**Family Bank Limited v Otieno (Commercial Appeal E001 of 2023)**
**[2025] KEHC 5856 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5856 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT SIAYA**

**COMMERCIAL APPEAL E001 OF 2023**

**DK KEMEI, J**

**MAY 9, 2025**

**BETWEEN**

**FAMILY BANK LIMITED ..... APPELLANT**

**AND**

**REMJIUS NYAKINA OTIENO ..... RESPONDENT**

***(Being an appeal from the judgment and decree of Hon. M.O. Wambani delivered on 28th September 2023 in Environment and Land Court No. 87 of 2019)***

## JUDGMENT

1. This instant appeal emanates from a judgment of the Chief Magistrate's court at Siaya dated 28/9/2023 where the trial magistrate found in favor of the Plaintiff/ the Respondent herein and made a declaration that the Appellant acted in bad faith and breached the contract of guarantee in respect of the subject loan and denied the Respondent a right of contribution and or contribution following the discharge of one of the co-guarantors Charles Omolo Yuya. The learned trial magistrate further ordered the discharge of the Respondent following the refusal by the Appellant to register and create a charge over a new title LR North Ugenya/Siranga/1312 in the name of one Valentine Akoth Opondo following a restructuring of the loan taken out from the Appellant by the principal borrower (Shalom Agencies Ltd).

2. Dissatisfied with the said judgment, the Appellant vide a memorandum of appeal dated 23rd October 2023, has appealed before this court on the following grounds:

    i. That the trial magistrate misdirected herself and erred in law and fact by holding that the plaintiff had proved his case against the Defendant on a balance of probabilities without any supportive evidence thereby arriving at a wrong finding.

ii. That the trial magistrate erred in law and in fact by holding that the contract of guarantee was unconscionable and commercially unreasonable, while the evidence on record did not support the finding.

iii. That the trial magistrate erred in law and fact in holding and finding that the Letter of Restructure dated 23/11/2018 executed by the borrower was a contract of guarantee instead of the registered charge dated 21/11/2014 executed by the plaintiff.

iv. That the trial magistrate erred in law and fact by finding that the Defendant was liable for the breach of contract of guarantee in respect of the subject loan without any supporting evidence thus making a wrong finding.

v. That the Honorable magistrate erred and misdirected herself in law and in fact in relying on extraneous matters and disregarding the parties' pleadings and submissions. Effectively, the court amended the parties contract and determined a new suit (cause of action) different from the one presented by the plaintiff to the detriment of the Defendant.

vi. That the trial magistrate erred in law and in fact by failing to consider, acknowledge, hold and find that the plaintiff introduced a new issue (discharge of one Charles Omolo Yuya) as a chargor after close of pleadings and that the same were not properly introduced.

vii. That the trial magistrate erred in law and in fact by making its holding and finding on un-pleaded issues and facts that were not in issue and failing to consider and acknowledge that the plaintiff introduced new issues and evidence after close of pleadings and that the same were not properly introduced.

viii. That the trial magistrate erred and misdirected herself both in law and fact in failing to acknowledge, hold, and find that the plaintiff did not adduce sufficient evidence that one Charles Omolo Yuya was discharged.

ix. That Honorable magistrate erred and misdirected herself in law and in fact by incorrectly formulating issues for determination which were not part of the pleadings.

x. That the learned trial magistrate erred in law and fact in disregarding the Appellant's evidence and submissions.

xi. That the Honourable magistrate erred both in law and fact by shifting the burden of proof from the Respondent to the Appellant despite the Respondent failing to discharge the burden of proof to the required standard.

The Appellant therefore prays that the judgement of the learned trial magistrate delivered on 28/9/2023 be set aside and substituted with an order dismissing the Respondent's suit with costs. That the Appellant be awarded costs of the appeal.

3. The Respondent filed his Memorandum of Cross Appeal dated 30/10/2023 wherein he raised one ground namely that the learned trial magistrate erred in law and fact in not making a determination on a very fundamental issue that was urged before her, namely, that the contract of guarantee offended section 44A of the *Banking Act* hence it was illegal and unenforceable. The Respondent therefore prayed that the appeal be dismissed and that the Cross Appeal be allowed and finally that the costs in this appeal and in the lower court be awarded to the Respondent/Cross Appellant.

