Atancha v Lekaram (Civil Appeal E1306 of 2023)
[2025] KEHC 13202 (KLR) (Civ) (18 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13202 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1306 OF 2023

DKN MAGARE, J

SEPTEMBER 18, 2025

BETWEEN

BERNARD TONNY ATANCHA .... APPELLANT

AND

EZEKIEL LETEPES LEKARAM .... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. A.N. Makau (PM) in Nairobi CMCC No. 4045 of 2017 delivered on 26.01.2021.
2. The Appellant filed an argumentative 10 paragraph memorandum of appeal dated 29.11.2023. The impugned decision was made on 26.01.2021. There is an indication that leave was granted on 15.11.2023 by D.A.S. Majanja. However, a copy has not been annexed to the record. Neither has the question been raised. It is unnecessary to set out the grounds of appeal as shall be noted shortly.

Pleadings

3. The Respondent instituted suit on 08.06.2017 against the Appellant, asserting that he was, and still remains, the registered owner of motor vehicle registration number KBR 201F, Toyota Land Cruiser. It was pleaded that on or about 14.12.2014, the Appellant approached the Respondent with the intention of purchasing the said vehicle at an agreed consideration of Ksh. 4,000,000/=, on an “as-is-where-is” basis.
4. The terms of the agreement required the Appellant to settle the purchase price within ninety (90) days. However, no payment was made within the stipulated period, and it was not until July 2016 that the Appellant remitted a deposit of Ksh. 800,000/=. The Respondent therefore claimed the outstanding balance of Ksh. 3,200,000/=, together with interest at the rate of 14%.

5. In the alternative, the Respondent sought an order for the release of the said motor vehicle, together with mesne profits quantified at Ksh. 1,478,760/=, which he claimed continued to accrue.

6. The Appellant filed a defence dated 4.09.2017 denying the claim. They stated that they agreed to purchase the said motor vehicle for a sum of Ksh.2,750,000/= subject to the Respondent undertaking repairs. The Appellant undertook the agreed repairs at a cost of Ksh. 653,000/=. The appellant in the meantime made payment of Ksh. 800,000/=.

7. It was their pleading that upon repairs the respondent disowned the agreement. They stated that the appellant's spouse, PW2 and a non-party published defamatory statements concerning the subject motor vehicle. The relevance of the said statement is not immediately discernible and its purpose can only be to obfuscate and mire issues.

    8. The Appellant averred that they had made payments amounting to Ksh. 1,653,000/=, being a sum of Ksh. 853,000/= expended on repairs and a deposit of Ksh. 800,000/=. However, the Appellant was silent on the dates when these payments and repairs were undertaken. It was their further contention that they had rescinded the agreement, subject to a refund of Ksh. 1,653,000/= and collection of the vehicle. It was, however, not clear how the issue of wear and tear of the vehicle from 2014 to date was to be addressed.

    9. It is crucial to note that there is no counterclaim or set off pleaded. Therefore, the only issue for determination was whether the Respondent proved their case to the required standards.

Evidence

10. The Respondent testified that he purchased the subject motor vehicle in 2012 from Smart Car Ltd. The vehicle, manufactured in 2004, was thereafter in use for about two years. He stated that the agreement with the Appellant was oral and concluded in 2014, and that the issues later raised by the defence only surfaced in December 2016, long after the agreement. Out of the agreed purchase price of Ksh. 4,000,000/=, he maintained that he had only received Ksh. 800,000/=, while retaining the original logbook. On re-examination, he clarified that the said sum was paid in 2016 to his spouse, as he was then away in the Democratic Republic of Congo.

11. The Respondent's spouse corroborated this account. She confirmed having signed a statement indicating that the vehicle was new in 2014 and testified that the purchase had taken place at Kirichwa Heights. She further stated that in 2013, the vehicle was mostly parked as the Respondent was frequently out of the country. A demand for payment was later addressed to her after she questioned the Appellant about his continued use of the vehicle. She reiterated that the agreed purchase price was Ksh. 4,000,000/=.

