Basta & Sons Limited v Compact Freight Systems Limited (Civil Suit 123 of 2013) [2025] KEHC 6911 (KLR) (26 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6911 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 123 OF 2013

DKN MAGARE, J

MAY 26, 2025

BETWEEN

BASTA & SONS LIMITED ..... PLAINTIFF

AND

COMPACT FREIGHT SYSTEMS LIMITED ..... DEFENDANT

JUDGMENT

1. This matter has been in the court corridors since 15.11.2013. It only proceeded after the court issued orders specifying a sale-by date. Subsequently, the defendant filed an application dated 31.10.2024, which was dismissed by the court on 26.3.2025. While I was finalizing the judgment, another application dated 8.5.2025 was filed. I dismissed this application ex tempore, as there can be no stay of the previous dismissal order. The court provided a history of the matter in that ruling, which is now reported as Basta & Sons Limited v Compact Freight Systems Limited [2025] KEHC 3821 (KLR). I do not find it necessary to reiterate that history herein.

2. The suit itself is a fairly straightforward claim. It is for allowing or dismissing that will only be based on evidence.

Pleadings

3. The plaintiff filed suit on 15.11.2013 against the defendant claiming the following claims:

    a. A sum of US $ 65,604.98

    b. A sum of Ksh. 952,604 being for repairs

    c. Costs and interest.

4. The defendant filed a defence dated 26.2.2024. The defendant filed an amended defense and counterclaim dated 7.11.2023, and filed on the same day. The counterclaim was that there was a custom

of the Container Freight Station industry that the loader must make at least 20 moves per hour. It was stated that there was an audit in 2012 to verify this but they found a discrepancy. According to them, there were to be at least 70 containers moves in a day, being loaded and offloaded. They stated that the oral agreement was supplemented with customs in the Container Freight Station Industry.

5. They stated that the audit revealed a discrepancy in the number of moves per hour. This resulted in overcharging and a lot more being claimed. They stated that the plaintiff's employee absconded and could not be a witness. They claimed an overpayment of US $ 150,254. They stated that the matter ought to be dealt with at the Chief Magistrate's court.

6. The defendant further filed an application to dismiss the suit. The defendant stated that the delay was caused by both parties, since the defendant had filed an application for amendment dated 21.3.2014, which was not prosecuted until 2023. The plaintiff replied the same through grounds dated 26.09.2023.

7. On 16.11.2023, the Plaintiff filed a reply to defence dated 15.11.2023. They stated that US $ 65,604.98 together with Ksh. 952,604 remains unpaid, and a claim of US $ 150,254 was thus not due. Their case was that the counterclaim was filed out of time, contrary to section 4 of the *Limitation of Actions Act*.

8. The defendant filed an application dated 30.6.2023 seeking to dismiss the suit for want of prosecution. I directed that the matter be concluded by 24.2.2024, failing which the suit and counterclaim were to stand dismissed.

Evidence

9. The plaintiff filed a statement of Basta Paolo dated 22.10.2013 which was adopted as evidence in chief. He stated that they agreed with Sam Kairu, the managing director of the defendant on the hire of a container Reachstacker machine for loading and offloading in Miritini CFS.

10. In March 2011 there was a request to use USD 100 as the hourly rate. Invoices were rendered and part payments made. In June 2011, the rate was changed mutually to USD 150 per hour. Invoices were rendered and after payments, a sum of USD 65,604.98 was due and owing. The parties had also agreed on various services for which a sum of Ksh. 952,604 was due and owing.

11. However, that the Defendant started raising false allegations in order to avoid making payments, hence this suit. On cross examination he stated that there had never been a dispute on the rates and or any invoice. He stated that the agreement was between him and Mr. Kairu. He stated that a sum of USD 2,000 per day was erroneous. The correct amount was USD 1,0000/= per day. He stated that he did not overcharge as it was business and nothing more.

