John Maina Kahiko t/a Smartmove Vemma Investment v Jackson (Civil Appeal E175 of 2023) [2025] KEHC 2821 (KLR) (5 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2821 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E175 OF 2023

DKN MAGARE, JA

MARCH 5, 2025

BETWEEN

JOHN MAINA KAHIKO T/A SMARTMOVE VEMMA INVESTMENT ..... APPELLANT

AND

CLAYTON ELLSWORTH JACKSON ..... RESPONDENT

JUDGMENT

1. The appeal arises from the Ruling of Hon. Nyariki J, (SRM) given on 18.7.2023 in Mombasa CMCC No. E1176 of 2022. The Appellant was the Plaintiff in the matter. The suit therein was struck out for being time barred. The Appellant raised the following grounds of appeal.

    a. That the learned trial court erred in law and in fact in finding that the suit was time barred.

    b. That the learned trial court erred in law and in fact in failing to consider and appreciate that the suit was based on breach of an agreement that was signed on 13.3.2017.

    c. That the learned trial court erred in law and in fact, in failing to take into account the acknowledgment of debt by the Respondent when he signed an agreement to pay the debt owed to the Appellant and, therefore, time started running in 2017 and lapsed in 2023.

    d. That the learned trial court erred in law and in fact in failing to consider and take into account the submissions made by the Appellant's counsel that the suit was based on breach of an agreement that was signed by the parties in 2017.

    e. That the learned trial court erred in law and in fact in failing to consider that the respondent takes cognisance of the existence of the agreement dated 13.3.2023.

    f. That the learned trial court erred in law and in fact in upholding the preliminary objection by the Respondent and awarding the Respondent costs.

2. Before I proceed, it is important to apologize to the parties for lapses in this matter. The matter was heard on 17.4.2024. The judgment date was slated for 17.6.2024. However, I received my letter of transfer on 20.5.2024 to the Nyeri High Court to report on 3.6.2024. We placed mechanisms for transferring all pending decisions to Nyeri for judgment writing. All matters received were concluded, and files were returned to Mombasa.

3. Subsequently, the parties made a routine inquiry sometime in October 2024. I enquired about the whereabouts of this file. Unbeknown to all parties, the file had remained in Mombasa as it did not have a lower court file. The file was forwarded to me on 4.11.2024 vide a letter dated 31.10.2024. It did not have the lower court file. I slated it for mention on 21.1.2025 to see if the lower court file had been availed. Meanwhile, the Deputy Registrar of this court requested, via a letter dated 11.11.2024, the whereabouts of the lower court file. The lower court file was sent to Nyeri on 22.1.2025 and received on 24.1.2025. I fixed this date on 21.2.2025 for judgment today. The inconvenience caused by systemic lapses is regretted. We take solace in the syllogism that an act of the court should prejudice no one, actus curiae reminem gravabit.

4. Unknown to me, the lower court file had been taken for taxation of costs. The ruling of which was delivered on 11.6.2024. Unfortunately, the parties did not find it necessary to inform the court that the file was needed in the appeal file.

5. The issues that arise are: -

    a. Whether the suit was time-barred.

    b. Who is to bear costs.

Pleadings

6. The Appellant filed suit stating that he was registered as Smartmove Vemma Investment vide BN/2014/316055 on 1.10.2014. The claim filed was for US $27,000, which was paid for delivery of goods. The date of this payment was not pleaded. The Appellant stated that on 13.3.2017, he acknowledged and committed to pay. In the statements, it comes out that the payment was in 2014. The Appellant was informed that the subject company was closed in 2015, so the Respondent committed to pay.

Analysis

7. This is an appeal from a preliminary objection. No evidence was taken. Therefore, the power of this court is more expansive than regular appeals. This is because the decisions are based on pleadings and documents. This was so held in the case of Sugut v Jemutai & 3 others (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR) where Kiage JA stated as doth: -

> "I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; Selle Vs Associated Motor Boat Co [1968] EA 123). I do accord due respect to the factual fndings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence

or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge."