12. A former employee of the Respondent and the driver of the subject motor vehicle testified that he worked for the Respondent until 2016, when he left employment to start his business. He knew the Appellant who was a neighbour. He bought the vehicle but when it was demanded, he went into hiding. He could not park the vehicle in the same compound. He could see the vehicle in various places and inform the Respondent. He knew the Respondent was pursuing the said vehicle.

13. He stated that during that period he frequently saw the vehicle in question along Ngong Road and Mombasa Road with the Appellant. His testimony, though limited, tended to show that the vehicle remained in use during the material period. His evidence was cogent and unshaken. It was not rebutted.

14. On his part, the Appellant testified as DW1. He adopted his written statement and produced supporting documents. He confirmed that he had entered into an agreement with the Respondent

for the purchase of the motor vehicle but insisted that the agreed purchase price was Ksh. 2,750,000/=, not Ksh. 4,000,000/=. He admitted having paid Ksh. 800,000/= and contended that he incurred additional expenses in repairing the vehicle.

15. He stated that although the agreement was made in 2014, payment of Ksh. 800,000/= was effected in 2016. He explained that the vehicle lacked a sunroof at the time of purchase and, upon procuring one, the vehicle had to be kept in the garage. According to him, the parties agreed that the cost of repairs would be deducted from the balance of the purchase price. He further claimed to have incurred storage charges but acknowledged that the invoice he relied upon did not bear his name.

16. He conceded in a rather subtle way that he was hiding the subject vehicle in garages. From cross examination he came out as a dishonest person who bought a vehicle and then took it into hiding for two years before paying. His explanations were rather pedestrian. Why will anyone buy a vehicle to keep it in garages?

Submissions

17. The Respondent filed submissions dated 24.1.2025. It was submitted that equity would not allow a wrong doer to benefit from a wrong. The Appellant had never paid the purchase price to date. It was also submitted that the Appellant had come to equity with unclean hands and the lower court was correct in its finding that the purchase price was Ksh. 4,000,000/=.

18. It was further submitted for the Respondent that the motor vehicle was sold on as is basis and there was no agreement as to the repair costs. The Respondent did not cite any authorities.

19. I have not had sight of the Appellant's submissions.

Analysis

20. 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. 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."

21. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the Judges in their usual gusto, held as follows;-

> " .. 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 re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

22. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for

themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

23. Having considered the evidence tendered by both parties, the central issues for determination are whether there was a binding agreement for the sale of the motor vehicle, what the agreed purchase price was, whether payment was made in full or in part, and whether the Appellant's claim for deductions on account of repairs and storage is sustainable.

24. The first one is the validity of the appellant's claim while the second one was the validity of the respondent's claim. The court will start with the appellant's claim. The claim is for reckoning of the repairs. There is no evidence of such an agreement to deduct repairs. The appellant was given a vehicle and only paid when PW2 queried him, 2 years later. The claims for repairs are in any case bogus, as most constitute storage charges by an unknown entity. There is a more fundamental one, the claims are not anchored in a counterclaim.

25. It is not disputed that there was an agreement between the parties for the sale of the motor vehicle. Both the Respondent and the Appellant acknowledged the same. The point of divergence lies in the purchase price. The Respondent maintained that the vehicle was sold for Ksh.4,000,000/=, whereas the Appellant insisted that the agreed price was Ksh. 2,750,000/=. On this issue, the Respondent's evidence was consistent with that of his spouse, who confirmed the figure of Ksh. 4,000,000/=. The Appellant, while asserting a lower figure, produced no contemporaneous documentation to support his version. The burden of proof rested on him to establish the lesser sum he alleged, but he failed to discharge that burden.

26. On the question of payment, it is admitted by both sides that only Ksh. 800,000/= was made. The Respondent stated that the payment was effected in 2016 through his spouse, while the Appellant also acknowledged that the sum was paid in 2016, two years after the alleged agreement. The delay in payment, though unusual, does not negate the existence of the agreement; it only goes to show that performance was incomplete.

