

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL APPEAL NO. E267 OF 2024

CENTRAL BANK OF KENYA.....APPELLANT

-VERSUS-

NAAMAN MUGUNA NDEGE.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. This appeal arises from the judgment and decree in the Chief Magistrates' Court Civil Case No. 1789 of 2019 (Honourable G. Sogomo, Principal Magistrate) in which the 1st respondent sued the appellant and the 2nd respondent, jointly and severally, for damages for malicious prosecution.
2. According to the 1st respondent's plaint filed in the lower court, on or about 24 May 2018, the appellant made a complaint against the 1st respondent to the officer commanding the Central Bank of Kenya police post at Mombasa. As a result of this complaint, the 1st respondent was arrested and subsequently charged in Mombasa Chief Magistrates Court Criminal Case No. 885 of 2018, with the offence of stealing contrary to section 268 (1) as read with section 275 of the Penal Code, cap. 63. In the alternative, he was charged with the offence of handling stolen property contrary to section 322(1) of the Penal Code.
3. On 6 May 2019, the 1st respondent was acquitted under section 210 of the Criminal Code. Cap. 75. According to this provision of the law, an accused person is acquitted, if at the close of the evidence in support of

the charge, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence.

4. It is as a result of the acquittal that the 1st respondent instituted the suit in the magistrates' court whose judgment, as noted, is the subject of this appeal. According to the judgment, the learned magistrate found the appellant and the 1st respondent jointly and severally liable. He awarded the 1st respondent the sum of Kshs. 5,000,000 as general damages and special damages of Kshs. 150,000/=. The 1st respondent was also awarded costs and interest.
5. The appellant was aggrieved by this decision hence the instant appeal. In the memorandum of appeal dated 9 September 2024, seventeen grounds of appeal have been raised and expressed as follows:

“1. That the Learned Magistrate erred both in law and in fact by finding that the police Investigating Report that formed the basis of having the 1st Respondent charged and prosecuted in Court was not presented to court for interrogation, yet the 2nd Respondent was debarred from calling any witness in defense and producing any document.

2. That the Learned Magistrate erred both in law and in fact by ignoring the Proceedings of the Criminal Court in the Criminal Case No. 885 of 2018 including the testimony of PC James

Mungai(PW6), Chief Inspector Wilson Cheruiyot (PW11 in the Criminal Case) and Sgt Joseph Muragu who testified before the Criminal Trial Court and explained the basis of the institution of criminal proceedings against the 1st Respondent herein.

3. That the learned Magistrate erred in fact by holding that the 1st Respondent personally made entries relating to the removal of electronics from Imperial Bank in the security office's occurrence book contrary to the evidence before the Court and the confirmation from the Criminal Trial Court that it is the Security Guards from Wells Fargo who recorded the Items in the Occurrence Book without any prodding or direction from the 1st Respondent herein.

4. That the Learned Magistrate erred in law and in fact by failing to appreciate and give weight to the 1st Respondent's concession that he did not obtain and have signed the Imperial Bank Official Asset Movement Forms prior to removing the impugned Items from the Bank but generated his own forms which he used to unlawfully remove the Items from the bank.

5. That the Learned Magistrate erred in law and in fact by failing to appreciate and give weight to the Appellant's testimony (DWI) that 1st Respondent removed the items from their respective

stations without obtaining approval from the Imperial Bank Coast Region Regional Head and without following due procedure, and that the 1st Respondent did not inform the Appellant of the repairs as per the standard operating procedures.

6. That the Learned Magistrate erred in law by failing to consider the uncontroverted testimony of the Appellant's Witnesses that it was a requirement in the removal of items, an official asset movement form to be filled and signed by the person who makes the request for the removal, the IT Officer and the Assistant Manager who receives a notification or email which the 1st Respondent did not follow in removing the Items from Imperial Bank.

7. That the Learned Magistrate erred in law by failing to properly apply the elements of the tort of malicious prosecution as established by precedent. Particularly, the Learned Magistrate failed to address key issues necessary to ascertain whether the 2nd Respondent acted without reasonable or probable cause in instituting the criminal charges against the 1st Respondent.