8. A preliminary objection has to be on non-disputed facts in its constitution. It cannot be based on disputed facts or argumentative postulations. The Court is not involved with questions of fact. In hearing a preliminary objection, this court proceeds on an understanding that what is pleaded is true. It is what the English common law used to call a demurrer. The locus classicus case of Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd [1969] E.A. 696, made this pertinent observation. It said: -

> " The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop".

9. In a Tanzanian case of Hammers Incorporation Co. Ltd –v- The Board Of Trustees of the Cashewnut Industry Development Trust Fund, the Court of Appeal, (Rutakangwa, N. P. Kimaro and S.S. Kadage JJA), sitting in Dar es Salaam in their decision given on 17/9/2015 regretted that the practice of raising preliminary objection that was frowned upon by the Court of Appeal in Kampala in the Mukisa biscuit case (Supra) still persists. They stated as doth: -

> " It was hoping against hope. We believe that had that Court survived to this day it would have issued a sterner warning. This is because the "improper practice" never stopped. Neither did it ebb away. On the contrary, it is on the increase. This forced the Full Bench of this Court in Karata Ernest & Others V The Attorney General, Civil Revision No. 10 of 2010 (unreported) to mildly urge all parties in judicial proceedings to pay heed to what was aptly pronounced in the MUKISA BISCUIT case (supra). The late call appears to be falling on deaf ears as this ruling will demonstrate."

10. In the case of Martha Akinyi Migwambo v Susan Ongoro Ogenda [2022] eKLR, Justice Kiarie Waweru Kiarie, summarized the preliminary objection nicely as seen from two of the judges in Mukisa Biscuit Manufacturing Co. Ltd (supra): -

> " A preliminary objection must be on a point of law. The Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969)EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:
>
> ....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

At page701 paragraph B-C Sir Charles Newbold, P. added the following:

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...."

11. A Tanzania Court of Appeal sitting in Dar es Salaam, in Karata Ernest & Others vs Attorney General (Civil Revision No. 10 of 2020) [2010] TZCA 30 (29 December 2010),(Luanda, J.A. , Ramadhani, C.J. , Rutakangwa, JJA), put the issue of preliminary objections in a more succinct manner: -

> " At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists of a point of law which has been pleaded, or which arises by clear implication out of the pleading; obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings.

12. Justice Prof J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of Oraro vs Mbaja [2005] eKLR:

> I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

13. It is therefore my view that a preliminary objection must be based on current law, and be factual in its constitution. It cannot be based on disputed facts or facts requiring further enquiry. In determining a preliminary objection therefore only 3 documents are required in addition to *the constitution*. The impugned law, the plaint and preliminary objection. If you have to refer to the defence, then the preliminary objection is untenable.

14. Looking at defence documents when dealing with a preliminary objection is unnecessary. Though pleaded as a cause of actions arising in 2017, the same occurred as per the statement, in 2014. The aspect of acknowledgment must be specifically pleaded.

15. Order 2 rule 10(1) of the Civil Procedure Rules provide as follows:

    (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing —

        (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and

(b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

16. The Appellant based the suit on an acknowledgment whose particulars are not pleaded. Particulars of breach of the original cause of action were not pleaded. The plaint was meant to mislead by not pleading the cause of action. Nevertheless, the same can be discerned from the witness statement. The court is not supposed to look at evidence at this stage. However, the parties made a premium of the fact that there was an agreement between the parties. None was on record. No particulars are given.

17. Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017)eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

18. Further in Prudential Assurance Company of Kenya Limited v Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005 the Court citing a passage in Odgers Construction of Deeds and Statutes (5th edn.) at p.106 emphasized that in construing the terms of a written contract;

> " It is a familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence."

19. The record contains no particulars or agreements for which the court can exercise discretion that an amendment will save the suit. The cause of action arose in 2014. No circumstances extending the limitation period by way of acknowledgment were shown to exist.

