Stima Sacco Society Limited v Ngugi & 10 others (Civil Appeal E1406 of 2023) [2025] KEHC 10996 (KLR) (Civ) (22 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10996 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1406 OF 2023

DKN MAGARE, J

JULY 22, 2025

BETWEEN

STIMA SACCO SOCIETY LIMITED ..... APPELLANT

AND

DAVID KAMAU NGUGI ..... 1ST RESPONDENT

PATRICK NGULUI ..... 2ND RESPONDENT

MAUREEN W MACHARIA ..... 3RD RESPONDENT

PETER MWANGI MUBIA ..... 4TH RESPONDENT

JOAN GACHUIRI ..... 5TH RESPONDENT

ROSE WAIRIMU KAMAU ..... 6TH RESPONDENT

MAGDALINE W KARIUKI ..... 7TH RESPONDENT

EPHANTUS KARANJA ..... 8TH RESPONDENT

MIRIAM W KARIUKI ..... 9TH RESPONDENT

ROSE GATIGI ..... 10TH RESPONDENT

GEORGE OPIYO ..... 11TH RESPONDENT

(The appeal against the ruling and order in the Co-operatives Tribunal Cause No. 39 of 2011 – Stima Sacco Society Limited vs David Kamau Ngugi & 10 Others, issued on 15th November 2023 dismissing the Appellant's application dated 3rd July 2023 and the entire suit for want of prosecution)

JUDGMENT

1. This is an appeal from the ruling that was issued on 15.11.2023 dismissing the Appellant's application dated 3rd July, 2023 and the entire suit for want of prosecution in the Co-operatives Tribunal Cause No. 39 of 2011 – Stima Sacco Society Limited vs David Kamau Ngugi & 10 Others. Aggrieved by the decision, the Appellant filed a Memorandum of Appeal dated 15.12.2023. The memorandum contains thirteen grounds, many of which are marked by verbosity, repetition, and rhetorical excess, offering little in terms of substantive legal argument. The filing of a memorandum of appeal is governed by Order 42 Rule 1 of the Civil Procedure Rules, which provides as follows:

> "(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
>
> (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

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

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

3. The court frowns upon the repetitiveness of grounds of appeal, as such drafting tends to obscure the real issues in dispute and hinders the court's clarity to efficiently identify and resolve the core matters requiring determination. The appellant purported to consolidate all issues, when in reality there is nobly one issue. In the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the court of appeal observed that : -

> "Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports*

Authority Act ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:

"The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

4. There is only one issue disclosed in the appeal, that is, whether, the court erred in dismissing both the application and the suit. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time.

5. The suit was filed on 1.02.2011, against the Respondents. It claimed that the 1st Respondent took out a loan on 27.08.2008 for Ksh. 1,580,000/=. The loan was approved on 10.09.2008 and deposited into his account. A deposit of Ksh. 48,874/= was made to cover October 2008. Certain other amounts were paid leaving Ksh. 1,461,126/=. The 2nd to 6th and 8th to 11th defendants filed defence on 11.03.2011. The 3rd Respondent also filed her separate defence.

6. An application was filed on 29.11.2011, seeking service by substituted service. The application was allowed ex parte. Later, a request for judgment was later made on 21.02.2012 against the 1st and 7th respondents. The court issued a notice of dismissal on 3.03.2021 for 22.4.2021. It was extended to 29.07.2021 for nonappearance. On the said date, the Appellant's advocate sought to get pleadings from the new advocates. The appellant was granted 30 days to have their house in order, that is, get pleadings from previous advocates. It is not lost that they had come on record on 23.01.2020 but had not done anything serious one year and 6 months later. Pretrial was fixed for 16.09.2021.

7. Pretrial did not proceed despite the respondents being served. It was mentioned on 12.11.2021 but later adjourned due to the absence of all parties. Subsequent mentions occurred on 21.03.2022 and 13.04.2022, where the claimant was granted a final adjournment to comply. Despite this, on 13.03.2022, the court again issued a final compliance opportunity and fixed the matter for 08.06.2022. The matter was later certified for hearing in Eldoret on 06.09.2022. On that date, Mr. Wahome sought more time to file documents. A compliance mention took place on 31.08.2022, and the hearing date of 06.09.2022 was retained. However, the matter was taken out and listed for mention on 10.11.2022.