4. Being a first appeal, this court must evaluate the entire evidence and subject it to a fresh exhaustive scrutiny and arrive at its own independent conclusion. It has also to bear in mind that it did not have the opportunity to hear or see the witnesses and must thus give an allowance for that. (See Selle &

Another vs Associated Motor Boat Company Ltd & others [1968] 1EA 123; Peters v. Sunday Post Ltd (1958) EA 424; Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000. (Tunoi, Bosire & Owuor JJA); Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another Civil Appeal No. 345 of 2000. (Okubasi, Githinji & Waki JJA)

5. A brief synopsis of the matter before the trial court is as follows: Shalom Agencies limited, the borrower/debtor/distributor herein entered into a distributorship contract with Nation Media Group dated 27th June 2014 for the distribution of products of Nation Media Group in Siaya/Bondo/Busia Sugar belt region. In order to give that contract to the borrower, the NMG demanded for a bank guarantee of Kshs 4 000 000/=. The borrower approached the bank/creditor/ the Appellant herein to give the guarantee to NMG. As a condition to giving the said guarantee to NMG, the bank demanded that the borrower brings guarantors and securities to be charged in favor of the Appellant to secure the guarantee which the Appellant was issuing to NMG. The demand for guarantors by the Appellant is what made the borrower to bring the Respondent on board as a guarantor with three other guarantors. Out of the four guarantors, two of them were directors of the borrower and thus had a beneficial interest in the facility.

6. The Respondent herein entered into a guarantee agreement with the Appellant over parcel numbers Siaya/ Pap Oriang/1242 and East Alego Pap Oriang/ 1391, both titles being in the names of Ramjius Nyakina Otieno, Respondent herein. The securities secured the entire amount of four million Kenyan shillings (Kshs 4,000,000/=).

7. The properties of the two directors (co-guarantors) were however not charged. The 4th guarantor, Charles Omolo Yuya, was later discharged and released by the Appellant/Bank from his obligations as a co-guarantor.

8. The borrower later defaulted in its obligations under the facility issued by the Appellant to NMG. The Appellant revised the terms of the facility to accommodate and enable the borrower to continue servicing the facility. In line with this, the directors of the borrower also doubling up as co-guarantors did a letter dated 23rd January 2017 to the Appellant/bank containing some of the terms of restructuring of the facility. The last paragraph of the said letter stipulates in part that "...In light of this and in light of the socio/mutual agreement(Gentleman's agreement) I had with Ramjius, i would wish to commit our title deed No. North Ugenya/Siranga/1312 measuring 0.45 Hectares with property and in the name of Valentines Akoth Opondo during the period i will be servicing the loan or exchange it for the titles held at the family bank" ( See page 187 of the Plaintiffs/Respondents documents being document No. 13).

   The Respondent upon learning that the Appellant had entered into new arrangements and that the Appellant had started to exercise its statutory power of sale of the charged properties, moved this court to seek for orders that he be discharged from further obligations towards the Appellant.

   The Appellant opposed the Respondent's claim and maintained that the Respondent duly offered his properties Siaya/Pap Oriang/1242 and East Alego/Pap Oriang 1391 as securities for the loan that had been advanced to the borrower. The the borrower failed to repay the loan forcing the Appellant to issue demand notices as well as statutory notices. That later, the borrower applied for a re-structure of the loan which was accepted by the Appellant and that the amounts were to be secured by the two properties belonging to the Respondent. That the Appellant was at liberty to exercise its statutory power of sale unless the Respondent and the borrower cleared the outstanding loan amount.

9. The appeal was canvassed by way of written submissions. Both parties duly complied.

10. The Appellant submitted that the trial magistrate relied on un-pleaded facts and that she misapplied the facts in finding that the deed of guarantee was a contract between the parties, and that the costs awarded to the Respondent were unjustly awarded.