8. That the Learned Magistrate erred in law and in fact by failing to appreciate that the 1st Respondent did not sufficiently

demonstrate that the prosecution was actuated by malice which was an essential element of malicious prosecution.

9. That the Learned Magistrate failed to take into account and/or give weight to the 1st Respondent's acknowledgement of wrongdoing and apology to the Appellant herein.

10. That the learned Magistrate failed to account on how it arrived at the conclusion that the prosecution was actuated with malice or that the 1st Respondent had established his case for tort of malicious prosecution.

11. That the Learned Magistrate failed to take into account that the decision to charge the 1st Respondent was made by the Director of Public Prosecutions under Article 157(10) of the Constitution of Kenya who neither required the consent of the Appellant herein to commence criminal proceedings against the 1st Respondent herein.

12. That the Learned Magistrate failed to take into account that the Appellant herein did not set the law in motion and had no role in the making of the decision to charge the 1st Respondent herein before the Criminal Court but proceeded to find it jointly and severally liable to the 1st Respondent herein.

13. That the learned Magistrate erred in law and in fact in holding that the Appellant and 2nd Respondent were jointly and severally liable for the torts the subject of the 1st Respondent's claim.

14. That the Learned Magistrate erred in law when he entered Judgment in favour of the 1st Respondent against the Appellant in spite of the 1st Respondent's failure to establish that the Officers from the National Police Service and the Director of Public Prosecutions acted with reasonable and probable cause and or whether the prosecution was actuated by malice.

15. That the learned Magistrate erred in law and in fact in failing to appreciate that an acquittal in a criminal case does not ipso facto render any prosecution as malicious particularly where the High Court had found on appeal that there was a just cause to put the 1st Respondent on his defence and the Trial Court only found that one element was lacking to justify a conviction of the 1st Respondent herein.

16. That the Learned Magistrate's decision is against the weight of the evidence tendered before the Court and made findings unsupported by evidence thereby offending the rules of fairness and justice.

17. That the Learned Magistrate erred in awarding the 1st Respondent the sum of Kshs Five (5) million as damages without any premise or basis in law and in awarding Kshs 150,000.00 as special damages together with costs of the suit.”

6. The appellant has prayed that the appeal be allowed, the lower court’s judgment be set aside and the 1st respondents suit be dismissed.
7. At the hearing of his claim, the 1st respondent adopted his written witness statement as evidence in support of his claim. According to that statement, he had been employed by the appellant as an assistant bank officer. He was seconded to Kenya Deposit Insurance Corporation (KDIC) and deployed to Imperial Bank Limited, Likoni Branch in Mombasa. The bank was under receivership and, therefore, the 1st respondent was deployed as the bank’s receiver manager.
8. It was the 1st respondent’s evidence that in his capacity as the receiver manager, he had authority to incur expenses not exceeding Kshs. 10,000/= and that based on that authority, he removed from the bank certain electronic items, ostensibly for repairs. These items were a Samsung television, a colour printer and a coffee maker. In his estimation, the cost of repairs of these items was not more than Kshs. 10,000/=. The removal of these items was recorded at the security desk at the bank’s entrance.

9. It was the 1st respondent's evidence that he took the items for repairs at Kongowea. When he left the bank, two years after he had been deployed, he handed over these items, amongst other items, to the officer who took over from him. On 21 May 2018, he was summoned to appear before a panel of the appellant's officers who questioned him about the items. He informed the panel that he had taken the items for repairs but that they were in his house. It was his evidence that he was in possession of the items because the stalls at Kongowea where he had taken the items for repair had been demolished.
10. The 1st respondent was then escorted to his house where the items were collected. He was subsequently charged with the offence of stealing. Eleven prosecution witnesses testified but the trial court found that the 1st respondent had no case to answer and, therefore, he was acquitted of the charges.
11. According to the 1st respondent, the institution of the criminal case against him was malicious as he had the authority to remove from the bank the items for which he was charged as having stolen and that he could return the items whenever he was required to. In any event, there were internal disciplinary procedures that the appellant could have employed to discipline the 1st respondent rather than prosecute him. As a result of the criminal case, the 1st respondent lost his job and had to

dispose of his property for his family upkeep and education of his children.