27. The Appellant further contended that he incurred expenses on repairs and storage and that these were to be deducted from the balance of the purchase price. However, he produced no agreement to that effect. While he referred to an invoice for storage, he conceded that the document did not bear his name. In the absence of credible evidence linking the alleged expenses to the contract of sale, this Court is unable to uphold that claim.

28. Another important factor is the Respondent's retention of the original logbook. Ordinarily, transfer of ownership in a motor vehicle is perfected by the transfer of the logbook. The Respondent's continued possession of this document supports his assertion that full consideration was never received.

29. Taken as a whole, the Respondent's evidence was consistent, corroborated, and supported by surrounding circumstances, while the Appellant's version was unsubstantiated and internally contradictory. I therefore, find that the parties agreed on a purchase price of Ksh. 4,000,000/=, of which only Ksh. 800,000/= was paid in 2016, 2 years after the agreement. The Appellant's claim of deductions for repairs and storage is unsupported and it is not only spurious but intended to steal the Respondent's vehicle and walk away with the same for a song. A man who could not afford to pay the purchase price for two years cannot purport to have incurred the alleged expenses. This line of defence was rightly rejected.

30. More importantly, the appellant did not seek, by way of counter claim, to assert that the purchase price was Ksh 2,750,000/=. He is bound to plead his case fully. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A.C. Mrima stated as doth: -

> “
>
> “ 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
>
> “.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded......
>
> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”
>
> In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled “The Present Importance of Pleadings” published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -
>
> As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings ....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

31. With respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

> "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings......'"

32. Further, the claim for repairs is in the nature of special damages, which must not only be specifically pleaded but also strictly proved. Such expenses must be shown to relate to the condition of the vehicle prior to the sale. Merely throwing figures before the court, without cogent evidence, cannot suffice. In the case of David Bagine Vs Martin Bundi [1997] eKLR, the Court of Appeal stated as follows: -

> "It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
>
> "Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

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

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

33. A party must by pleadings invite the court to make findings. Just pleading without a counterclaim and set off remains just that, mere pleadings. The evidence of repairs have nothing to do with the agreement for sale of the motor vehicle. This is informed by three persons who dealt with the vehicle. They all testified as PW1-PW3.

34. DW1's evidence shaky. He admitted that there was an agreement as far back as 2014, yet he did not pay even a dime until confronted by PW2. It was only then that he introduced the story of repair costs. If indeed he was genuine that the purchase price was Ksh. 2,750,000/=, he ought to have paid the said sum in full and thereafter demanded reimbursement for repairs. In his pleadings, he had maintained that the duty to repair lay with the Respondent. He cannot now depart from his pleadings and attempt to shift that obligation to himself. The Court of Appeal [GBM Kariuki, PO Kiage & K M'inoti, JJA] in Independent Electoral and Boundaries Commission & another v Mule & 3 others [2014] KECA 890 (KLR), emphasized that a party is bound by their pleadings and cannot be permitted to depart from them at will. The court stated as follows:

> As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well- intentioned, went well beyond the grounds raised by the Petitioners and answered by the Respondents before her and thereby determined the Petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the Appeal succeeds on that score.

35. The cost of repairs is in the nature of sunk costs, which properly belong to the person in possession and use of the vehicle. The Respondent cannot be responsible for repairs post the sale of the vehicle including fuel and storage. It simply does not form part of a contract for sale. These are consumables and part of what constitutes ownership of a car.

36. This court, like the court below, does not believe the evidence of DW1. The court below saw DW1 in court. She formed an opinion in his believability. This court cannot differ on the observations made by the lower court unless they are not based on any evidence. The appellant appeared to have been engaged in chicanery, duplicity, subterfuge, and skulduggery in avoiding meeting his part of the bargain. He should not have bought a vehicle he clearly could not afford. Regarding interfering with the opinion of the court below, the former East African Court of Appeal addressed this succinctly in the case of Peters vs Sunday Post Limited [1958] EA 424 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..."