11. The Appellant submitted that Order 2 Rule 4 of the Civil Procedure Rules require that matters such as fraud, misrepresentation and illegality should be specifically pleaded. The Appellant relied on the case of Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 others (2014) eKLR, where the Court of Appeal held:

> " It is a cardinal principle of procedural law that parties are bound by their pleadings and that a court should not pronounce judgment on issues not raised in the pleadings."

12. It was the Appellant's submissions that the Respondent filed their pleadings on 15th November 2019 and that procedurally no further pleadings were filed. That the Respondent however introduced new issues for determination in his submissions as follows:

    a. The alleged discharge of one Charles Omolo Yuya as a chargor (Refer to pages 13-14 and 37-41 of the Respondents submissions, found on pages 332 -340 of the Record of Appeal).

    b. The alleged infringement of rights against co-sureties (paragraphs 24-36 of the Respondents' submissions, located at pages 337-33p of the Record of Appeal).

    c. The alleged undervaluation of the suit properties as in the Respondents' submissions at page 346 of the Record of Appeal.

    d. The alleged unconscionability of the Bank Guarantee.

13. The Appellant submitted that the four issues above are based on fraud, misrepresentation, and illegality, which fall under the requirements of Order 2 Rule 4 of the Civil Procedure Rules.

14. The Appellant/Defendant at the trial objected to the introduction of these new issues pointing out that they were not properly before the court for determination.

15. On the other hand, the Respondent submitted that there are exceptions to the Rule that a court cannot make findings on un-pleaded facts. It relied on the case of Jobs vs. Mubia [1970] EA 476, where it was held that:

> " A court may allow evidence to be called and may base its decision on an un-pleaded issue if it appears from the course followed at the trial that the un-pleaded issue has in fact been left to the court for decision."

16. The Respondent submitted that the trial court acted within the law.

17. The Respondent likewise submitted that each issue they raised as a ground for discharging the Respondent was singularly sufficient upon proof, to discharge the Respondent from his obligations as a co-guarantor.

18. The Respondent thus urged the court to dismiss the appeal with costs and uphold the judgment of the trial court.

19. Having considered the Record of Appeal together with the rival submissions and authorities, I find that the issue for determination is whether the trial court properly addressed itself on the issues before it.

20. The Appellant has maintained that the learned trial magistrate relied on un-pleaded facts in making her determination. Indeed, Order 2 Rule 4 of the Civil Procedure Rules requires that matters such as fraud, misrepresentation, and illegality must be specifically pleaded. In the case of Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR, the Court of Appeal held that it is a cardinal principle of procedural law that parties are abound by their pleadings and that a court should not pronounce judgment on issues not raised in the pleadings. The Respondent filed his pleadings, including a plaint, witness statement, and list of documents, all dated 15/11/2019 and that no further pleadings were filed by the Plaintiff until the close of pleadings (refer to pages 10-22 of the Record of Appeal). It is noted that the Respondent introduced new issues for determination in his submissions namely; the alleged discharge of one Charles Omolo Yuya as a chargor pg 13-14 and 37-41 of the Respondent's submissions and found on pg 332 and 340 – records of appeal; that the alleged infringement of rights against co-sureties (par24-36) and on (pg 337-339) records of appeal of the Plaintiff's submissions; that the alleged under-valuation of the suit properties (par 63-65) and pg 346)of the Respondent's submissions; that the alleged unconscionability of the Bank Guarantee.

That the four issues outlined above in the background are based on fraud, misrepresentation, and illegality, which fall under the requirements of Order 2 Rule 4 of the Civil Procedure.

Learned counsel for the Respondent in his submissions has maintained that the failure by the Appellant to register a discharge over a title discharges a co-guarantor. It was submitted that the Appellant discharged one Charles Omolo Yuya and left the Respondent to shoulder the burden. Even though that may have happened, the obligations of each guarantor towards the loan repayment must be performed by each of them to the extent of the loan facility that had been offered to the borrower. The Bank in such situations reserves the right to release/discharge a guarantor depending on circumstances surrounding each guarantor and whether any would have settled the loan sums. It is instructive that the Respondent in his plaint did not plead a claim against the Appellant for discharging other guarantors and retaining the Appellant. Indeed, the Respondent was bound by his pleadings and therefore was not allowed to raise new matters at the hearing.

