Noor Aluminium & General Hardware Ltd v Hydro Aluminium Ltd (Civil Appeal E749 of 2023) [2025] KEHC 10690 (KLR) (Civ) (21 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10690 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E749 OF 2023

DKN MAGARE, J

JULY 21, 2025

BETWEEN

NOOR ALUMINIUM & GENERAL HARDWARE LTD ..... APPELLANT

AND

HYDRO ALUMINIUM LTD ..... RESPONDENT

(Appeal from the Judgment and decree of the Honourable V.M. Mochache, RM/ Adjudicator given on 24.03.2023 in Milimani SCC COMM. No. E7846 of 2022)

JUDGMENT

1. This is an appeal from the Judgment and decree of the Honourable V.M. Mochache, RM/Adjudicator given on 24.03.2023 in Milimani SCC COMM. No. E7846 of 2022. The court shall be dismissing the appeal shortly. The Appellant was the Respondent in the Small Claims Court.

2. The matters in the claim and response are not in dispute. The only issue raised in this appeal is that the decision of the court was made after expiry of 60 days from the date of filing. The claim was based on goods sold between 2021 and 2022 to the Appellant for a sum of Ksh. 265,978.42. These goods were in respect of invoices numbers 5810, 6162, and 6164. The invoices and sales orders were filed.

3. A response was filed by the appellant stating the payments for 230,178/= were made for these invoices. They disputed certain interest of 3% for delayed payments. This however is not the dispute in court. Upon the matter being concluded, each party filed submissions. Their argument was that payments were made. They sought dismissal. It is not necessary to go into what the Respondent stated.

4. The question whether the matter had exceeded its time was not raised at any stage and was not part of the questions left for the court to determine. Upon the court considering submissions, the court,

pursuant to Section 32 of the Small Claims Act found in favour of the respondent. There is no factual dispute or any legal dispute from the determination by the court.

5. The Appellant filed an appeal and set out 4 grounds of appeal, which I do not wish to set out in this appeal as they are repetitive. The first ground is otiose as it does not raise the question of law that errors occurred in. Only grounds 2-4 were available. They raised a question as to the effluxion of time as at 13.02.2023.

Submissions

6. This appeal was argued by way of written submissions. The parties filed acres of submissions on what is essentially a question of law. The appellant argued that as the first appellate court, this court has a duty to re-evaluate evidence. They relied on the decision of the supreme court of India in Santosh Hazari vs Purushottam Tiwari (Dead), AIR 2001 Supreme Court 965, 2001 (3) SCC 179. It was then posited that the jurisdiction of the court is set out in Section 38 of the Small Claims Act. The court was invited, but declines to re-evaluate evidence as this is not in tandem with the aforesaid section.

7. In respect to the matters in issue, reliance was placed in Section 34 of the *Small Claims Court Act*, and stated that the claim was filed on 13.12.2024 and concluded outside the stipulated time on 24.03.2023. They relied on a case of Aprim Consultants v Parliamentary Service Commission & another [2021] KECA 1090 (KLR), where the Court of Appeal set aside a decision of the High Court by stating as doth:

   Our reading of the Act is that the High Court was under an express duty to make its determination within the time prescribed. During such time did its jurisdiction exist, but it was a time-bound jurisdiction that ran out and ceased by effluxion of time. The moment the 45 days ended, the jurisdiction also ended. Thus, any judgment returned outside time would be without jurisdiction and therefore a nullity, bereft of any force or effect in law.

8. They also relied on the decision of my sister Gichohi, J in High Court in Kartar Singh Dhupar & Company Limited v ARM Cement PLC (In Liquidation) [2023] KEHC 2417 (KLR).

9. The respondent wrote a thesis for submissions. It is a 31 paragraph *9* page monolith. They sought to rely on Section 38 of the *Small Claims Court Act* to maintain that the court's jurisdiction is on matters of law only. They relied on what they indicated to be emerging local jurisprudence. Reliance was placed on the decision of D.S. Majanja, in the case of Lumumba v Rift Gas Limited [2023] KEHC 25998 (KLR) and Crown Beverages Limited v MFI Document Solutions Limited [2023] KEHC 58 (KLR).

10. It was their case that the small claims court does not set out consequences for failure to comply while the *Public Procurement and Asset Disposal Act*, 2015 provides for consequences. They reiterated their submissions that the use of the words, so far as practicable connotes flexibility. They then went into the factual context of the delay.

