



**Thika Coffee Mills Limited v Muthara (Civil Appeal E269 of 2021)
[2024] KEHC 7004 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7004 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E269 OF 2021
DKN MAGARE, J
JUNE 6, 2024**

BETWEEN

THIKA COFFEE MILLS LIMITED APPELLANT

AND

ROBERT NJOKA MUTHARA RESPONDENT

*(Being an appeal from the decision of the Hon. D. O. Mbeja (Mr.),
PM, in Nairobi CMCC No. 6873 of 2013 delivered on 7th May, 2021)*

JUDGMENT

1. This is an appeal from the decision of Hon. D. O. Mbeja in Nairobi CMCC 6873 of 2013 delivered on 7/5/2021. The Appellant was the defendant. The Appellant filed a Memorandum of Appeal with 16 grounds and 3 prayers.
2. The Memorandum of Appeal is a classic unconcise memorandum which is argumentative, prolixious and is an eye sore. This is contrary to 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.”



3. The court of Appeal had this to say in regard to rule 86 of the Court of Appeal rules (which is *pari materia* with order 42 Rule 1) 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...”

4. Further in *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.”

5. 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.

6. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 where 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 it 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.”

7. The duty of the first appellate Court was discussed 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 law looks in their usual gusto, held by 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.”

8. In the case of *Peters vs Sunday Post Limited* [1958] EA 424, court 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...”

9. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya -vs- Republic* [1957] EA 336 is as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

pleadings

10. The suit was filed in the Lower Court on 1/11/2013 vide a *Plaint* dated the same day. The Respondent was a customer delivering coffee for milling, *Grower B.D No. 0001 Mbiriai Farm*. He stated that summons were received in *Embu Succession Cause No. 315 of 2010* showing production sheet and analysis of accounts.
11. They stated that the release of documents to *Grace Karau Njoka* was in breach of duty of care, legal and contractual duty. They stated that the said disclosure was illegal. The application related to proceeds in respect of the estate of the late *Josphat Njoka Mbiriai* annexed thereto.
12. The said proceeds were found to be part of the proceedings of the said estate by hon Justice Hon. *Ong’udi J*. The Applicants in that matter were administrators. The Respondent also had a grant for the same estate for which he used to switch the numbers from his father to himself. The Applicants were his mother and step mothers.



13. The act of giving documents to the widows, who included his own biological mother, to use in court is the subject of this Appeal. The widows position was that the account belonged to their husband the late, Josphat Njoka Mbiriai (deceased). The widows were vindicated in the high court. This resulted in the matter, which is essentially an Appeal from the high court to the magistrate court, save only that roles have been reversed.
14. The Appellant stated that the Respondent was not the owner of the property of Mbiriai Farm. It was the Respondent's brothers who collected coffee and supplied to the Appellant under a license from coffee board of Kenya. The brothers were Fredrick Nyamu Njoka and John Nderi Njoka who delivered coffee, who booked a movement permit with Coffee Board of Kenya.
15. The Respondent was said to be intermeddling with the estate of the deceased. The Respondent shameless did not deny these allegations but came up with a cock and bull story that he was a partner to his father. The evidence in court was that the Appellant did not receive even an ounce of coffee from the Respondent. It was also evident, that the Respondent did not have a single coffee tree in his name in any place in the cosmos. Like Okonkwo's father, Unoko, before him, he harvested where he never sowed but still wanted to sit in a council of coffee growers.
16. The bottom line from the said admissions is that the account belonged to the estate of the late, Josphat Njoka Mbiriai (deceased). There is a binding decision of this court on the ownership. However, the court below found it necessary to overturn the decision of the high court and find in favour of the Respondent. The Appellant further stated that suit is in breach of requirements of Article 165(3)(b) of *the constitution*. The said article provides as follows: -