Further, in the Respondent's memorandum of cross appeal, he is attempting to reintroduce the issue that the Bank Guarantee violated the provisions of Section 44 of the *Banking Act* despite the issue having not been pleaded or even raised during the trial proceedings and which constitutes an improper attempt to expand the scope of litigation beyond what was originally presented before the trial court and which is prejudicial to the Appellant.

It was contended that the learned trial magistrate erred in referring to and considering the aforementioned issues, as they were not raised in the pleadings nor subject to determination by the trial court.

It is noted that the learned trial magistrate held that the contract of guarantee was and remains unconscionable and commercially unreasonable since it seeks to bring down the entire debt burden upon the Plaintiff while releasing and setting free all the co-guarantors as cited in the case of Margaret Njeri Muiruri Versus Bank of Baroda (Kenya) Limited (2014) eKLR; that the discharge and release of Charles Omolo Yuya as Co-guarantor, is a breach of the contract of guarantee between the Plaintiff and the Defendant and that the court has found that the Plaintiff's right of subrogation has been lost by the acts of the Defendant in releasing the co-guarantor, one Charles Omolo Yuya and the security that was furnished by the said co-guarantor to the Defendant and that this misdirection led to the impugned judgment as the court's reasoning was influenced by extraneous matters that were neither pleaded nor properly before it for adjudication and that the decision was based on considerations outside the scope

of the parties' claim resulting in a miscarriage of justice. Reliance was placed in the case of Kuria Kiarie, Njuguna Kuria & Kimani Kiria v Sammy Magera [2018] KECA 467 (KLR) where the learned Judges stated that "we have examined the Appellant's amended defence for any pleading on particulars of fraud or illegality but there is none. The claims were therefore stillborn and no evidence could be tendered. Even if it was open to tender evidence on fraud and illegality, the mere allegations that a sale agreement and a consent for transfer cannot be obtained on the same day is well below the standard of proof set under the authorities cited. We need not belabor this issue as we are satisfied that it was neither proper pleaded nor strictly proved. That ground of appeal fails too." In this case, the learned Judges asserted with authority and referenced to the matter of Vijay Morjaria vs. Nansingh Madhu Singh Darbar & Another [2000] eKLR where Tunoi, JA (as he then was) stated that it is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The act alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.

21. The Respondent, being the initiator of the suit, was under obligation to discharge the burden of proof. Section 107 of the *Evidence Act* outlines clearly on where the burden of proof lies. The same provides that 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 those facts exists; that when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. Also, Section 108 provides for incidences of burden and proof of particular facts that the burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on their side. This was captured in the case of Eastern Produce [K] Ltd v Christopher Atiado Osiro HCCA 43 of 2001 where the court held that it is trite that the onus of proof is on he who alleges. It is noted that the learned trial magistrate ruled that the Respondent had discharged his burden of proof by establishing the existence of a new agreement requiring the discharge of the Respondent's property after the borrower managed to get new guarantors. However, no such agreement was presented to the court to the effect that the Appellant had agreed to discharge the Respondent. What was presented to the trial court was evidence to the effect that the borrower had sought to have a gentlemen's agreement but which did not elicit a response from the Appellant and hence no such agreement was validly executed or legally enforceable and that the letters cited by the Respondent in support of its claim for discharge do not amount to a legally enforceable agreement. It is thus obvious that the trial court wrongly disregarded the fundamental requirement of mutual assent necessary to create binding obligations and that the trial court somehow attempted to alter the parties' contractual obligations instead of interpreting the contract as agreed upon yet the loan restructuring was explicit in its terms namely, that the restructured loan was to be secured by the suit properties. The Respondent presented letters dated 23/1/2017, 7/2/2017 and 29/10/2018 to the trial court but failed to confirm with evidence that the said letters had been responded to and acknowledged by the Appellant. In the absence of concrete evidence, then the Respondent's obligation under the guarantee could not be avoided. In the case of Robert Njoka Muthara & Another vs. Barclays Bank of Kenya Limited & Another [2017] eKLR, Civil Appeal No. 18 of 2014 it was held that a guarantee by definition is a pledge by a person (guarantor) other than a party upon whom the contractual or other legal obligation is imposed, to the effect that if the party so bound (principal) fails to perform the act in question, the guarantor will either perform or make good any loss or claim arising from the non-performance. The pledge is ordinarily made to a creditor. The essence is that the guarantor agrees not to discharge the liability in any event, but to do so only if the principal debtor fails to honour his duty."

