Momanyi & another v Getanda (Civil Appeal E084 of 2023)
[2025] KEHC 4082 (KLR) (20 March 2025) (Judgment)

Neutral citation: [2025] KEHC 4082 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E084 OF 2023

DKN MAGARE, J

MARCH 20, 2025

BETWEEN

ROSE MOMANYI ..... 1ST APPELLANT

TIPU AUTOMOBILE LIMITED ..... 2ND APPELLANT

AND

JEREMIAH NYARABO GETANDA ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. C. Ocharo (SPM) in Kisii CMCC No. E284 of 2020 delivered on 1.08.2023. The 1st Appellant was the 1st Defendant in the lower court. The 2nd Appellant was the 2nd Defendant, who never entered appearance. I do not understand how the 1st Appellant filed a joint appeal with an adversary.
2. The lower court found the Appellants 100% liable for the accident. She awarded general damages of Kshs. 1,000,000/= and specials of 10,610/= in the judgment delivered on 1.08.2023.
3. The Appellants filed ten grounds of appeal, which give rise to only two issues:
    a. The quantum of damages.
    b. Liability.
4. The memorandum of appeal is a classic study of inconcise memorandum of appeal. The same is contrary to Order 42 Rule 1 of the Civil Procedure Rules which provides as follows:
    1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

2. The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

5. The Court of Appeal had this to say about compliance with Rule 86 [88]of the Court of Appeal Rules (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
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> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

6. In the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the court of appeal observed that : -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:
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> "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

7. 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 trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand.

8. This was aptly stated in the case of Peters vs Sunday Post Limited [1958] EA 424 where, the court of appeal 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..."

9. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the court on a first appeal:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

Pleadings

10. The Respondent filed suit on 2.07.2020 against the Appellants. The 2nd Appellant was the owner of motor vehicle Registration KCQ 227A Toyota matatu. The 1st Appellant was said to be the owner in possession of motor vehicle Registration KCQ 227A, Toyota matatu. The Respondent was a pedestrian who pleaded that he was hit while lawfully walking at the Kisii main stage. He pleaded particulars of negligence. The Appellant suffered:-

    a. Fracture of the right tibia.

    b. Fracture of the right fibula

    c. Fracture of the left tibia.

    d. Fracture of the left fibula

    e. Chest contusion

    f. Blunt trauma to the neck

    g. Blunt trauma to the lower back

    h. Lacerations on the left leg

    i. Lacerations in the right hand

    j. Bruises on the left leg

11. He pleaded special damages of Ksh 10,610/=, made up as hereunder:

    a. Treatment expenses Ksh 3,560/=

    b. Search Ksh. 550/=

    c. Medical examination Ksh 6,500/=

12. The 1st Appellant entered appearance and filed defence on 21.10.2020. She denied liability and set up particulars of Respondent's negligence. The 2nd Appellant neither entered appearance nor filed defence.

Evidence

13. The matter was part of a series, including CMCC 278, 282, 281, and 284 of 2020. On 20.4.2022, PW1 testified that he was attached to the Traffic Department in Kisii. He stated that records indicated that the matatu lost control and hit two pedestrians, the Respondent and another. He blamed the matatu.

14. PW2 was Dr. Morebu, who stated that he is a senior medical officer. He testified that he examined the Respondent and prepared a medical report. He stated that the history given was that the Respondent was involved in an accident with a PSV matatu.

15. It was his evidence that the Respondent suffered fractures of the tibia and fibula on both legs; he also suffered lacerations on both hands. He had bruises on the left leg. He was treated at Kisii Teaching and Referral Hospital. His permanent disability was assessed at 40%. He produced his report, receipt, medical cards, and P3 form.

16. On cross-examination, he testified that he examined the respondent one month after the accident. He was due for open reduction and internal fixation (ORIF). This is a surgical procedure used to treat severe fractures or dislocations by realigning the broken bones and stabilizing them with internal hardware, such as screws, plates, or rods.

17. The Respondent testified as PW3. He stated that he was standing off the road walking when the suit motor vehicle veered off the road into a kiosk he was in. He was hit from behind. He stated that both legs were fractured. He stated that he uses clutches and needed support to climb places.

18. Dr. Jeniffer Kamotho testified that she was a medical graduate from the University of Nairobi. She stated that she examined the respondent on 28.11.2022. The Respondent underwent an examination two years and eight months after the accident. The X-rays revealed that the Respondent had a fracture of the tibia and fibula. She stated that the plaster of Paris was used instead of the operation for open reduction and internal fixation. The Respondent did not have a permanent disability. She stated that future medical expenses were no longer required. This was due to the patient not requiring the same.

