**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MIGORI**

**CIVIL APPEAL NO. E065 OF 2023**

**SUKARI INDUSTRIES LIMITED ……**

**APPELLANT**

**VERSUS**

**OCHOLA DAVID WASONGA ……**

**RESPONDENT**



## JUDGMENT

1. This appeal arises from the judgment and decree of the Hon. A. C. Munyuny, Senior Resident Magistrate in Migori Chief Magistrate's Court Case Number 752 of 2018, given on 27.09.2023. The appellant was the defendant in the lower court.

2. The respondent sued the appellant vide a plaint dated 23.06.2018 in relation to a contract dated 17.04.2013 for the appellant to harvest cane on the respondent's parcel of land measuring 1.2 hectares. The respondent planted sugar cane on the 1.2 hectares of land, which was to be transported to the

appellant's factory on maturity. The maturity was to be 18-28 months, and 16-18 months for ratoons.

Pleadings and Proceedings

3. The respondent was not to transfer the interest on the said parcel without the consent of the appellant. The respondent posited that the cane crops expected were 96 tonnes and the price was a sum of Ksh 3,400/= per tonne. The respondent averred that the cane was not automatically compromising ratoons that could weigh as much. Particulars of negligence were set out. The respondent sought damages for breach of contract for three cycles.
4. The appellant filed a defence dated 26.11.2018 and denied that there was a proposal on 17.11.2011 for the 1.2 hectares in N. Kwabwai, Ndiwa sub-county in Homa Bay County. The appellant averred that there was no prospect of payment in three harvest circles.

5. The question of harvest and ratoons was denied in toto. There was a denial that, as of April 2013, the appellant negligently failed to harvest the cane and that there was great financial loss. The price per tonne was denied. The harvest of the first crop and ratoon was denied. Without prejudice, it was stated, rather ironically, that it is the respondent who instructed the appellant not to harvest. It was further averred that 1.2 hectares cannot yield 96 tonnes.

6. They further pleaded fraud, saying that there was no contract between the parties. It was stated that the respondent lacked the capacity to contract. The land was not registered in the respondent's name, and there was sugarcane poaching at the said time.

7. The court heard the matter and entered judgment for a sum of Ksh 288,000/=, costs, and interest. This resulted in this appeal. The appellant set forth the following grounds of appeal:
    a) The learned trial magistrate erred in law and fact and grossly misdirected herself in treating superficially the evidence and submissions on record, more so the Appellant's, consequently arriving at a wrong conclusion on liability.
    b) The learned trial magistrate erred in law and fact by finding that the alleged contract was breached without any evidence being tendered as to which clause of the contract was breached.
    c) The learned trial magistrate erred in law and fact at arriving on the wasted tonnage of sugarcane without any supporting evidence.
    d) The learned trial magistrate erred in law and fact by awarding damages for the 1st and 2nd Ratoon without any evidence that the said plant cycle were ever developed.
    e) The learned trial magistrate erred in law and fact and grossly misdirected herself in treating superficially the

evidence and submissions on record more so the Appellant's, consequently awarding damages without basis.

f) The learned trial magistrate erred in law and fact, applied the wrong principles and misapprehended the evidence on record that she arrived at an award in damages that was so inordinately high and excessive in the circumstances of the case and in relation to the probable loss suffered.

g) The learned trial magistrate erred in law and fact in not evaluating the evidence tendered judiciously.

8. The appeal raised only two questions, that is, quantum and liability.

Submissions

9. The Appellant filed submissions on the duty of the party moving the court. Reliance was placed on the case of **Timsales v Willy Nganga Wanjohi (2006)KEHC 1528 KLR**, where the court stated as follows:

> In Statpack Industries v James Mbithi Munyao [2005] KEHC 2043 (KLR) [Visram J] [held] that;
> Coming now to the more important issue of "causation", it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be

drawn. Not every injury is necessarily a result of someone's negligence. An injury, per se, is not sufficient to hold someone liable for the same (referenced).

10. The appellant maintained that the burden of proof is set out in Section 109 of the Evidence Act. It was submitted that the KESRA report, which sought compensation, was not produced. It was submitted that parties are bound to plead their cases fully. Reliance was placed on the case of **Migore v South Nyanza Sugar Co Ltd [2018] KEHC 5465 (KLR)**, where A.C. Mrima stated as follows:

> 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 reaffirmed 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.*

11. The appellant posited that where a party signs a contract, it is binding on him including the exception clauses unless vitiated by fraud as stated in the English case of **Curtis v Chemical Cleaning and Dyeing Co. [1951] 1 KB 80**. They submitted that a booklet was produced to show the contract. Reliance was placed on the case of **National Bank of Kenya**

**Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] KECA 362 (KLR).**

12. Further, reliance was placed in the case of **Langat v Co-operative Bank of Kenya Ltd [2017] KECA 152 (KLR**), where the court of appeal [Waki, Makhandia & Ouko, JJ.A] stated as follows:

> **8. We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved. See *National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd [2002]2 EA 503*. The primary task of the court is to construe the contract and any terms implied in it. See Megarry, J. in the case of Coco vs A. N. Clark (Engineers) Ltd. - [1969] RPC 41.**

13. The appellant stated that there was no duty to harvest cane under clause 1. There was also a requirement for notice under clause 3. It was further submitted that the respondent did not notify the appellant of the breach as required under clauses 10 (c) and 7.2 of the contract. The appellant submitted that the court shifted the burden to the appellant and relied on an inapplicable provision. They stated that there cannot be award of general damages in breach of contract. Reliance was placed on the case of **South Nyanza Sugar Co Ltd V Dominic**

**Erick Angila** (2011) KEHC3058 KLR, where Asike-Makhandia J, as then he was stated as follows:

> It is trite law that there can be no award of general damages for breach of contract. In the case of Joseph Ungadi Kedera V Ebby Kangisha Karai, C. A. No. 239 of 1997(UR) the Court of Appeal was emphatic "…As to the award of Kshs. 250,00/- as general damages, Mr. Adere submitted that there can be no award of general damages for breach of contract. In addition, there is no evidence on which this can be supported. We respectfully agree. There can be no general damages for breach of contract. Mr. Ombija submitted that general damages lay and relied on Foaminol Laboratories Ltd V British Artion Plastics Ltd(1941) 2 ALL.ER 493. We are satisfied that even on the basis of that case there is no evidence to support an award of Kshs. 250,000/- …"
>
> The upshot of the foregoing is that general damages are not recoverable or awardable on a breach of contract. To the extent that the learned magistrate may have made an award, on that basis he was in error. I have no doubt in my mind that the learned magistrate was alive to that fact. However, in a rather convoluted manner, he went on to treat the award as though it was hinged on special damages.

14. The appellant submitted that there was no evidence on wasted tonnage. Reliance was placed on the case of **Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd**

[1992] KECA 48 (KLR), where the court of appeal [Gicheru, Cockar & Muli JJ A] held as follows:

> The law on damages stipulates various types of damages.
>
> The distinction between general damages and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimaint may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded. (See Chitty on Contracts 26 edition para 1772 at p117 et seq.)
>
> Clearly the respondents in the instant case could not expect an award of special damages because they did not plead the same.

15. Further reliance was placed on the case of **Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003**, Kimaru, J, where the court held as follows:

> **In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages, they must**

**be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred...Special damages and general damages are used in corresponding senses.**

16. There were no submissions from the respondent.

Evidence

17. The Respondent testified that he had an agreement on 17.04.2023. They entered into an agreement to run for a duration of 6 years, with three harvests. The timber had been planted in the shamba and was one month old. He was given a card for 1.2 acres. The sugar cane was to be harvested after 2 years, that is, in 2015. They did not harvest, and sugarcane dried on the farm. They could not prepare the second ratoon as the sugarcane dried on the farm. He adopted his statement, which basically reflects the same information in the plaint. He produced two exhibits and marked two documents for identification, being the Kenya Sugar Research Foundation report and the sugarcane price list 2010-2015.

18. On cross-examination, he stated that the agreement was for 1.2 acres and that those plots in the area have no title deeds. The price per tonne was said to be 3,400/=. He denied breaching the agreement. The documents marked for identification were produced by consent as exhibits 3 and 4.

19. John Otieno Okinda testified that he is an agricultural officer at the appellant factory. He adopted a witness statement dated 20.06.2022. He denied the existence of a contract. In the statement, he stated that the respondent never confirmed that he did not have a contract with South Nyanza Sugar Company Ltd.

Analysis

20. It is hard to conceptualize, problematize, and contextualize the issues in this matter in view of the prevarication and obfuscation of issues by the appellant. This is based on the structural deficit in the appellant's defence and evidence leading to an uncanny change of positions, where the appellant is both approbating and reprobating. The two issues, as understood by the court, are:

    i. *Whether the respondent's case was proved*
    ii. *Award of damages*

21. 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. however, the treatment of findings of fact by the lower court was addressed in the case of **Peters vs Sunday Post Limited [1958] EA 424**, where the 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…"**

22. The appellant's case and evidence in the lower court were straightforward, that is, that there was no contract entered into on 17.04.2011. Secondly, there was no evidence of a valid contract between the parties. In evidence, a third limb was added, stating that the respondent did not inform the appellant that they did not have a contract with South Nyanza Sugar Company Ltd. Reviewing the evidence, I came to the inevitable conclusion that the words of Justice CB Madan in *N v N [1991] KLR 685*, applies herein, where he expressed himself in the following terms:

> I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair, even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted.