The contract entered into by the Respondent is one of guarantee and as such he was required to settle the debts owed by the borrower in the event the said borrower defaults in payment. As noted in the above authority, a contract of guarantee is an accessory contract by which the surety undertakes to ensure that the principal performs the principal obligations. It has been described as a contract to indemnify the creditor upon the happening of a contingency namely the default of the principal to perform the principal obligation. The surety is therefore under a secondary obligation which is dependent upon the default of the principal and which does not arise until that point. As the obligation of the principal had not been discharged, the Respondent's obligation also remained unfulfilled and thus it was erroneous for the trial court to seek to rewrite the terms of the contract by directing that the Respondent be discharged from his obligations under the restructured loan agreement, contrary to the settled principle that courts should not interfere with freely negotiated contractual terms and that by directing the Respondent be discharged from his obligations under the Bank Guarantee, without a valid basis, the court effectively substituted its own terms in place of the agreed contract, an approach that is contrary to legal principles that the court should not re-write contracts for parties as held in the case of National Bank of Kenya Ltd v Pipe plastic Samkolit (K) Ltd & Another [2001] eKLR, where the Court of Appeal held that a court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. Indeed, the trial court acknowledged this principle but nevertheless proceeded to depart from it by altering the terms of the restructured loan agreement and directing that the Respondent be discharged from his obligations. Again, in Pius Kimaiyo Langat v. Cooperative Bank of Kenya Limited [2017] eKLR, the Court of Appeal emphasized that the court should not make contracts for parties and that it is not the function of a court to re-write a contract but to give effect to the intention of the parties as discernible from the agreement itself. Despite recognizing this rule, the trial court appeared to have waded into the arena of the parties by effectively modifying the contractual terms instead of enforcing them as agreed. This has led the trial court to arrive at an erroneous conclusion.

As regards the standard of proof, in the case of Kinyanjui Kamau vs. George Kamau [2015] eKLR, the Court of Appeal expressed itself that it is trite law that any allegations of fraud must be pleaded and strictly proved. In the case of Ndolo vs. Ndolo (2008) 1KLR the court stated that:

> "We start by saying that it was the Respondent who was alleging that the will was forged and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

Also, in the case of Gichinga Kibutha v Caroline Nduku [2018] eKLR, the Court stated with authority, that it is therefore settled law that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts that a party has legal obligation to provide evidence that will best facilitate the proof of existence of those facts. The party must present to the court all the evidence reasonably available on the litigated factual issues and that a party is bound by their own pleadings and the evidence they

> adduce in court and that the purpose of pleading is to ascertain with clarity the matter on which parties disagree and points of agreement so as to ascertain matters for determination.

From the foregoing, it is evident that the trial court erred by relying on un-pleaded issues, thereby violating the established legal principle that parties are bound by their pleadings. The Respondent's attempt to introduce new issues including allegations of fraud, misrepresentation, and illegality without having pleaded them as required under Order 2 Rule 4 of the Civil Procedure Rules, was improper and prejudicial to the Appellant.

Again, I find the trial court erred by considering extraneous matters, effectively rewriting the terms of the contract and disregarding the Appellant's legal rights under the Bank Guarantee and that the Respondent failed to discharge the requisite burden of proof to the required legal standard and thus the court's decision was based on flawed reasoning and a misapprehension of the applicable legal principles.