19. On cross-examination, she could not confirm or deny the presence of a fracture on the left leg. The initial notes showed fractures in both legs. She stated that the plaintiff, the Respondent, did not heal with deformities. She noted that the cost of implants was Ksh 140,000/= for NHIF in private hospitals. The public hospitals were allegedly cheaper. She stated that events have overtaken the requirement of surgery.

20. The Appellants did not testify on liability. The 1st Defendant closed her case without calling witnesses.

Analysis

21. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

22. 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."

23. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

24. On liability, the burden of proof is on whoever alleges. It is set out in section 107-109 of the *Evidence Act* which provides as follows: -

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."

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

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

26. 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; -
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> "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 the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a 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."

27. The Appellant did not testify in support of her case. The second Appellant never participated. They knew how the accident occurred but did not rebut the Respondent's evidence. The police abstract indicated that the 1st Appellant owned the suit motor vehicle. The search indicated that the 2nd Appellant was the registered owner of the said vehicle. The police abstract and search were sufficient evidence of ownership. In the case of Fredrick Odongo Otieno v Al-Husnain Motors Limited [2020] eKLR, R.E. Aburili stated as follows:

18. It is important first to consider the circumstances under which a court considers a Police Abstract sufficient proof of ownership. The position taken by various courts as conceded by both parties in this appeal is that a Police Abstract when produced as evidence can be sufficient proof of ownership save where it is successfully challenged. In the case quoted by the Respondents herein, Joel Muga Opija v East African Sea Foods Ltd [2013] eKLR the court in affirming this position held:

> "in our view an exhibit is evidence and in this case the appellant's evidence that the police recorded the respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect that the learned Judge in failing to consider in depth the legal position of what is required to prove ownership erred on point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor Vehicles showing who the registered owner is, but when the Abstract is not challenged and is produced in court without any objection, its contents cannot be later denied."

28. This piece of evidence was unrebutted. The court has no basis for differing from the court below on ownership. There was no dispute that the police abstract represented correct facts as supplied by the Appellant's driver. Secondly, the Appellants did not rebut any of the evidence regarding liability. The Appellants did not adduce evidence of contributory negligence. The court cannot thus apportion blame under this head.

29. I find that the Respondent proved to the required standard that the Appellant was the owner. The Appellant also failed to offer a plausible explanation to prove contributory negligence. A motor vehicle, if well-maintained and driven cannot cause accident. This was the position postulated in the case of Kenya Bus Services Ltd v Dina Kawira Humphrey Civil Appeal No. 295 of 2000 where the Court of Appeal, per Tunoi, Omollo and Githinji JJA observed quite correctly that:

> "Buses, when properly maintained, properly serviced and properly driven do not just run over bridges and plunge into rivers without any explanation."

30. In a courtroom 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).

31. The Respondent proved that the Appellants had a duty of care, a breach of that duty, a causal connection between the breach and the damage, and foreseeability of the particular type of damage caused against the Respondent. 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."
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> In Caparo case (supra) the Court stated:
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> "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."

32. Where the Respondents proved their case to the required standard, it was the duty of the Appellant to prove contributory negligence. This was not pleaded. It is, therefore vain to determine contributory negligence. In the case of Mac Drugall App V Central Railroad Co. Rbr (supra) the court held that; -

> " In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defence and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence".

33. I find no basis to disturb the finding of the learned magistrate on liability and hold that the Respondent proved want of care on the part of the Appellant. I am in consonance with the reasoning of the Court in the case of Mombasa Maize Millers & another v Elius Kinyua Gicovi [2021] eKLR where Nyakundi J referred to Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan, and held as follows:

> " In this case contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In Nance v British Columbia Electric Rly [1951] AC 601, at page 611, Lord Simon said:
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> ".....When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the

plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

34. The court finds no basis for interfering with the liability at 100% against the Appellant. I dismiss the appeal on this head.

35. The duty of the court regarding damages is settled: the state of the Kenya economy and the people generally, the welfare of the insured, and the public must be at the back of the trial Court's mind. In Butler vs. Butler Civil Appeal No. 43 of 1983 (1984) KLR, Keller JA stated the following regarding the award of damages.