8. On 10.11.2022, the court was informed that the 4th Respondent had died. The Respondents prayed for a hearing date. The matter was fixed from hearing on 09.03.2022. The court made the following orders:

> Parties to proceed to the close of their case on the next hearing date. Parties to note the urgency of the matter and ensure that the witness statement and documents.

9. In the next hearing date, only the Respondents' advocate attended court. The court ordered that parties were to avail witnesses or close their cases on the next hearing date. Hearing was placed on 05.07.2023 in Nairobi. Nothing happened until 15.11.2023. On the said date the Appellant indicated that they were not ready to proceed. They had filed an application dated 03.07.2023. They had not served the 1st Respondent.

10. The court directed that the Appellant was aware that they were to proceed for hearing. The court declined to hear the matter and directed that the matter proceeds for hearing as directed on 10.11.2022. The advocate then stated that he required time to seek instructions. He was seeking further

instructions. He wished to close his case. Later at 3.15 pm, the matter was deemed closed. The same was dismissed with each party bearing their own costs.

11. This resulted in the appeal. I will not set out the grounds herein as they are a waste of judicial time to set out 13 repetitive grounds of appeal.

12. The appellant filed an application dated 7.02.2025, seeking the following orders:

> That the Honourable Court be pleased to grant leave to the Appellant/Applicant to serve the pleadings and court documents in this matter on the 1st and 8th Respondents hereof by way of substituted service via newspaper advertisement.

13. The said application was not served. Further, the 4th and 5th Respondents died and were not substituted. The appeal against them is thus not useful herein and are accordingly dismissed. The 1st and 8th Respondents did not participate in this appeal.

Submissions

The appellant submitted that the cardinal rule of the right to be heard and procedural fairness was violated when the tribunal reached its decision without hearing the Appellant. They associated themselves fully with the position in Justice Amraphael Mbogholi Msagha v Chief Justice & 7 others [2006] eKLR where it was held as follows:

> " The Court observes firstly that the rules of natural justice "audi alteram partem" hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialization of the globe during the hey-days of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision...It is paramount at this juncture that this court establishes the ingredients.

14. They also rely on the case of Egal Mohamed Osman v Inspector General of Police & 3 Others [2015] eKLR, where the Court at the time referred to The Management Committee of Makondo Primary School and Another v Uganda National Examination Board, HC Civil Misc. Application No.18 of 2010, where the Ugandan Supreme Court stated as follows regarding the rules of natural justice:

> " It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing."

15. The Appellant contends that the failure to file the application under a certificate of urgency is a procedural technicality that should not defeat substantive justice. It is submitted that the law does not mandatorily require applications to be filed under a certificate of urgency; rather, this is a practice

developed to facilitate the expedited handling of certain matters. The Appellant urges this Court to consider the principles set out in the case of Shabbir Ali Jusab v Annar Osman & Attorney General [2013], wherein the Court addressed the tension between procedural technicalities and substantive justice. In that case, reference was made to the Supreme Court's decision in Raila Odinga *v Independent Electoral and Boundaries Commission & 4 Others [Petition No. 5 of 2013*], where the Court held that:

> In arriving at this decision, this Court is guided by rules and regulations and urges all parties to follow the same since they guide the court and the parties in obtaining justice. However, the Court is alive to the provisions of Article 159 (2) (d) of *the Constitution* which requires the Court to administer justice without undue regard to procedural technicalities. The essence of that provision is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the Court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine Sthe best course. This is one of the cases where the Court disregards procedural technicalities in favour of substantive justice having regard to all relevant circumstances obtaining in this case."

16. The Appellant submitted that, in the interests of justice and to uphold the right to a fair hearing and determination of the matter, the Court ought to have granted the orders for substituted service as prayed. It was contended that such orders would have lawfully dispensed with the requirement of personal service upon a named defendant who could not be found, in accordance with the applicable rules of service. It was their prayer that the appeal be allowed.