12. On 21.11.2023, the defendant filed a list of documents and a witness statement by George Mwangi, who indicated that he was a manager and an internal auditor. The witness testified that they carried out internal audits in their business, which included freight station and warehousing. In 2011, an oral agreement was entered into to hire a reach stacker machine to load and offload cargo at the defendant's yard. He stated that the initial agreement was US $ 1,000/= per day from 5.02.2011 to 1.03.2011.

13. He stated that later, they agreed at a rate of US $ 100 per hour for the hour the Reachstaker was working. This was between 1.03.2011 and 16.04.2011. They stated that the parties renegotiated the rate to USG 150 per hour worked. In this respect, the parties had agreed that there had to be 20 moves and 20 containers per hour. He then stated that there had to be at least 100 containers per day.

14. They stated that they carried out audit and noted in 2012 that the said employee was colluding with the plaintiff. He keyed in extra hours. There were anomalies. An employee tasked to countersign

was summoned to explain but absconded. This was significantly different from the defence, which indicated 70 containers. The internal audit revealed an overpayment of US $ 150,524/=.

Submissions

15. Parties filed submissions dated 12.1.2024, and filed on the same date. They stated that the claim of US $ 65, 604.98 and Ksh. 952,604 for CVS Reachstacker rent and repair services, they relied on exhibit 22, pages 33-37. They stated that the proper claim is US $ 65, 604.98 and not US $ 65, 504.98. They relied on exhibits 1-14, 16-17 12-25, 27 and 28. They also stated that Ksh 952, 604 was proved in exhibits 15, 18 and 19. The same was also conceded by the defendant. They relied on the case of ICEA Lion General Insurance Company Limited v Noble Merchants Shipping Limited & another [2023] KECA 1061 (KLR).

16. They submitted that their witness, Paolo Basta, agreed with the defendant's director, Muiruri. It was their case that the defendant's witness, George Mwangi, was not present when the rates were negotiated. They also stated that Mwangi conceded that not all data was captured. The defendant equally conceded that the amounts are speculative. Reliance was placed upon the case of Rentco East Africa Limited v Dominic Mutua Ngonzi [2021] eKLR in regard to speculative evidence. The Plaintiff relied on the case of Rose Nafula Wanyama v Nusra Nasambu Chibanga & another [2020] KECA 933 (KLR).

17. The plaintiff filed supplementary submissions dated 15.1.2024. They stated that the sum was Ksh. 852, 604.98. They also stated that the defendant had admitted US $ 53,904.98. It was stated that a sum of US $ 11,700 were not admitted. They stated that the reduced figures were a rich figment of imagination. On interest, they stated that interest was due. Reliance was upon Prem Lata v Peter Musa Mbiyu [1965] EA 592.

18. The defendant filed submissions dated 12.2.2024. They stated that the suit must be accompanied by a Board of Directors resolution on the letterhead. Further, they stated that there was no evidence that an agreement of US $ 150 per hour was settled at US $ 150/=. They stated that a rate of US $ 65,605.98 should be reduced by 11,700/= and a sum of Ksh 952,604, being repairs arrears.

19. They relied on the case of Menno Travel Services Ltd V Menno Plaza Ltd [2013]eKLR.

20. They also relied on the case of Vincent M. Kimwele v Diamond Shield International Limited [2018] eKLR, where the court held as follows:

    17. It is clear that up to this stage the plaintiff had not met the defendant. It is for this reason that I find that there was no meeting of the mind between the plaintiff and the defendant. In other words there was no consensus ad idem. The defendant made an offer to Rose, and it seems that Rose requested the defendant's LPO to be addressed to the plaintiff. Rose was the go-between person, between the plaintiff and the defendant.

    18. It is for that reason that I find the contract failed to have the offer and acceptance. The American Jurist Oliver Wendell Holmes Jr. Wrote on the meeting of minds as follows:

        > " We talk about a contract as a meeting of the minds of the parties, and hence it is inferred in various cases that there is no contract because their minds have not met; that is, because they have intended different things or because one party has not known of the assent of the other. Yet nothing is more certain than that parties may be bound by a contract to things which neither of them intended, and when one does not know of the other's assent. Suppose a contract is executed in due form and

> in writing to deliver a lecture, mentioning no time. One of the parties thinks that the promise will be construed to mean at once, within a week. The other thinks that it means when he is ready. The court says that it means within a reasonable time. The parties are bound by the contract as it is interpreted by the court, yet neither of them meant what the court declares that they have said. In my opinion no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs - not on the parties having meant the same thing but on their having said the same thing."