37. PW3 was a neutral witness whose testimony remained firm and unshaken under cross-examination. The same applied to the evidence of PW1 and PW2, which was not controverted in any material respect. Having agreed that there was indeed an oral agreement, the only question left for determination is the establishment of its precise terms. In the case of Omar Gorhan v Municipal Council of Malindi (Council Government of Kilifi) v Overlook Management Kenya Ltd [2020] KEHC 6789 (KLR), Nyakundi J, posited as follows:

 The basis of any suit in contract performance or non-performance is as per requirements in Subsection 3 of the Law of contract. Act (Cap 23 of the Laws of Kenya). The appellant was therefore expected to proof on a balance of probabilities the following essential elements to a lease agreement with the respondent:

 (a) An offer.

 (b) An acceptance.

(c) Any consideration.

(d) Any intention to create legal relations.

The essential components of a contract as was observed by Harris JA in Garvey v Richards {2011} JMCA 16 ought to ordinarily reflect the following principles:

"It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence."

And the Supreme Court of United Kingdom in RTS Flexible Systems Ltd v Moikerei Alois Muller GMBH & Co K. G. {2010} UKSC 14:

"The general principles are not in doubt, whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon them, by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precaution to a concluded and legally binding agreement."

38. Parties generally agreed that there was an offer, an acceptance, consideration and an intention to create legal relations. The Appellant has stayed and used the vehicle from 2014 to date. He is not a thief and is otherwise lawfully in possession of the vehicle. The Appellant did not indicate that the Respondent reserved an unpaid seller's lien. The lien was placed on the log book. In effect the goods in the vehicle passed on subject to the seller's lien. Consideration was also agreed. The only difficulty the court had was who to believe.

39. The Appellant did not present himself as a credible witness, particularly with regard to the issue of payment. The surrounding circumstances revealed that he was attempting to shirk responsibility. He was unable to displace the Respondent's and the Respondent's witnesses evidence, which was cogent and consistent. The Appellant's conduct in making part payment almost two years later, ipso facto, depicts a person who is not believable. Indeed, it took a confrontation to compel him to pay merely one-fifth of the purchase price. Lastly, had the Appellant truly believed in his case, he would have filed a counterclaim. Every factor points to a weak and untenable appeal.

40. Before departing it is important to address the question of rescission and repairs. Rescission must be unequivocal. There was no rescission carried and or pleaded. Beautiful submissions cannot be a basis for holding that there was rescission. The court was also not invited by pleadings. On repairs, if the Appellant found the vehicle to require repairs he needed to deal with it long before he used the vehicle for long. The court believed and I hereby do, that the vehicle was sold on as is where is basis. The court cannot let the appellant escape a contract, however bad he thinks it was. In the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] KECA 362 (KLR), the Court of appeal [Tunoi, Shah & Keiwua JJ A] stated as follows:

> A Court of law cannot re-write 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.

There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

As was stated by Shah JA in the case of Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported):

"It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".

41. From the foregoing, I am satisfied that there was a valid oral agreement between the parties for the sale of the subject motor vehicle. The agreed purchase price was Ksh. 4,000,000/=, of which only Ksh. 800,000/= has been paid. The Appellant's defence that the balance was to be offset by alleged repair and storage costs is without evidential foundation and cannot stand.

42. Accordingly, I find and hold that the Respondent had proved his case on a balance of probabilities. Judgment entered in his favour against the Appellant for the balance of the purchase price, being Ksh. 3,200,000/=, together with interest at court rates from the date of filing suit until payment in full is proper. The claim for repairs is unpleaded and untenable.

43. In the end I find no merit in the appeal and is consequently dismissed. I find that the findings by the court below were proper, and the court has no reason to interfere with the same. The next question is who shall bear costs.

44. 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.

45. 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.

46. 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.

47. Given that costs follow the event, the Appellant shall bear costs of Kshs. 165,000/= for the appeal.

Determination

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

    a. The appeal is dismissed for lack of merit with costs of Ksh. 165,000/= to the Respondent.

    b. 30 days stay of execution on costs.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 18TH DAY OF SEPTEMBER, 2025.

KIZITO MAGARE

JUDGE

Represented by:-

Prof. Tom Ojienda & Associates Advocates for the Appellant

Agnes W. Njoroge & Co. Advocates for the Respondent

Court Assistant – Michael