17. The 2nd, 3rd, 7th and 11th Respondents filed submissions through M/s Saluny Advocates LLP. They submitted that the appellant presented inconsistent information to the tribunal. They submitted that an application for service by substitution was allowed in 2011. They submitted that the appellant was negligent in handling service. They stated that the application dated 03.07.2023 was filed two days before the hearing. The respondents indicated that there is differentiation between procedural technicalities and negligence. Reliance was placed in the case of Malika v Registrar of Lands [2024] KEHC 374 (KLR), where the court stated as follows:

In the case of James Mangeli Musoo v Ezeetec Limited [2014] eKLR it was held that:

> "A technicality, to me is a provision of law or procedure that inhibits or limits the direction of pleadings, proceedings and even decisions on court matters. Undue Regard to technicalities therefore means that the court should deal and direct itself without undue consideration of any laws, rules and procedures that are technical and or procedural in nature. It does not, from the onset or in any way, oust technicalities. It only emphasizes a situation where undue regard to these should not be had. This is more so where undue regard to technicalities would inhibit a just hearing, determination or conclusion of the issues in dispute."

18. In this regard, the said respondents stated that negligence was defined in the case of Njeru (Suing as the personal representative of the Estate of Kennedy Mukundi Njiru) v Machikine Holdings Limited [2023] KEHC 585 (KLR) as:

> Negligence was defined in the case of Blyth v Birmingham Waterworks Company (1856) 11 Ex Ch 781 (Baron Alderson) as the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The

> defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done" (See Salmond and Heuston on the Law of Torts 9th Edition). The elements of the tort of negligence which must be proved for an action in negligence to succeed are (a) there was a duty of care owed to him or her, (b) the duty has been breached, and (c) as a result of that breach he or she has suffered loss and damage (See Donoghue v. Stevenson [1932] A.C. 562.)

19. They stated that, the appellant failed to comply with timelines. Reliance was placed in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR, stating as follows:

> I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.

20. They relied on the case of Susan Wavinya Mutavi v Isaac Njoroge & another [2020] KEELC 8 (KLR), where the court, B M Eboso J, stated as follows:

> Over the years, Kenya's superior courts and courts in the Commonwealth have developed principles which guide the exercise of jurisdiction to re-open a case and receive additional evidence in a civil trial court. First, the jurisdiction is a discretionary one and is to be exercised judiciously. In exercising that discretion, the court is duty-bound to ensure that the proposed re-opening of a part's case does not embarrass or prejudice the opposite party.

21. The 2nd, 3rd, 7th and 11th respondents also relied on the case of Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 others [2015] KECA 284 (KLR), where the Court of Appeal [Makhandia, Ouko & M'Inoti, JJ.A.] stated as follows;

> "Justice shall not be delayed" is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the *Civil Procedure Act* are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a license to parties to ignore or contravene the law and rules of procedure. We agree, with respect, with the learned Judge's conclusion that the suit in the High Court was not properly handled by the appellant's advocate. The court cannot be invited to turn a blind eye in the face of such inordinate delay and in the absence of sufficient explanation. Likewise it cannot be

fashionable for parties to blame their advocate and disclaim that the mistakes made by their advocates, who they have themselves appointed cannot be visited upon them.

22. Reliance was also placed in the case of Duale Maryan Gurre v Aminal Mohamed Mahamood & another [2014] KEHC 7646 (KLR), where CM Kariuki J, posited as follows:

> I have considered the material placed before the court and the reason offered by the plaintiff for the delay in prosecuting the suit and I am not persuaded I should exercise my discretion in favour of the plaintiff. Any person who initiates a litigation against another has a duty and is under an obligation to ensure that the suit he has brought is expeditiously processed and prosecuted in the court by ensuring the necessary preparation and follow up is done to ensure there are no unnecessary delays. The overriding objective of rendering justice expeditiously as envisaged under sections 1A and 1B *Civil Procedure Act* is anchored on the parties and their legal advisors playing their supportive roles in the chain of justice delivery and as the saying goes justice cuts both ways in every matter.

23. They therefore sought that the appeal be dismissed for lack of merit. The other respondents did not file submissions.