21. They stated that in that case there was no evidence of an agreement or consensus.

22. On interest, the last invoice was in 2011, and suit was filed in 2013. Consequently, the defendant should not bear interest before filing. They relied on the case of John C. Omollo v South Nyanza Sugar Co. Ltd [2020] eKLR, where A. K. Ndung'u held as follows:

> 9. That being said, where a claimant is slack in prosecuting his matter, his claim for interest may be denied. I find useful guidance in the case of Peter M. Kariuki v Attorney General Civil Appeal No. 79 of 2012 [2014] eKLR
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> where the Court of Appeal held;
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> It is an accepted principle that a claimant who unreasonably delays his proceedings or otherwise misconducts himself regarding those proceedings may have his claim for interest denied. See METAL BOX CO LTD V CURRYS LTD, (1988) 1 ALL ER 341 and the decision of this Court in MUMIAS SUGAR CO LTD V NALINKUMAR M SHAH, CA NO. 21 OF 2011, (MSA), (unreported). Due to the appellant's own delay in filing his petition, we shall only award interest from the date of decree of the High Court till payment in full.

23. They submitted that the suit was not prosecuted until 14.12.2013. They relied on the case of Adero Ojano v South Nyanza Sugar Company Ltd [2018] eKLR, where the court held as follows:

> 11. However, I would also depart from the general principle because the case before the trial court took 9 years to be tried. The respondent should not be penalized for the appellant's tardiness when it had in fact applied to dismiss the suit for want of prosecution at one stage. I would therefore award interest on the sum awarded to run from the date of the first hearing, which is 11th May 2015. On that day, the appellant was heard and closed his case and left the respondent to pursue its defence.

24. There were no submissions on the counterclaim.

Analysis

25. There are five issues, including costs and interest to be determined in this matter, that is:

    a. Whether the plaintiff proved a sum of US$ 65,604.98.

    b. Whether repair sums of Ksh. 952, 604 were proved.

    c. Whether a counterclaim of a sum of US $ 150,254 was proved.

    d. Interest

    e. Who is to bear costs.

26. This is not a criminal trial. It is a civil trial where the court has to find for one party or another on a balance of probabilities. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

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

27. This was further enunciated in the case of Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions [2015] KECA 616 (KLR), where the Court of Appeal [J Karanja, GG Okwengu, CM Kariuki, JJA] stated as follows:

> The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. 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 probabilities are equal, it is not. Thus, proof 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' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

28. The burden of proof is set out in sections 107-109 of *the constitution*. The same is provided as follows:

> "107.
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> (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.
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> (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.
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> 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.
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> 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."

29. In the case of Odinga & another *v Independent Electoral and Boundaries Commission & 2 others (Election Petition 1 of 2017)* [2017] KESC 32 (KLR) (1 September 2017) (Determination), the

Supreme Court [Maraga, CJ & P, Mwilu, DCJ & V-P, Ojwang, Wanjala, Njoki and Lenaola, SCJJ] addressed the question of the burden of proof as follows:

> The common law concept of burden of proof (onus probandi) is a question of law which can be described as the duty which lies on one or the other of the parties either to establish a case or to establish the facts upon a particular issue. 46 Black's Law Dictionary47 defines the concept as "[a] party's duty to prove a disputed assertion or charge....[and] includes both the burden of persuasion and the burden of production." With that definition, the next issue is: who has the burden of proof?
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> The law places the common law principle of onus probandi on the person who asserts a fact to prove it. Section 107 of the *Evidence Act*, Cap 80 of the Laws of Kenya, legislates this principle in the words: "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." In election disputes, as was stated by the Canadian Supreme Court in the case of Opitz v. Wrzesnewskyj48, an applicant who seeks to annul an election bears the legal burden of proof throughout. This Court reiterated that position in the 2013 Raila Odinga case, thus:
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> "[195] There is, apparently, a common thread in...comparative jurisprudence on the burden of proof in election cases...that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner....
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> This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law."