> " This court has declared that awards by foreign courts do not necessarily represent the results which should prevail in Kenya, wherethe conditions relevant to the assessment of damages, such as rents, standards of living, levels of earnings, costs of medical supervision and drugs, may be different. Kimothia v Bhamra Tyre Retreaders[1971]EA(CA-K); Tayab and Ahmed Yakub & Sons v Anna May Kinanu Civil Appeal 29 of 1982 (Law, Potter & Hancox JJA)March 30,1983.The general picture, all the circumstances and the effect of the injuries on the particular person concerned must be considered.
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> The fall in the value of money generally, and the leveling up or down of the rate of exchange between the Kenya Shs 20 and Pound Sterling, must be taken into account.
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> Some degree of uniformity, however, is to be sought in awards of damages and the best guide is to pay regard to recent awards in comparable cases in local courts. Bhogal v Burbridge [1975] EA 285 (CA-K). None, alas, has been cited to us.
>
> But a member of an appellate court may ask himself what award would have been made? There are differences of view and of opinion in the task of awarding money compensation in these matters, of course, and if the one awarded by the trial judge is different from one's own assessment, it is not necessarily wrong. H West & Sons Ltd v Shephard [1964] AC 326, Lord Morris of Borth-Y-Gest; also Hancox JA in Tayab (1983 KLR, 114).

36. In Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019)eKLR, Justice D.S Majanja held as doth:

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

37. Whether to disturb the quantum given by the lower court, the court should be aware of its limits. As an exercise of discretion, it should be done judiciously and conclusively in the circumstances to ensure that the award is not too high or too low to be an erroneous estimate of damages. The court of appeals succinctly pronounced these principles in Kemfro Africa Ltd, 1957 KLR 27 as follows: -

The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.

38. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is Nance vs British Columbia

Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

39. Therefore, for me 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.

40. So my duty as the appellate court is threefold regarding the quantum of damages: -

    a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.

    c. To ascertain whether the award is simply not justified by evidence.

41. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards. In Reuben Mongare Keba v L P N [2016] eKLR the court set aside the award of Kshs 1,200,000/= and substituted with an award of Kshs 800,000/= where the respondent therein had sustained the following injuries; fracture of the tibia-fibula bones of right leg, dislocation of the right hip joint, bruises on the chin, fracture of the right femur and degloving injury of the right leg. These injuries were far more serious. In Hussein Sambur Hussein v Shariff A. Abdulla Hussein & 2 others [2022] eKLR, the court awarded Ksh 600,000/= in 2022, to a claimant who sustained injuries on the leg and ankle that he could not walk for long. He told the court that he could not carry any luggage and was unable to go to work.

42. . In the case of Aloise Mwangi Kahari v Martin Muitya & another [2020] eKLR, the appellant who suffered compound fracture of the right tibia and fibula, severe soft tissue injuries on the face, soft tissue injury on the left shoulder joint, injuries which are more or less similar with the injuries suffered by the respondent herein was awarded Kshs. 500,000/= in the year 2020.

43. In the case of Daniel Otieno Owino & another v Elizabeth Atieno Owuor [2020] eKLR the respondent who had sustained compound fracture of tibia and fibula bones of the right leg, deep cut wound and tissue damage of the right leg, head injury with cut wound on the nose, blunt chest injuries and soft tissue injury on the lower left leg was awarded Kshs 400,000/= general damages in the year 2020.

44. In the case of Godfrey Mugnicholas Mwiti Mwirebua v Marcella Mpaka Kiambi [2022] eKLR the court affirmed an award of Kshs 900,000/= for general damages where the appellant suffered multiple communited fracture of right femur, right tibia-fibular fracture and blunt abdominal trauma injuries.

45. In Jane Njeri Macharia v Godfrey Murimi Muya & another [2020] eKLR an award of Kshs 800,000/= was made for a plaintiff who particularized injuries as a cut wound on the right periorbital region; blunt injury on the upper lips and a compound fracture on the right tibia and fibula and a closed fracture on the left tibia and fibula. As result of the injuries, she was admitted in hospital for three months.

46. Based on the above authorities, the award herein of Ksh. 1,000,000/= was high but not inordinately high. In the circumstances, the court cannot substitute the lower court for its own. The said amount

awarded is sufficient for fracture of the right tibia, fibula, fracture of left tibia, and fibula with 40% disability.

47. The special damages awarded were proved by receipts, and I do not equally see the basis to disturb the finding of the lower court.

48. 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.

49. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

50. 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.

51. Costs follow the events. In this case the appeal lacks merit and is dismissed. The Respondent is entitled to costs.

Determination

52. In the circumstances, I make the following orders:

a. The appeal is dismissed for lack of merit.

b. Costs of Kshs. 115,000/= to the Respondent.

c. Right of appeal 14 days.

d. 30 days stay of execution.

e. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 20TH DAY OF MARCH, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for parties

Court Assistant – Michael