12. The appellant defended itself against the 1st respondent's claim and filed a defence to that effect, in particular, denying liability. It was admitted, however, that the 1st respondent was an employee of the appellant; he was engaged as an assistant bank officer 1 in February 2015 and posted to the appellant's Mombasa Branch.

13. While the respondent was in charge of Likoni Branch of Imperial Bank Limited (in Receivership), the 1st respondent is said to have unlawfully removed from the Branch premises a 54' inch Samsung TV, 1 Colour Printer and 1 Coffee Maker on the pretext that he was taking them to Imperial Bank Mombasa Office in Kizingo. However, the 1st respondent took the items to his house for personal use without disclosing to the appellant or the Kenya Deposit Insurance Corporation (KDIC) Regional Manager. As a matter of fact, the items were recovered from the 1st respondent's house in Kiembeni Estate, Mombasa on 21 and 22 May 2018.

14. The 1st respondent's conduct, it was contended, was contrary to the appellant's Staff Rules and Regulations which demand absolute integrity and honesty in the discharge of an employee's duties. It is for this reason that the appellant demanded of the 1st respondent to show cause why disciplinary action should not be taken against him.

15. Further, given that the 1st respondent's conduct amounted to a criminal offence, the appellant felt obliged to lodge a complaint with the Officer Commanding the Central Bank Police Post, Mombasa.
16. Subsequently, the National Police Service independently investigated the 1st respondent's conduct and found that there was sufficient evidence to sustain charges of stealing the three items or handling stolen property. Consequently, the 1st respondent was arrested on the 24 May 2018 and arraigned in Mombasa Chief Magistrates Criminal Case No. 885 of 2018.
17. According to the appellant, the 1st respondent was arrested and charged for good cause; more particularly, for stealing the three items or handling stolen property. The trial Court found as a fact that the 1st respondent actually took the items to his house but held that the criminal intent, *mens rea*, was lacking.
18. The acquittal of the 1st respondent notwithstanding, the State lodged an appeal against the trial court's decision in this Honourable Court as **Criminal Appeal No. 60 of 2019, Republic versus Namaan Muguna Ndege**. The appeal is pending for hearing and determination.
19. It was the appellant's case that the 1st respondent was lawfully arrested and arraigned based on evidence gathered against him and independent assessment by the Director of Public Prosecutions. Accordingly, there was no malice either, in the lodging of the complaint against the 1st respondent or in his arrest and prosecution by the State.

20.As far as the dismissal of the 1st respondent from employment is concerned, the appellant pleaded that the 1st respondent was lawfully and procedurally dismissed from the appellant's employment on 3 October 2018. The 1st respondent has challenged his dismissal in Mombasa Employment and Labour Relations Court Cause No. 39 of 2019, a case that is pending for determination.

21.In support of the appellant's case, the appellant legal officer, Elizabeth Njogu; Fredrick A. Mumbaa, who was also an employee of the appellant but seconded to the Kenya Deposit Insurance Corporation as an assistant manager; and, Elizaphan Karianjahi, a senior assistant security officer with the appellant, filed witness statements which they adopted as their evidence in court. The statements, more or less reiterated, the appellant's case as pleaded in the statement of defence.

22.More importantly, the appellant's witnesses' evidence was consistent that the 1st respondent took the items in issue and that they were recovered from his house. This fact of removal by the 1st respondent of the items from the bank and their recovery from his house was not disputed by the 1st respondent. In his witness statement the 1st respondent stated as follows:

“17. I was asked about the items mentioned and informed the panel that I had taken out the items for repairs and the same

were at my house. The items ended up at my house when the stalls at Kongowea Market where the repairer was based were demolished.

18. I informed the panel that if given time about half an hour, I shall avail the items. However, I was put in the 1st defendant's van and taken to my house where the items were collected."

23. A letter dated 23 May 2028 written by the 1st respondent and directed to the appellant in response to appellant's demand that the 1st respondent shows cause why disciplinary action should not be taken against him stated in part:

"I am in receipt of your letter today requiring me to explain.

I wish to explain that I took the subject items in good faith for repairs with a view to returning them immediately they were repaired.

The delay to return them was occasioned by my absence (was on annual leave) upcountry. I had anticipated returning them immediately but the fundi after repairing dropped them at my residence.