11. They further relied on the case of Kituo Cha Sheria v Gil Adiz Advertising Company Ltd [2023] KEHC 25743 (KLR), where this court stated that there must be demonstration of prejudice. They were happy with the holding in Kartar Singh Dhupar & Company Limited v ARM Cement PLC (In Liquidation) [2023] KEHC 2417 (KLR) to the effect that:

    > Considering the purpose and purport of the Small Claims Court, it sounded unfair and unjust that the appellant who violated the timelines wished to benefit from the violation by citing section 34 of the Small Claims Court.

12. The Respondent set out in extensio my own decision in Biosystems Consultants v Nyali Links Arcade (Civil Appeal E185 of 2023) [2023] KEHC 21068 (KLR) (31 July 2023) (Ruling) Neutral citation: [2023] KEHC 21068 (KLR), where this court addressed the foregoing issue as follows:

> The purpose of the *Small Claims Court Act* is to facilitate expeditious disposal of the disputes while at the same time respecting the right to be heard. The net result is that balancing the two may result at times to overshooting the 60 days. The 60 days do not have penal consequences for good reason. They are aspirational. This is part of having access to justice over amounts that need not be in the normal system. Allowing the application will open flood gates that will eventually defeat the purpose of the Act.
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> 57. It is my take that the non-compliance goes to the court's performance and is answerable internally. It cannot affect parties who are in court and ready to be heard. I have seen defendants use various gimmicks to have matters adjourned and thereafter turn around to say, 60 days are over. The parties have wasted a full month arguing in this court and with preliminary objections that are much ado about nothing.

13. They relied on the case of Nyagwoka Ogora Alias Kennedy Kemoni Bwogora V Francis Osoro Marko [2004] KECA 14 (KLR), where Court of Appeal, [R.S.C Omolo. E.M. Githinji,JJA and A.G. Ringera Ag. JA] addressed the issue of timelines for delivery of judgment as follows:

> The real question is what is the consequence of non-compliance therewith? No doubt the rule is an important one in the expeditious dispensation of justice. And it is made to be obeyed. However, if non-compliance with the rule were to have the effect contended for by the appellant, we think the overall result would be more injustice than justice to the parties. A lot of time and resources spent in litigation would come to naught if judgments delivered after the expiry of 42 days were to be voided or declared void IPSO facto. The rule cannot and in our view could not have been intended to deprive a trial Judge of his jurisdiction to write and pronounce judgment in a case he has heard. In our considered view, while non-compliance with the rule and particularly persistent noncompliance or inordinate delay in compliance should call for censure of the judicial officers concerned from those in charge of judicial administration, it should not be a ground for vitiating a duly delivered judgment. Being of that persuasion we would reject ground 1 of appeal.

14. The respondent prayed for the appeal to be dismissed with costs.

Analysis

15. This being an appeal from the Small Claims Court, the duty of the court is circumscribed under section 38 of the *Small Claims Court Act* which provides as doth:

    (1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.

    (2) An appeal from any decision or order referred to in subsection (1) shall be final.

16. However, an appeal of this nature is on points of law. It can be pure points of law or mixed points of law but points of law it is. An appeal on points of law is akin to a second appeal to the Court of Appeal.

The duty of a second appeal was set out in the case of M/s Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR: -

> " This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below-considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: Stanley N. Muriithi & Another versus Bernard Munene Ithiga (2016) eKLR)."

17. Then what constitutes a point of law? In Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others, (2014) eKLR, the court stated as doth: -

> " 4. Although the phrase 'a matter of law' has not been defined by the *Elections Act*, it has been held in Timamy Issa Abdalla Vs Swaleh Salim Swaleh Imu & 3 Others, Malindi Civil Appeal No. 39 of 2013 (Court of Appeal), (Okwengu, Makhandia & Sichale, JJA) of 13.01.2014 that a decision is erroneous in law if it is one to which no court could reasonably come to, citing Bracegirdle vs Oxney (1947) 1 All ER 126. See also Khatib Abdalla Mwashetani Vs Gedion Mwangangi Wambua & 3 Others, Malindi Civil Appeal No. 39 of 2013 (Court of Appeal), (Okwengu, M'inoti & Sichale, JJA) of 23.01.2014 following AG vs David Marakaru (1960) EA 484."

18. In Peter Gichuki King'ara Vs Iebc & 2 Others, Nyeri Civil Appeal No. 31 of 2013 (Court of Appeal) (Visram, Koome & Odek, JJA) on 13.02.2014, the court held as follows: -

> " It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanour – is an issue of law."