20. The *Limitation of Actions Act* provides as follows:

1. The following actions may not be brought after the end of six years from the date on which the cause of action accrued-

a. actions founded on contract;

b. actions to enforce a recognizance;

c. actions to enforce an award;

d. actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

e. actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

21. Therefore, the primary duty is to show that either the cause of action accrued within 6 years or exceptions therein are provided. The exception is set out in Sections 23(3) of the *Limitation of Actions Act* as follows:

> 3. Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgment or the last payment: Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but a payment of interest is treated as a payment in respect of the principal debt.

22. The Appellant ought to have indicated in the pleadings when the debt was taken and when it was acknowledged. Further, all the formalities in Section 24 of the *Limitation of Actions Act* must be complied with. This is provided as follows:

> (1) Every acknowledgment of the kind mentioned in section 23 is signed by the person making it.
>
> 2. The acknowledgment or payment mentioned in section 23 of this Act must be in writing and of this Act is one made to the person, or to an agent of the person, whose title or claim is being acknowledged, or in respect of whose claim the payment is being made, as the case may be, and it may be made by the agent of the person by whom it is required by that section to be made.

23. Lastly, the payments were to some company known as FTC. This is not a party to the suit. There are neither pleadings related to acknowledgment of the debt of US $27,000/= or part payment thereof. Therefore, parties are bound to plead their cases fully. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: -

> "
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> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
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> ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
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> ...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."
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> In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack

Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
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> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

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

> " 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....."

25. Parties are bound by their pleadings. A party cannot rely on an agreement that is either inchoate or not signed by both parties. The parties exhibited to court an agreement purported to be between Smart Company and the Respondent. It is known what that was meant to achieve as these are not parties. Secondly, it is an evidentiary question of a matter that is not pleaded. The question of whether a party can rely on an agreement between Smart Company to call it an acknowledgment was addressed in the case of Philmark Systems Co. Ltd v Andermore Enterprises [2018] eKLR, Justice T. W. Cherere as doth; -

> " 18. The next issue for determination is whether respondent can enforce the contract between appellant and Andmore Timber Yard. Halsbury's Laws of England, 3rd Edition, Volume 8 at paragraph 110 which was quoted extensively in Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi [1985] eKLR states as follows: "As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him

> the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."

26. The question of extension was addressed in the case of Nicholas Mahihu Muriithi v Barclays Bank Kenya Limited [2018] eKLR, where the court of appeal stated as follows:

There is authority for saying that every time interest is debited on a defaulting borrower's account, a new cause of action arises. In the case of Shire V. Thabiti Finance [2000] LLR 1455 (CAK), this Court stressed that the effect of acknowledgment of a debt is to give rise to "fresh accrual of the right of action" in computation of limitation; that,

> "[These words] leave no doubt that the legislature intended that any acknowledgement or part-payment not only extends the limitation period but also revives an otherwise statute-barred action falling within that provision."

27. There should be a pleading on the agreement and how the cause of action accrued. This was not the case here. The appeal before the court has not met the threshold required to show that the trial court erred in any way. The preliminary objection that the matter was time-barred was merited, the cause of action having arisen in 2014.

28. Before leaving the file, it is noted that the Appellant complained that the court did not consider submissions. This is a baseless allegation as the court does not need to analyze submissions on record. These are neither pleadings nor evidence. 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 it was held that:

> " 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."

29. Submissions are not, strictly speaking, part of the case, the absence of which may do no prejudice to a party. Their precence 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."

30. The Court of Appeal was more succinct in 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."

31. The appeal is accordingly dismissed. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

> (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
>
> (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.

32. 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.

33. The cause of action relates to US $27,000. Therefore, costs of US $2,546 will suffice.

Determination

34. The upshot of the foregoing is that I make the following determination: -

a. The appeal lacks merit and is accordingly dismissed with costs of US $2,546.

b. 30 days stay of execution.

c. Right of appeal 14 days.

d. This file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 5TH DAY OF MARCH, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms. Gichira for the Appellant

Ms. Gwahalla for the Respondent

Court Assistant – Michael