I also wish to inform you that the state of shock that I was in contributed to the mix up of item thus they ended up picking the wrong one.

Sir, I am very remorseful and highly regret my action and hereby promise you that this will never happen again.”

24. Thus, the question whether the 1st respondent took the appellant's properties and that the properties were recovered from his house was not, and could not have been an issue. The issue that the lower court ought to have been concerned with and which is this Honourable Court has to attend to in the determination of this appeal is whether, in those circumstances, the appellant was justified in making a complaint to the police and whether, based on the appellant's complaint and his own investigations, the Director of Public Prosecutions was justified in arraigning the 1st respondent for the charges of theft or handling stolen property, more particularly as stated in the charge sheet.

25. In his judgment, the learned magistrate considered the East African Court of Appeal decision in **Mbowa versus East Mengo District Administration (1972) EA 352** in which the tort of malicious prosecution was defined. In that case, the court held, *inter alia*, that the tort of malicious prosecution is committed where there is no legal reason

for instituting criminal proceedings and where the purpose of the prosecution is personal and spite and not for the benefit of the public.

26. The learned magistrate then held as follows:

“In the instant case the police investigative report that formed the basis of having the Plaintiff charged and prosecuted liable in a court of law with the offence of stealing and the alternative crime of handling stolen goods was not presented to court for interrogation.

“In the absence of the said evidence it can be inferred that the threshold of evidence for initiating meaningful prosecution of the plaintiff for the offences charged had not been attained”.

27. The learned magistrate also held that the Attorney General had not controverted the evidence against him and, therefore, upheld the 1st respondent’s case. He also placed much weight on the 1st respondent’s acquittal in holding both the appellant and the Attorney General liable. To this end, the learned magistrate held as follows:

“...the Plaintiff was absolved of the criminal malfeasance complained of when he was acquitted under Section 215 of the Criminal Procedure Code the trial court having made finding that the evidence proffered by his accusers was too underwhelming to hold sway.”

28. Having so held, the learned magistrate found the appellant and the Attorney General liable and proceeded to assess the quantum of damages payable to the 1st respondent. In this regard, he took into account such factors as that the 1st respondent was in the management cadre of the appellant bank; that he lost his career and “*its trappings*”; that he had to contend with stigma and humiliation associated with “*being frogmarched to the police station*” and “*dragged to court like a common rascal to answer to false and malicious charges.*” Based on these findings, the learned magistrate awarded “*general damages in the global sum of Kshs. 5,000,000/=.*” He also awarded Kshs. 150,000/= as special damages on account of legal expenses which the 1st respondent is said to have incurred.

29. I have had the opportunity to consider the submissions filed in support of and in opposition to the appeal. The basic issue is, of course, whether, based on the evidence presented in the lower court, the 1st respondent demonstrated that he had been maliciously prosecuted by the appellant and the Attorney General.

30. The ingredients of the tort of malicious prosecution are stated in **Clerk & Lindsell on Torts**, 16th ed. (1989), p. 1042, para. 19-05 as follows:

“In action of malicious prosecution, the plaintiff must show first that he was prosecuted by the defendant, that is to say, that the

law was set in motion against him on a criminal charge; secondly, that the prosecution was determined in his favour; thirdly, that it was without reasonable and probable cause; fourthly, that it was malicious.”

31. It is reiterated in the same book that the onus of proving every one of these ingredients is on the plaintiff.

32. For purposes of this tort, a defendant who has procured the institution of criminal proceedings by the police is regarded as responsible in law for the initiation of the prosecution. The act of procuring the institution of criminal proceedings is itself a question of fact and, therefore, calls for close analysis of the particular circumstances. Where, for instance, the defendant has given false information to the police, that in itself is not a sufficient basis in law for treating the defendant as the prosecutor. The plaintiff must go further and prove that the defendant's conduct must, at the very least, have influenced the police decision to prosecute.

33. In determining whether a third party (in this case, the appellant) is responsible in an action for malicious prosecution for criminal proceedings instituted by the police, an important factor to consider is whether, based on the defendant's complaint, the police took the initiative and conducted an investigation before they decided to prosecute. The

onus on the plaintiff is to satisfy the court that the defendant actually procured the use of the power of the State to hurt him.

