.

46. 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 if 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.

47. 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.

48. Costs follow the event. In this case, the Respondent is entitled to costs. They shall have costs of Ksh 85,000/=.

Determination

49. In the upshot, I make the following orders:

a. Appeal is dismissed.

b. The Respondent shall have costs of this appeal assessed at Ksh. 85,000/=.

c. 30 days stay of execution.

d. 14 days right of appeal.

e. The file is closed.

DELIVERED, DATED, AND SIGNED AT NYERI ON THIS 6TH DAY OF MARCH, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Kipyegon for the Appellant

No appearance for the Respondent

Court Assistant – Michael