30. Sections 3(2) and (3) of the *Evidence Act* provide what it means to prove a fact. It states as follows:

> (2) A fact is proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists.
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> (3) A fact is disproved when, after considering the matters before it, the court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it does not exist.

The next question is whether there is a duty to prove an admitted fact.

31. However, a party is not bound to prove an admitted fact. Section 17 of the *Evidence Act* provides as follows:

> An admission is a statement, oral or documentary, which suggests any inference as to a fact in issue or relevant fact, and which is made by any of the persons and in the circumstances hereinafter mentioned.

32. Section 26 of the *Evidence Act* provides as follows regarding admissions:

> Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.

33. The prayer for a sum of Ksh 952,604/= was admitted in evidence. This amount cannot be debated. In any case, it is provided for and provided in exhibits 15, 18, and 19. The defence also admitted it, even in submissions. Therefore, I award the sum of Ksh 952,604/= as prayed for in the plaint.

34. Special damages must be both pleaded and proved before they can be awarded by the Court. In the case of Swalleh C. Kariuki & another v Viloet Owiso Okuyu [2021] eKLR, the court, Justice Luka Kimaru, as then he was, stated as doth; -

> "In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:
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> "Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

35. The next question is the proof of a sum of US$ 65,604.98. The plaintiff admitted that the correct sum was US$ 65,504.98. It means the claim for US$ 100 is abandoned. The next question is, what amount is in dispute? The defendant admitted a sum of US$ 53,904.98. The dispute is, therefore, whether a sum of US$ 11,700/= is due and owing.

36. On the case of Attorney General v Kabuito Contractors Limited (Civil Appeal 638 of 2019) [2023] KECA 230 (KLR) (3 March 2023) (Judgment), the Court of Appeal, [HM Okwengu, MA Warsame & JM Mativo, JJA] stated as follows regarding oral agreements:

> An oral agreement must as well satisfy the requirements of a valid agreement such as offer, acceptance consideration, capacity to contract etc. (See the Supreme Court of Uganda in JK Patel v Spear Motors Ltd SCCA No. 4 of 1991 (1991)1 KALR 40). Although it may seem abundantly clear that the elements are sufficiently certain, the real problem is overcoming the burden of proof. Where a person alleges the existence of an oral contract, that party has the burden of proving the assertion to the satisfaction of the court. In doing so, there will be an onus to highlight the key terms of the contract and to prove the existence of the essential elements.

37. Oral agreements are valid if they have a lawful purpose; mutual agreement, consideration, and genuine assent are required for the contract to be enforceable. In the case of Moses Njane Ngendo v Josiah Anyangu Omutoko & another [2022] eKLR, the court addressed the question of oral arguments as follows:

> There is uncontroverted evidence that the two defendants agreed to hire the plaintiff stage equipment, took possession the same but failed to pay the total hire price and failed to return the equipment to the plaintiff to date. Verbal/oral contracts are valid just like written contracts. This is as long as such contracts are for a lawful purpose, there is mutual agreement, consideration and genuine assent for the contract to be enforceable.

38. It is not enough simply to put before the court a great deal of material and expect the court to make a finding in your favour. In the case of Kenya Breweries Limited Kiambu Vs. General Transport Agency Limited [2000] eKLR, the court said -

> " It is the duty of the Plaintiff to prove its claim for damages as pleaded. It is not enough simply to put before the court a great deal of material and expect the court to make a finding in his favour. It was said by Lord Goddard, CJ in Bonham Carters Hyde Park Hotel Limited [1948] 64TR 177 -
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> > The Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to write down particulars and, so to speak, throw them at the head of the court, saying, "this is what I have lost, I ask you to give me these damages." They have to prove it."