19. The main issue for determination in this case is whether the trial court erred in law in failing to dismiss the suit for being determined outside the 60 days provided under section 34 of the Small Claims Act which provides as follows:

(1) All proceedings before the Court on any particular day so far as is practicable shall be heard and determined on the same day or on a day to day basis until final determination of the matter which shall be within sixty days from the date of filing the claim.

(2) Judgment given in determination of any claim shall be delivered on the same day and in any event, not later than three (3) days from the date of the hearing.

(3) The Court may only adjourn the hearing of any matter under exceptional and unforeseen circumstances which shall be recorded and be limited to a maximum of three adjournments.

(4) When considering whether to allow an adjournment on the grounds of exceptional and unforeseen circumstances referred to in subsection (3), the court may in particular take

into consideration where appropriate any of the following exceptional and unforeseen circumstances—

(a) the absence of the parties concerned or their advocate or other participants to the proceedings required to appear in court for justified personal reasons which may include sickness, death, accident or other calamities;

(b) an application by a party for the Adjudicator to withdraw from hearing the matter;

(c) a request by parties to settle the matter out of court;

(d) an appeal filed in the matter where orders of stay of proceedings have been granted;

(e) an application by a party to summon new witnesses to court,
collect new evidence, new inspection or evaluation or supplementary

investigation on the subject matter of the case; and

(f) any other exceptional and unforeseen circumstances which in the

opinion of the court justifies or warrants an adjournment.

20. The two sub-issues that arose in this matter relate to the timelines and the second is on whether this is a question properly before the court. The submissions filed in the small claims court did not raise the question of time lines at all. The question of time lines was not an issue submitted to the court for adjudication on 28.2.2023 when the court reserved the date for ruling. It is thus not an issue for the appeal. It is an issue arising for the first time during the appeal. Secondly, even where the issue is raised, jurisprudence from both this court and the Court of Appeal is fairly crystalised on the subject of delayed decisions. In the case of Sugut v Jemutai & 3 others (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR), the Court of Appeal addressed a question of delay in delivering of judgment as follows:

> On the first issue, Esther complains that the judgment of the trial court is illegal due to the delay in delivery and consequently it should be set aside, relying on Manchester Outfitters Suiting Division Ltd & another & another v Standard Chartered Financial Services Ltd & another & another [2002] KECA 303 (KLR)
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> I concur with the observation made in that decision that a delayed judgment prolongs and increases the stress and anxiety of litigation and reduces public confidence in the judicial process. I am mindful, however, that the vicissitudes of judicial service and the pressures attendant thereto may in some instances conspire to cause such delay as occurred herein. I note that the learned Judge at the end of her judgment expressed her 'sincere and absolute regret at the most unfortunate and unintended delay' in delivery of the judgment. Were I to accept the appellant's submissions I would have to remit the matter to the High Court for a retrial. I apprehend that ordering a retrial would be subjecting the parties to further and unconscionable delay. Moreover, the matter has been in court since the year 2004, and it is highly probable that the memory of witnesses have considerably faded. For these reasons I take the view that this Court as a first appellate court shall proceed to re-evaluate and re-assess the record with a view to making its own inferences of fact as is expected of us. I am unprepared to make the drastic holding that the judgment, though long delayed, was thereby a nullity.

21. I agree with FROO Olel, J in his holding in the case of Trundell v EW*K (Minor suing through mother and next friend WK) (Civil Appeal E57 of 2021*) [2023] KEHC 25275 (KLR) (7 November 2023) (Judgment), where he posited as follows as regards to unpleaded issues:

> 54. The Court of Appeal in Magnate Ventures Limited vs. Alliance Media (K) Limited & Others [2015] eKLR had this to say on the same issue: "In Gandy V. Caspar Air Charters LTD [1956] 23 EACA", 139 the former Court of Appeal for Eastern Africa expressed itself as follows on the purpose of pleadings:"...the object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given." And in Galaxy Paints Co. Ltd. V. Falcon Guards LTD. [2000] 2 EA 385, this Court stated that the issues for determination in a suit flowed from the pleadings and that a trial court could only pronounce judgment on the issues arising from the pleadings and that unless pleadings were amended, parties were confined to their pleadings. (See also IEBC & Another V. Stephen Mutinda Mule & Others, *CA No. 219 of 2013*).The exception to the general rule that parties are bound by their pleadings, is expounded in such cases as ODD JOBS V. Mubia [1970] EA 476 and VYAS Industries Ltd. V. Diocese of Meru [1982] KLR 114) arises where the parties raise and address unpleaded issues and leave them to the Court to decide."
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> 55. The same court in Christopher Orina Kenyariri T/A Kenyariri & Associates Advocates vs. Salama Beach Hotel Limited & 3 Others [2017] eKLR reiterated this view in the following terms:"Those therefore were the crisp and only issues before the learned judge. As has been stated time without number, a court will not determine or base its decision on unpleaded issues. However, if it appears from the cause followed at trial that an unpleaded issue has been left to the court to decide, the trial court may validly determine the unpleaded issue. (See Odd Jobs v. Mubea [1970] 476, and Baber Alibhai Mawji v. Sultan Hashim Lalji & Another, *CA No 296 of 2001*)."

22. In spite of 60 days having run out as at the time the Appellant was testifying, he did not raise any issue. He was raising questions of fact, which the court found were not sufficient to displace the solid case before her.

23. Secondly, even if the issue had been raised, there is no question of law relating to conclusion of the case within 60 days. Unlike other time bound legislation, the Small Claims Act requires that the decision be made as is practicable. This question has been dealt by courts and fairly settled. D.S. Majanja, in the case of Lumumba v Rift Gas Limited [2023] KEHC 25998 (KLR) stated that:

> While it is true that the intention of Parliament in codifying the 60-day timeline in the SCCA was to ensure timely disposal of all proceedings before the said court, I find that the said 60-day timeline is not cast in stone and discretion of the court totally shut out as is with the PPAD which provides for the consequence of the failure of the High Court to make the decision within the prescribed timeline. The intent of the PPAD and the consequence for failure to comply with the timelines is set out bearing in mind the fact that procurement is a one-off process.
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> 12.Whereas these timelines are valid, it should not be lost that the SCCA grants the court flexibility to do justice to the parties and the said court has the right to impose any terms

and conditions to ensure that the hearing can proceed within the time limited (see Rutere v Muigai [2023] KEHC 17345 (KLR)). The 60-day timeline in the SCCA is directory and not mandatory as it is not the intention of the SCCA to invalidate any proceedings that violate the statutory timelines. To adopt such a position would undermine the statutory objects and cause injustice to the parties as the case would have to be reheard afresh with attend costs to the parties (see Crown Beverages Limited v MFI Document Solutions Limited [2023] KEHC 58 KLR)].

24. The court must consider the provisions of section 34 within its broader context, guided by key principles such as ensuring that all proceedings are resolved promptly and in the most cost-effective manner possible. There is no useful purpose to be served if the parties were to be retuned to do the case afresh, when the results are not in dispute. In the case of Crown Beverages Limited v MFI Document Solutions Limited [2023] KEHC 58 (KLR), where DS Majanja J Posited as doth:

> 9. Although section 34(2) of the SCCA is couched in mandatory terms, the court must look at the context of the provision in light of the guiding principles which include, inter alia, the timely disposal of all proceedings before the court using the least expensive method. The provision as to delivery of judgment is meant to be directory and not mandatory as it is not the intention of the SCCA to invalidate any proceedings that violate the statutory timelines. To adopt such a position would undermine the statutory objects and cause injustice to the parties as the case would have to be reheard.
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> 10. The issue of breach of timelines for delivery of judgment is not a novel issue and has been dealt with by our courts in reference to order 21 rule 1 of the Civil Procedure Rules which provides that judgments must be delivered within 60 days upon conclusion of the hearing. In Nyagwoka Ogora alias *Kennedy Kemoni Bwogora v Francis Osoro Maiko Civil Appeal No 271 of 2000* (UR) the Court of Appeal observed as follows: The real question is what is the consequence of non-compliance therewith? No doubt that rule is an important one in the expeditious dispensation of justice. And it is made to be obeyed. However, if non-compliance with the rule were to have the effect contended for by the appellant, we think the overall result would be more injustice than justice to the parties. A lot of time and resources spent in litigation would come to naught if judgments delivered after the expiry of 42 days were to be voided or declared void ipso facto. The rule cannot and in our view could not have been intended to deprive a trial judge of his jurisdiction to write and pronounce judgment in a case he has heard. In our considered view, while non-compliance with the rule and particularly persistent non-compliance or inordinate delay in compliance should call for censure of the judicial officer concerned from those in-charge of judicial administration, it should not be a ground for vitiating a duly delivered judgment. Being of that persuasion we would reject ground 1 of appeal.
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> 11. There may be instances where the delay is inordinate and such delay prejudicial to the parties. In such cases, the court may set aside the judgment as was held by the Court of Appeal in Manchester Outfitters Services Limited and Another v Standard Chartered Financial Services Limited and Another [2002] eKLR. The appellant does not contend that the failure to deliver the judgment within the stipulated timelines was prejudicial or that the delay was inordinate. I therefore reject the appellant's contention that the judgment is null and void.