34. On this very question of who, between the defendant and the police should be considered the prosecutor for purposes of the tort of malicious prosecution, the burden still rests on the plaintiff to establish that it was the false evidence tendered by a third party which led the police to prosecute before that party may be characterised as having procured the prosecution. Thus, where the police carried out their own independent investigations, it cannot be assumed that tainted evidence persuaded the police to prosecute.

35. As a general rule, however, a prosecution will be considered to be brought when the charge is laid and by the person who lays it; in our case, the Director of Public Prosecutions. Thus, the Director of Public Prosecutions will generally be treated as the prosecutor and no action for malicious prosecution will lie against the person on whose information the police or the Director of Public Prosecutions has acted.

36. But in certain instances, the person who supplied the information to the police may be regarded as the prosecutor even though the charge was not laid by him. A person may be regarded as the prosecutor if, *inter alia*, he puts the police in possession of information which, for all practical purposes, compels the police to charge. For example, if he deliberately deceives the police by supplying false information in the absence of

which the police would not have proceeded; or if he withholds information, the knowledge of which the police would not prosecute.

37. In **Davis v. Gell (1924) 35 C.L.R. 275, 282 Isaacs A.C.J.** addressed this point and noted as follows:

“For the purposes of this form of action the law looks beyond theory and regards the person in fact instrumental in prosecuting the accused as the real prosecutor. It enables the person innocently accused to treat his virtual accuser as party to the criminal charge, a circumstance bearing directly on the question of the effect in the civil action of the judicial termination of the criminal proceedings. The substance and not the legal form must in all cases govern, and while, on the one hand, a person giving information to the police is not necessarily the prosecutor yet, on the other, the mere fact that the police conduct the prosecution does not exclude him from that position.”

38. And the **American Law Institute, Restatement of the Law, Torts , 2d (1977), section 653**, dealt with the matter as follows:

“When a private person gives to a prosecuting officer information that he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not

liable under the rule stated in this section even though the information proves to be false and his belief was one that a reasonable man would not entertain. The exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings. If, however, the information is known by the giver to be false, an intelligent exercise of the officer's discretion becomes impossible, and a prosecution based upon it is procured by the person giving false information. In order to charge a private person with responsibility for the initiation of proceedings by a public official, it must therefore appear that his desire to have the proceedings initiated, expressed by direction, request or pressure of any kind, was the determining factor in the official's decision to commence the prosecution, or that the information furnished by him upon which the official acted was known to be false.”

39. Turning back to the appellant's case, the proceedings in the criminal trial show that the appellant only learnt of its missing properties after one of its officers in the IT department, one Mahommed Abubakar, who testified as the fourth prosecution witness, noticed a television set which had all along been mounted on the wall, at Imperial Bank Limited, Likoni

branch, was missing. He brought this information to the attention of the appellant's officers at the appellant's branch in Mombasa. It is then that the officers visited the branch and confirmed, after an audit that indeed a television set, among other bank's items, was missing.

40. A security officer who testified as the first prosecution witness testified that on 21 July 2017 he saw the 1st respondent leave with a coffee maker. He recorded the event in the occurrence book. On 6 February 2018, the same security officer confronted a bank employee who was taking away a television set from the bank. He wanted to know where he was taking the television set. The officer testified that the 1st respondent intervened and informed him that he had instructed the employee to take the television to his motor vehicle. Once again, the officer recorded this incident in the occurrence book.

41. It has been acknowledged before that it is not in dispute that the 1st respondent took the appellant's property from the bank but I have had to make some reference to this part of the criminal proceedings in order to appreciate the circumstances under which the items in question were carted away.

42. From the evidence at the criminal trial, nobody except the 1st respondent, knew where these items were until after 1st respondent was confronted by the appellant's officers to explain where the missing appellant's properties were. It is in these circumstances that the appellant made a

report to the police. The police who booked the report testified as follows:

“I am number 70753 PC James Mungai attached to CBK Mombasa. I perform general police duties and investigations. I recall 21/5/2018 at and(sic) 1300 hours. I received a report from one Fredrick Mumba of Imperial Bank that some items were missing from Likoni Branch. I enquired what was missing. He told me they were a TV set, a clour printer and a coffee maker. I booked the report in the CBK police post OB. He further informed me that one of the staff members knew where the items were. After booking the report I proceeded together with CI Cheruiyot a staff member Mabruk, Lengaine and the accused person in the bank motor vehicle to where the items were.”