Analysis

24. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. This was aptly stated in the case of Peters vs Sunday Post Limited [1958] EA 424 where, the Court of Appeal therein rendered itself as follows:-

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

25. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

26. In the case where there are no evidence taken, the duty of the appellate court is the same as the lower court. 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 Kiage JA stated as doth: -

> " I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; Selle Vs Associated Motor Boat Co [1968] EA

123). I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge."

27. In this matter, the suit was filed way back in 2011. The court gave a last chance to give evidence twice. Instead of giving evidence, they filed an application to serve by substituted service. This was despite the fact that the same tribunal had given leave to serve by substituted service in 2011. The application purported to be used to seek an adjournment was filed 2 days before the hearing and no date taken. There were no unserved summons since summons expired on 31.03.2011 when they were not served.

28. After declining an application for adjournment, nothing could have been harder than put the witness in the dock. No witness was placed in the dock. The court had given orders that the matter do proceed until close of the case. The order remained in force and was not reviewed. The tribunal was faced with a recalcitrant claimant. The right to be heard is sacrosanct. The right is a two-edged sword. The claimant was given an opportunity to be heard but did not take it. In Harakam Enterprises Ltd & another v Ochieng *& another (Suing as the Legal Representatives of the Estate of the Late Sarah Awuor Odhiambo) (Civil Appeal 12 of 2021*) [2023] KEHC 18917 (KLR) (13 June 2023) (Ruling), SM mohochi, J, posited as follows:

In this case, the Applicant's case is that he was heard on the notice to show cause and seeks to regurgitate "showing cause" as a basis of the Application. The Decision by the Learned Judge Kizito is not faulted and no material has been placed to show case if the decision was not judicious or was informed by mistake.

20. However, in Union Insurance Co of Kenya Ltd v Ramzan Abdul Dhanji Civil Application No. Nairobi 179 of 1998 the Court of Appeal held that: -"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly, the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilize it."

29. Before the applicant was given an opportunity to be heard, the tribunal had on its own motion issued notices to show cause to the parties. The tribunal indulged them without a number until they stood firm and gave a hearing date. The appellant did not want to be heard or did not show signs that he was interested in being heard.

30. In the case of Simon Ndungu & another v Kangathia Kiuna & another [2021] eKLR, L. Gacheru, J posited as follows:

> Justice is a double-edged sword; the Applicant had an opportunity to defend his suit but thwarted it. He has been an indolent party and equity aids a vigilant party not an indolent one.

31. Therefore, parties have the obligation and duty to assist the court to adjudicate on the matters brought before it expeditiously as was held in the case of Gideon Sitelu Konchella vs Daima Bank Limited (2013)eKLR where the court while citing the case of Mobile Kitale Service Station v Mobil Oil Kenya Limited & another [2004] eKLR, held that:-

> I must say that the Courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/or negligence of the plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendant. The consequences must be placed on their shoulders.

32. The net effect is that I do not see where the court erred in dismissing the suit. This was proper exercise of discretion. In the case of Mbogo and Another vs. Shah [1968] EA 93 the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

33. In the circumstances the appeal lacks merit. It is accordingly dismissed. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

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

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

34. 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.

35. 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.

36. In the circumstances the appeal is dismissed with costs as follows:

    a. Ksh 65,000/= to the 2nd, 3rd , 7th & 11th Respondents,

    b. Ksh 65,000/= to the 9th Respondent

    c. Ksh 65,000/= to 9th Respondent

    d. Other parties to bear their own costs

Determination

37. The upshot of the foregoing is that I make the following orders:

    a. The appeal herein lacks merit and is consequently dismissed with costs as follows:

    b. Ksh 65,000/= to the 2nd, 3rd , 7th & 11th Respondents

    c. Ksh 65,000/= to the 9th Respondent

    d. Ksh 65,000/= to 9th Respondent

    e. Other parties to bear their own costs

    f. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 22ND DAY OF JULY, 2025.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Mutua for the Appellant

Ms. Mahugu for the 9th Respondent

Ms. Kinanga for the 2nd, 3rd, 7th and 11th Respondents

Court Assistant – Michael