39. Special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit The Court of Appeal decision in Capital Fish Kenya Limited Vs Kenya Power & Lighting Company Limited (2016) eKLR was as follows:

> " Starting with the first issue, it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See National Social Security Fund Board of Trustees vs. Sifa International Limited (2016) eKLR, Macharia & Waiguru vs Muranga Municipal Council & another (2014) eKLR and Provincial Insurance Co. EA ltd vs Mordekai Mwanga Nandwa, KSM CACA 179 OF 1995 (UR). In the latter case, this Court was emphatic that "... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract ..."

40. The evidence before me was that the parties agreed on the level of services rendered. The defendant prevaricated between custom and reality. For example, if one has to move cargo in stock 3 out of 14, there will be moves removing all the 11 containers on top, then removing the needed container, then replacing the 11. These will be 23 moves, but only one container was moved. Therefore, there is no correlation between moves and the number of cargo containers moved.

41. For the unschooled, what I understood to be a move is the removal of containers. If there is a stack of 48 containers, and the very last one is needed, then all these others must be moved to allow the removal of the very last one. Then the goods are returned to the position, excluding the one removed. There is, thus, no way of knowing the number of moves that result in the removal of one container, by looking at the containers.

42. The record of how many moves were made was with the defendant. They needed to produce a statistical tally sheet. A summary will not suffice. I have noted that both parties agree on the hours the machines worked. It is also clear that payment was made in a graduated manner. The payments requested were thus in consonance with US $ 1,000 per day.

43. This was followed by US$ 100 between 5.2.2011 and 1.3.2011, between 1.3.2011 and 16.3.2011, and thereafter a sum of US $ 65,504.98 was proved.

44. The counterclaim of US $ 150,254 was pleaded. However, it has two aspects. No evidence was presented to prove this point. The table also shows that payment was graduated from US $ 1,000 per

day to US $ 100 per day and finally to US $ 150 per day. No particulars of fraud were proved by the evidence.

45. Most of the matters were raised in submissions. This is not the way to raise matters. Matters must be raised by way of pleadings. 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: -

> " 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: -
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> > 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."

46. In 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.....'"

47. Submissions are not, strictly speaking, part of the case, the absence of which may do no prejudice to a party. Their presence or absence does not in any way prejudice a case as held in Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, the Court held 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."

48. 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."

49. The counterclaim for US$ 150,254 was not proved and was abandoned at the submission level. In the circumstances, the counterclaim is 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.

48. 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.

49. 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.

50. The plaintiff is successful at the end of the day. They are entitled to costs as a successful party. Consequently, the counterclaim is dismissed with costs of US$ 2,275. The claim for US $ 65,504.98 is allowed. Judgment is entered for Repairs for a sum of Ksh. 952,604. The Plaintiff shall also have costs of the suit of US $ 1,500.

50. The final issue concerns interest. The plaintiff filed suit in 2013 and allowed it to sit inactive for 12 years. They should not be permitted to benefit from their own delay. The award of interest is a matter

of judicial discretion. In the case of Sansora Wire & Nail Works Ltd V Shreeji Enterprises Kenya Ltd [2005] KEHC 3184 (KLR) Ochieng J held: -

1. The provisions of order 16 rule 5 of the Civil Procedure Rules are only applicable to suits, as opposed to applications.

2. The court has a discretion to order for the payment of interest on the decretal amount at such rate as it deems reasonable, whether from a date before the institution of the suit, the date of the suit or from the date of the decree. The interest may be directed to be payable either to the date of payment or until such earlier date as the court thinks fit.

50. Consequently, the plaintiff shall have interest from 6 years ago, that is, from 18.5.2019 until payment in full.

Determination

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

a. Judgment is entered for the plaintiff against the defendant for US $ 65,504.98.

b. Judgment is entered for the plaintiff against the defendant for Ksh. 952,604/= being repair costs.

c. The counterclaim is dismissed with costs of US $ 2,275.

d. The plaintiff shall have the costs of the suit of US $ 1,504.

e. Stay of 30 days.

f. Interest at court rates from 18.5.2019 until payment in full.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 26TH DAY OF MAY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Ondego for the Plaintiff

Mr. Gikandi for the Defendant

Court Assistant – Michael