43. Fredrick Mumba whom the police referred to in his testimony was the appellant’s employee who also testified as a prosecution witness in the criminal trial.

44. When I consider the totality of the circumstances surrounding the removal of the appellant’s property from its premises; the 1st respondent’s possession of the property and his own explanation of how he ended up keeping the property; and, how the property was eventually recovered, I

am inclined to conclude that the appellant was justified in making a report to the police of its missing property.

45. There is no evidence that the appellant deliberately deceived the police by supplying false information, the absence of which the police would not have acted; neither is there any proof that the appellant withheld information, the knowledge of which the police would not prosecute.

46. It is, of course, trite that the only person who can be sued in an action for malicious prosecution is the person who prosecutes. For reasons I have given, the appellant cannot be said have prosecuted or be deemed to have prosecuted the 1st respondent. All the appellant did was merely to give information to the police, who after investigation appear to have thought fit to prosecute the 1st respondent. The appellant cannot be said to be responsible for the Director of Public Prosecution's decision to prosecute the 1st respondent and, for this reason, no action would lie against the appellant for malicious prosecution.

47. Section 5 of the Office of the Director of Public Prosecutions Act cap. 6B provides, *inter alia*, that, pursuant to article 157 of the Constitution, the Director of Public Prosecutions shall have power to direct the Inspector-General to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction. (see 5(a)).

48. Section 5 (b), on the other hand, provides that the Director shall exercise State powers of prosecution and, in that regard, may institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed. (See section 5(b)(i)).

49. Section 6 of the same Act speaks to the independence of the Director of Public Prosecutions and is emphatic that the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and that, in exercise of his powers, he is not be under the direction or control of any person or authority and that he is only subject to the Constitution and the law. (See section 6(a), (b) and (c)).

50. Thus, the police have been given powers in regard to investigation of criminal charges and whether a prosecution should ensue largely depends on the result of the investigation. It follows that if a complainant does not go beyond giving what he believes to be correct information to the police and the police without interference on his part, except in instances where he may be required to provide assistance of some sort as may be necessary, think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution.

51. Despite the prosecutorial powers with which the Director of Public Prosecutions is clothed, if the charge is false to the knowledge of the

complainant; or if he misleads the police by bringing false witnesses to support it; and, generally speaking, if the complainant influences the police, either overtly or covertly, to assist him in sending an otherwise innocent man for trial - it will be equally improper to allow him to escape liability merely because the prosecution has not, technically speaking, been conducted by him.

52. The question in all cases of this nature always is this: who was the prosecutor? And the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion is not the criterion: The conduct of the complainant before and after making the charge must also be taken into consideration. Nor is it enough to say, the prosecution was instituted and conducted by the police. That again is a question of fact.

53. I conclude by reiterating that the essential feature of malicious prosecution is an abuse of the process of the court. The essence of the complaint in such a case is that criminal proceedings have been instituted not only without reasonable and probable cause but also maliciously. It has been held that in such cases the actions are not brought on or in respect of any evidence given but in respect of malicious abuse of process (see **Else v. Smith (1822) 2 Chit. 304**).

54. For the reasons I have given, I am not satisfied that the prosecution of the 1st respondent was an abuse of the process of the court. Based on the evidence presented before the trial court, I am unable to accept the

argument the criminal proceedings against the 1st respondent were instituted without a reasonable and probable cause or that they were maliciously instituted. In short, the 1st respondent case fell short of the threshold of the tort of malicious prosecution. Ultimately, I hold that there is merit in the appellant's appeal. It is hereby allowed.

55. The judgment of the lower court is set aside and substituted with the order dismissing the 1st respondent's suit. The appellant will have costs of the appeal and costs of the suit in the lower court. It is so ordered.

Signed, dated and circulated on the CTS on 20 February 2026

Ngaah Jairus

JUDGE