22. It is noted that the Appellant contents that no binding agreement existed, as it was never signed and went ahead to claim that the letters cited by the Respondent in support of its claim for discharge do not amount to a legally enforceable agreement. It seems the trial court disregarded the fundamental requirements of mutual assent necessary to create binding obligations. The court in holding otherwise, it improperly altered the parties' contractual obligations instead of interpreting the contract as agreed upon. The trial court further failed to appreciate that the loan restructuring was explicit in its terms, stating that the restructured loan was to be secured by the suit properties. It was erroneous for the trial court to rely on the Respondent's letters dated 23/1/2017, 7/2/2017 and 29/10/2018 despite the fact that there was no evidence that these letters were ever responded to or acknowledged by the Appellant. In the absence of evidence to the effect that the Appellant respond ended to those letters, then it was erroneous for the trial court to rely on the Respondent's documents which were one-sided as there were no input from the Appellant. That being the position, the Respondent's obligation under the guarantee was never discharged.

As regards the standard of proof, the Court of Appeal in the case of Kinyanjui Kamau vs George Kamau [2015] eKLR expressed itself as follows:

> " It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1KLR (G&F) 742 wherein the Court stated that ...we start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required on ordinary civil cases namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

In the case of Gichinga Kubutha v Caroline Nduku [2018] KEELC 3981 KLR the court stated with authority that it is therefore settled law that in civil cases, a party who wishes the court to give judgment or to declare any legal right dependent on a particular fact or sets of facts that a party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on the litigated factual issue.

It goes without saying that a party is bound by their own pleadings and the evidence they adduce in court. The purpose of pleadings is to ascertain with clarity the matters on which parties disagree and points of agreement so as to ascertain matters for determination.

23. The Respondent in his cross appeal maintained that the trial magistrate failed to make a determination to the effect that the contract of guarantee offended Section 44 A of the *Banking Act* and therefore the same was illegal and unenforceable. Indeed, the Respondent was entitled to raise a cross appeal in this matter. However, it is instructive that the Respondent's plaint dated 15/11/2019 does not include such a claim against the Appellant as regards the violation of the provisions of Section 44A of the *Banking Act*. Learned counsel for the Appellant has contended that the Respondent was barred from raising new issues in submissions which were not pleaded in the plaint and hence, the trial magistrate cannot be faulted for not making a determination on that matter. As the issue was not pleaded in the plaint and advanced in evidence by the Respondent, the same could not be raised by the Respondent at any stage of the proceedings as the same amounted to an ambush on the Appellant. That being the position, the learned trial magistrate was right in not venturing into that arena. I find the trial magistrate cannot be faulted over the same. Consequently, the Respondent's cross appeal dated 30/10/2023 lacks merit and ought to be dismissed.

24. It is clear from the foregoing observations that the trial court erred in law and in fact by relying on un-pleaded issues, thereby violating the established legal principle that parties are bound by their pleading. The Respondent's attempt to introduce new issues, including allegations of fraud, misrepresentation, and illegality, without having pleaded them as required under Order 2 Rule 4 of the Civil Procedure Rules, was improper and prejudicial to the Appellant. On the whole, the Respondent's case was not proved on a balance of probability. The learned trial magistrate erred in law and in fact when she considered new matters that had not been pleaded and further sought to re-write the contract between the Appellant and the Respondent contrary to the accepted norms and thereby arrived at an erroneous decision. The same must be interfered with.

25. In the result, the Appellant's appeal has merit. The same is allowed. The Respondent's cross appeal lacks merit and is dismissed with no orders as to costs. The judgment of the learned trial magistrate delivered on 28th September 2023 is hereby set aside and substituted with an order dismissing the Respondent's suit vide plaint dated 15th November 2019 with costs to the Appellant. Each party to bear the costs of this appeal.

    Orders accordingly.

**DATED AND DELIVERED AT SIAYA THIS 9TH DAY OF MAY, 2025.**

**D. KEMEI**

**JUDGE**

In the presence of:

Miruka.....for Appellant

Malea for Ongoya.....for Respondent

Okumu.....Court Assistant