25. The objective of the *Small Claims Court Act* is to ensure the swift resolution of disputes while safeguarding the right to be heard. Striking a balance between these two goals may, in some instances, lead to exceeding the 60-day timeline. This happened in this case where parties were fully heard. I had hitherto addressed the question of the sixty day time lines in the case of Biosystems Consultants v

Nyali Links Arcade (Civil Appeal E185 of 2023) [2023] KEHC 21068 (KLR) (31 July 2023) (Ruling) Neutral citation: [2023] KEHC 21068 (KLR):

54. I don't think the legislative intent of section 34 of the Small Claims Act is to impose unnecessary bottlenecks. Even tax statutes have timelines for paying or declaring taxes. It is never that non-payment makes those taxes void. There should be consequences. In the *Income Tax Act*, the non-compliance with deadlines does not vitiate the taxes. It attracts known penalties. What are the consequences under section 34 of the Small Claims Court?

55. A court is not entitled to impose a penalty that was not hitherto anticipated. The parties must know, a priori, the consequences of their actions. Any act, especially one promoting certain aspects of *the constitution* cannot be read mechanically. The Supreme Court in the case of Munya v Kithinji & 2 others (Petition 2B of 2014) [2014] KESC 38 (KLR) (30 May 2014) (Judgment), opined that a purposive interpretation should be given to statutes so as to reveal the intention of the statute. The court observed as follows:

> 167.In Pepper v. Hart Para 1992. 3 WLR, Lord Griffiths observed that the "purposive approach to legislative interpretation" has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:
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> "The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."

56. The purpose of the *Small Claims Court Act* is to facilitate expeditious disposal of the disputes while at the same time respecting the right to be heard. The net result is that balancing the two may result at times to overshooting the 60 days. The 60 days do not have penal consequences for good reason. They are aspirational. This is part of having access to justice over amounts that need not be in the normal system. Allowing the application will open flood gates that will eventually defeat the purpose of the Act.

57. It is my take that the non- compliance goes to the court's performance and is answerable internally. It cannot affect parties who are in court and ready to be heard. I have seen defendants use various gimmicks to have matters adjourned and thereafter turn around to say, 60 days are over. The parties have wasted a full month arguing in this court and with preliminary objections that are much ado about nothing.

26. It appears that the words of the Supreme Court in the Munya v Kithinji & 2 others (Petition 2B of 2014) [supra] fell on deaf ears. The court stated as follows:

> 116A. The lesson to be drawn from an endeavor on the part of Judges to appreciate the legislator's perspective, has been remarked in comparative judicial practice. We would cite, in this regard, the statement of Lord Simon, in Maunsell v. Olins PARA 1975. AC 373:
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> > " The first task of a court of construction is to put itself in the shoes of the draftsman – to consider what knowledge he had and, importantly, what statutory objective he had ...being thus placed...the court proceeds to ascertain the meaning of the statutory language."

27. There is nothing in the Act to require punishment for the court that has endevoured to complete a judgment within 60 days but overshoots by a few weeks. In the circumstances, I find no merit in the appeal. It is accordingly dismissed.

28. The Supreme Court has set forth guiding principles applicable in the exercise of discretion in respect to costs 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.

29. Since costs follow the event, the Respondent is entitled to costs of the appeal. A sum of Ksh 70,000/= will be right and just.

Determination

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

a. The appeal lacks merit and is according dismissed with costs of Ksh. 70,000/= to the Respondent.

b. Costs be paid within 45 days, in default, execution do issue.

c. The file is closed.

DELIVERED, DATED and SIGNED at NYERI on this 21st day of JULY, 2025.

Judgment delivered through Microsoft Teams Online Platform. .

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for the Appellant

Mr. Nyanchwa for the Respondent

Court Assistant – Michael