Subject to clause (5), the High Court shall have— (a) unlimited original jurisdiction in criminal and civil matters; (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
17. The administrators are said that letters were issued and as a result Mbiriai farm was changed to the administrators.
18. The Respondent had been sued for intermeddling. The report was given to the true owners. There was a change effected from Robert Njoka to Joyce Wanjuki Njoka, Margaret Kairu Njoka, Grace Karau Njoka and Teresia Gaturi Njoka. These were the widows of the late, Josphat Njoka Mbiriai (deceased). One of them was the Respondent's biological matter.
19. It was shown that the Coffee Board of Kenya approved the transfer on 9/11/2011 on application of Duncan Muyodi & Co. Advocates to the widows as per grant. The Coffee Board reviewed the license for the said farm to the Respondent. It is noted that the parcel of land upon which the coffee is said to be grown was in the name of the late Josphat Njoka Mbiriai (deceased). It is land parcel number Gaturi/Nembure/268. The change of BD-0001 was effected after statements between 1998-2002 were to be sent to the Board and effected by the marketing agents, who are the Appellants in this case
20. This is a sad state of events. It is noted that there has never been a documented cure for greed. The Respondent was not satisfied with defrauding his family. He turns round and blames the Appellant for the fortunate events that stopped a grand larceny form the father's estate. It reminded of the words of the court of Appeal in Richard K. Bunei & 8 others t/a Geo-Estate Development Services v Lorien



Ranching Company Limited & 799 others (being sued on behalf of themselves and on behalf of alleged 795 Members) [2017] eKLR where they stated;

“the startling decree of misuse of the judicial process in the pursuit of an insatiable greed and varice that stops at nothing to achieve its ends, including subverting the legal process”.

21. It is in this state of affairs that the learned magistrate proceeded and sat on Appeal from the decision of the High Court in Embu HC.P&A 315 of 2010. The court had dealt with the question of intermeddling of the estate of the owner of Mbiriai Farm. The Respondent fraudulently converted his father’s license to himself. This was contrary to section 45 of the *Law of Succession Act*.
 - (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 - (2) Any person who contravenes the provisions of this section shall- (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.
22. The Respondent’s was not to be awarded money for the grand larceny but to find a very nice corner in Kamiti maximum security prison and join the Mulot boys in doing what they do best. I decry the tendency of the courts to raise purported rights to fetish and as a result reward wrong doers and punish the righteous. Of what right did the Respondent have after stealing from his father’s estate. Unlike the prodigal son who repented the Respondent wanted more from innocent parties who apparently obeyed summons from the high court.
23. The suit is based on summons received in a court of law. Whatever transpired therein is absolutely privileged. The sister, who produced the document is the only one who knows the source of those documents. She was entitled to those documents as they contained the proceeds of his father’s estate. It is not surprising that it is the Respondent’s brothers who testified on behalf of the Appellant.
24. The court could not question the goings on in the High Court. Secondly it is clear that the Respondent was an intermeddler. The change of name to himself was clearly fraudulently. The court cannot protect property or anything obtained by fraud. Article 40(6) of *the Constitution* provides as follows:
 - (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.
25. The impugned documents filed in court can only be dealt with in that case. The Respondent’s sister is not an agent of the Appellant. The Respondent stated that the application was dismissed on 12/7/2012. This was a lie that may even surprise Satan himself. It has been posited from time immemorial that parole evidence cannot be used to amend documentary evidence. The Ruling by the Embu high court can be read by even the visually impaired. I now believe that one can have eyes but not see. In *Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017)eKLR*, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

“Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents



meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed...”

26. The court gave orders preserving the estate. He was reminded that the application dated 25/7/2012 was allowed. The Respondent stated that he was running the coffee farms with the father. He did not produce the certificate. Unfortunately, he appeared to have changed his father’s ownership to himself. He stated that he had a change of particulars but did not provide details of the said change.
27. The duty to prove ownership was on the Respondent. It is provided under section 107-109 of the [evidence Act](#) as doth: -
- 107.
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person
28. This was not a bank account that is personal to him. It is a coffee supply contract for Mbirai farm. The overwhelming evidence shows it belonged to the deceased. The deceased was registered and finally it was split to 4 numbers for each of the widows. The Respondent was unable to show his interest, other than adding his name.
29. It should be recalled that the respondent had special knowledge regarding the change of particulars. He did not produce the said evidence. So long as he used letters of administration to change, then the account in reality belongs to the estate. Section 112 of the [evidence Act](#) provides as follows: -
- “In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
30. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR, the court stated as follows:
- “Section 112 of the [Evidence Act](#) Chapter 80 of the laws of Kenya provides:
- ‘In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.’
- Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make the adverse inference that if such evidence was produced, it would be adverse to such a party.”
31. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession.”
32. He stated that to change names he annexed:



- i. Change of particulars
 - ii. Certificate of Registration
 - iii. And letters of administration.
33. The same was allegedly done through Embu RMCC 3 of 2000. He stated that No. 0001 was split and given to the 4 widows of his father. I do not need to deal with the balance of his evidence after admitting that coffee was growing on the father's Land Parcel No. Gaturi/Nembure/268 measuring 6.52 ha. in the name of his father.
 34. DW1 gave evidence. He stated that his father Josephat Njoka Mbiriai was member. Fredrick Nyamu Njoka stated that he is a driver and the Respondent is his elder brother. He adopted his statement. He stated that the farm is not owned by Robert Njoka. He stated that the Respondent has no evidence of ownership. They went to the Board and noted that the Respondent had changed the name. They carried out succession. He stated there was a will.
 35. Joel Nderi Njoka also stated that the farm belonged to his father. Letters were given out. He stated on cross examination that he was the Manager.
 36. DW3 was David Kingori Kiritho. He stated that John Nderi Njoka was delivering coffee. The court in what appears to be a strained analysis overruled the High Court and allowed the case. He awarded damages of Kshs.4,000,000/=.

Appellant's Submissions

37. The Appellant filed humongous submissions. They relied on *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-

“An appeal to this court from a trial by the High 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.”
38. The Appellant stated that the court had no jurisdiction to award damages under section 165(b)(b) and 8(2) of the Magistrate Court Act. Secondly they stated that the Respondent had illegally transferred his father's account to himself. They stated that no party can benefit from breach of the law or their own illegality. He stated that the right to privacy was not misled.
39. The Respondent opposed the Appeal. They stated that some of the documents annexed were not in the original record.

Analysis

40. The court has a duty to respect the fidelity to the rule of law. In *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017)* [2017] KESC 42 (KLR) (Election Petitions) (20 September 2017) (Judgment) (with dissent - JB Ojwang & NS Ndungu, SCJJ) the supreme court by majority stated as follows: -

“(394) It is also our view that the greatness of a nation lies not in the might of its armies important as that is, not in the largeness of its economy, important as that is



also. The greatness of a nation lies in its fidelity to the Constitution and strict adherence to the rule of law, and above all, the fear of God. The Rule of law ensures that society is governed on the basis of 121 National Super Alliance (NASA) Kenya v. The Independent Electoral & Boundaries Commission & 2 Others, Petition No. 328 of 2017; [2017] eKLR. Presidential Petition No. 1 of 2017 172 | Page rules and not the might of force. It provides a framework for orderly and objective relationships between citizens in a country. In the Kenyan context, this is underpinned by the Constitution.

(395) And as Soli J Sorabjee, a former Attorney General of India once wrote, the rule of law “is the heritage of all mankind” and “a salutary reminder that ‘wherever law ends, tyranny begins’.”¹²² Cast the rule of law to the dogs, Lutisone Salevao once observed “and government becomes a euphemistic government of men...” He adds: “History has shown (sadly, I might add) that even the best rulers have fallen prey to the cruel desires of naked power, and that reliance on the goodwill of politicians is often a risky act of good faith.”¹²³ The moment we ignore our Constitution the Kenyans fought for decades, we lose it.”

41. The day we let down our guard then everything will fall apart. There is a limited window for enforcement of rights by the magistrate court. It is also in respect of matters provided. However, protection of fundamental rights and freedoms still are domiciled in the High Court. The court had no jurisdiction to deal with the matters it dealt with. It does not matter that they were clothed in a different way. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the Supreme Court stated as doth: -

“This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

42. Enforcement of Article 31 remains a preserve of the High Court. Further, the parent matter was dealt with by a high court sitting in Embu. Summons were issued therein. The court below cannot question the documents the court used to arrive at its decision. It had already determined the matter. When the issue arose, the court below was simply to down its tools. In Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR, justice Nyarangi JA, as he then was stated as doth;

“With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what



I have already said is consistent with authority: “By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.”

43. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists.
44. The documents on record show that the Respondent was an intermeddler in the estate of the late Josphat Njoka Mbiriai (deceased). The respondent no right to No. BD 0001. In any case the Respondent were entitled to release documents for use in court. The magistrate had no business questioning evidence placed before the High Court. The evidence tendered was fully privileged. Secondly, there was ample evidence that the number was pilfered from the estate. A fraudulently obtained property cannot be defended. Finally, though it is clothed as a contractual obligation, the suit was for enforcement of articles 31 (c) and (d). they provides as follows: -

Every person has the right to privacy, which includes the right not to have-

- (c) information relating to their family or private affairs unnecessarily required or revealed; or
 - (d) the privacy of their communications infringed.
45. First, the information was within family. The mother is not a stranger to the Respondent. More fundamentally, Article 23 provides as follows: -
- (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
 - (2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
 - (3) In any proceedings brought under Article 22, a court may grant appropriate relief, including-
 - (a) a declaration of rights;
 - (b) an injunction;
 - (c) a conservatory order;
 - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
 - (e) an order for compensation; and
 - (f) an order of judicial review.
46. Parliament has not enacted legislation contemplated under Article 23(2) of *the constitution*. This means the subordinate court could not award damages as it did. A reading of the Magistrates Court Act, 2015 would have helped. Section 7 thereof provides as follows: -



1. A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed...”
47. The said Act continues as follows in sections 7(3) and 8 of the Act: -
 - (3) A magistrate's court shall have jurisdiction in proceedings of a civil nature concerning any of the following matters under African customary law –
 - (a) land held under customary tenure;
 - (b) marriage, divorce, maintenance or dowry;
 - (c) seduction or pregnancy of an unmarried woman or girl;
 - (d) enticement of, or adultery with a married person;
 - (e) matters affecting status, and in particular the status of widows and children including guardianship, custody, adoption and legitimacy; and
 - (f) intestate succession and administration of intestate estates, so far as they are not governed by any written law.
 8.
 - (1) Subject to Article 165 (3) (b) of *the Constitution* and the pecuniary limitations set out in section 7(1), a magistrate's court shall have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
 - (2) The applications contemplated in subsection (1) shall only relate to the rights guaranteed in Article 25 (a) and (b) of *the Constitution*.
 - (3) Nothing in this Act may be construed as conferring jurisdiction on a magistrate's court to hear and determine claims for compensation for loss or damage suffered in consequence of a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights.
48. The rights guaranteed under Article 25(a) and (b) are: -

“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited-

 - (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
 - (b) freedom from slavery or servitude;”
49. The right guaranteed under Article 31 c and d are expressly forbidden from being dealt with. Further damages are equally expressly prohibited. The court had no powers to grant damages. It is therefore not necessary to go into the question whether they are excessive. They are not awardable by the court below. The court therefore sets aside the award of damages in toto.
50. In the circumstances I allow the Appeal, set aside the finding and in lieu thereof dismiss the Respondent's case.



51. Secondly on damages no loss was pleaded. Consequently, even where liability had been proved, and damages were awardable, none were pleaded. They were to be dismissed in any case. Had I found the Appellant liable a sum of one shilling could have been sufficient.
52. Section 27 of the *civil procedure Act* 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.
53. The Respondent was awarded damages of Kshs.4,000,000/= by the lower court. In that connection therefore the Appellant is entitled to costs of Kshs.285,000/=.
54. 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.”
55. Costs follow the Event. The event is the success of the Appeal and dismissal of the suit in the court below. The Appellant shall be entitled to costs of Ksh. 285,000 for the Appeal and costs in the court below.

Determination

56. In the circumstances I make the following orders:
- a. The Appeal is allowed. The Judgment given in Nairobi Milimani CMCC 6873 of 2013 by the Hon. Mbeja given on 7/5/2021 is set aside. In lieu thereof, I dismiss the suit in the court below. Costs to the Appellant to be assessed by the court below or agreed.



- b. Costs of Kshs.285,000/= to the Appellant for this Appeal.
- c. The Deputy Registrar of this court to serve this Judgment on Hon. D.O. Mbeja, SPM.
- d. Right of appeal 14 days.
- e. File is closed.
- f. 30 days stay of execution.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 6TH DAY OF JUNE 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Thuo for the Appellant

Mr. Muriithi for the Respondent

Court Assistant - Jedidah