23. The appellant proceeded at the pleadings level, that there was no contract between the parties. Further, the Respondent's parcel of land could not produce 96 tonnes. They had maintained that there was no contract dated 17.04.2011 for the maturity of cane in April 2013. This is, of course, true since the contract entered was for 2013. By maintaining that there was no contract, they cannot then hold the respondent to terms. I agree with the appellant on the decision of **Migore v South Nyanza Sugar Co Ltd 2018] KEHC 5465 (KLR**), where A C Mrima, J, stated as follows:

> 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: -
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> *.....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.*

24. Therefore, before the appellant postulates on clauses in the contract, they must first plead that the contract was in situ and the same was breached; they cannot rely on non-existent contracts. 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.*

25. This was succinctly addressed in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** where the court found and held as follows in an election petition:

58. In the case of Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & anr, Civil Appeal Nos 5710-5711 of 2012; [2014] 2 SCR the Supreme Court of India held that [paragraph 8]:

> ....
>
> 52.Further, the court went on and observed that:
>
> "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. The court cannot exercise discretion of ordering recounting of ballots just to enable the election petitioner to indulge in a roving inquiry with a view to fish material for dealing the election to be void. The order of recounting can be passed only if the petitioner sets out his case with precision supported by averments of material facts."

26. In this case, the appellant mainly argued that there was no contract. They cannot turn around and rely on a nonexistent contract. They cannot approbate and reprobate.

Consequently, the postulations on breach of certain clauses are dismissed. In any case, they were not raised.

27. Secondly, the appellant maintained that the respondent did not declare that there was no contract with South Nyanza Sugar Company Ltd. This is an irrelevant submission. It is not raised as part of the pleadings or as part of the contract. The court is not required to rewrite a contract between parties. This was discussed in the decision of **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] KECA 362 (KLR)** where 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.

28. In this context, the appellant is plainly wrong in seeking to have the court rewrite its contract. I find and hold that there

was a contract between the parties. The contract provided its own terms. The court wrongly failed to award for the two ratoons. However, there is no cross-appeal in respect thereof.

29. The next question is whether the claim herein was for general damages for breach of contract or special damages. The respondent set out the amounts of money they lost from the failed harvest and two subsequent ratoons. The same, though indicated as special damages, was an ascertained amount of Ksh 3,400/= per tonne for 96 tonnes, making a sum of Ksh 326,400/=. The claim was not strictly a general damage claim. The nature of the claim falls within a special exception to the general rule.

30. Special damages were addressed in the case of **David Bagine V Martin Bundi [1997] KECA 54 (KLR**), where the Court of Appeal [E. Gicheru, A.B. Shah and G. S. Pall], posited 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"

31. On other hand, general damages, which are at large are addressed in the case of **Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019)eKLR** , where Justice D.S Majanja held as doth:

> “General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same.”

32. A claim set out in this nature, ought to be specifically answered as addressed in the case of **Raghbir Singh Chatte v National Bank of Kenya Limited** [1996] KECA 99 (KLR) where the Court of Appeal [Akiwumi, J. A], stated thus:

> The words of Jessel M.R. on this issue are the following:
>
> When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he

received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with diverse circumstances, it shall not be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given."

33. The court in the above case continued as follows:

> In the subsequent appeal to this court, it was held that a mere denial is not a sufficient defence in the type of action that had been brought against the defendant. In the judgment of this court delivered by Platt, J. A. as he then was, it is clearly stated as follows:
>
> "First of all, a mere denial is not a sufficient defence in this type of case; there must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient, therefore, simply to deny liability without some reason given."
>
> Thus, in Maguga General Stores, this court authoritatively enunciated the principle that in an action for a debt or liquidated demand, a mere denial or general traverse will not do for all purposes. Applying the same principle a defence in an action of that type that is a mere general traverse cannot be and is not a sufficient defence

and also discloses no reasonable defence for the purposes of 06 r 13(1)(a).

34. In the circumstances, it was not enough to have a general denial to a very specific claim. Having several alternative claims does not cut. There has to be a specific defence. The court finds that the appeal on liability is untenable.

35. The next question is quantum. The two impugned documents were admitted by the parties' consent. The court found that an award of 80 tonnes and 3,000/= sufficed. The court rightly found that the appellant paid a sum of Ksh 3,000/= per tonne in 2015. The court also found rightly that the tonnage per acre was 80 tonnes per hectare. I cannot find fault with the judgment of the court below.

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

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

that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

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

37. Costs are generally discretionary. However, the discretion is not arbitrary. 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.**

38. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Rai & 3 others v Rai & 4 others [**2014] KESC 31 (KLR), 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, prior-to, during, and subsequent-to the actual process of litigation
> 22. 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. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

39. Costs follow the event. The event is the dismissal of the appeal. The respondent did not file submissions and did not attend court. The only order available in the circumstances is to order that each party bears its own costs.

Determination

40. In the circumstances, I make the following orders:

    a) The appeal herein lacks merit and is consequently dismissed.

b) Each party to bear its own costs.

c) 30 days stay of execution.

d) The file is closed.

**DELIVERED, DATED** and **SIGNED** at **NYERI** on this **4th** day of **March, 2026**. Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**

**JUDGE**

**In the presence of:-**

No appearance for parties

Court Assistant – Michael