REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL NO. E094 OF 2025

BRITAM INSURANCE CO. LTD ……. APPELLANT

VERSUS

BEATRICE BOKE NYAKOGERA ……. RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. Naomi Wairimu (SPM) dated 17.06.2025 arising from Migori CMCC No. E075 of 2022. The Appellant was the defendant in the lower court. The court below entered judgment to the effect that:
    a. Judgment for the respondent for Ksh 1,227,968/=
    b. Costs and interest.
2. The foregoing triggered this appeal. The same proceeded by way of filing of submissions.
3. The respondent was the Plaintiff in a declaratory Suit under the Insurance (Motor Vehicle Third Party Risks) Act, Cap. 405. The respondent filed suit, being Migori CMCC E024 of 2021. The lower court awarded a sum of Ksh. 1,105,000/= and costs

of Ksh. 122,968/=. They pleaded that the said award was in respect of an accident involving a motor vehicle registration number KAW 196 J and a motorcycle registered KMEU 3201. The motor vehicle is insured by the appellant under policy number TP: KSI/MPRV/PVL/2114353. The Accident is said to have occurred on 25.09.2020 during the currency of the policy.

4. The respondent pleaded that the statutory notice was issued on 12.10.2020 before the filing of the suit. A demand notice was issued to the appellant's issuer, Lilian Wairimiu Gachahi, the defendant in the primary suit. The demand notice was also copied to the appellant.

5. The matter in the lower court initially proceeded for an *inter partes* hearing with three witnesses testifying for the respondent in this matter and in E094 of 2025. The appellant called one witness. The appellant alleged that they learnt of the suit while perusing the court file. This is key to determining the matter, as will be seen shortly. The defence filed was to the effect that:
    a. The claim was vague and bad in law.
    b. That the said motor vehicle registration number KAW 196 J was not involved in an accident.
    c. The appellant was not the insurer of the motor vehicle registration number KAW 196 J.

d. The appellant was not aware of Migori MCCC No. E024 of 2021.
e. They are not bound legally to settle the claim in Migori MCCC No. E024 of 2021.
f. They were not bound to settle the claim under section 10 of Cap 405 as the suit was not reported to it or disclosed to it.
g. They stated that even if the notice was given, they were not under an obligation to settle the decree.

6. The respondent testified that she filed suit in the lower court and served the defendant in the primary suit. Judgment was entered for the amounts pleaded. Judgment was for the respondent for Ksh 1,227,968/=. The rest of the documents in her list were produced. This is not the proper procedure pursuant to Order 11 of the Civil Procedure Rules. A party must indicate at that level which documents they object to, or forever keep their peace.

7. She was cross-examined and stated that a demand notice and a statutory notice were sent. She stated that she had a letter showing that the two documents were sent.

8. Joseph Marwa Nyabite was the second witness who adopted his statement dated 8.7.2023. He also stated that he had a matter where he sued the insurance. This was E074 of 2021.

9. PW3 was immaculate Awuor, a court official who produced the file in E024 of 2021, E074 of 2021 and E140 of 2023.

10. DW1 was Wilson Odek. His witness statement was adopted as evidence in chief. On cross-examination, he stated that he had seen a screenshot of an email from the respondent's advocate. He admitted that the email was sent to their email and rerouted to the correct person. He stated that the said email was sent by Abisai Advocate but produced by the plaintiff and ought to have been produced by the said advocate. He stated that the email does not have a stamp to show it was received. He said, quite strangely, that they are supposed to receive notice at least 20 days after the commencement of proceedings. I will be addressing the fundamental legal principle *ignorantia juris not excusat.*

11. On cross-examination, he stated that when the accident occurred and was reported, he was not with the appellant. He named persons who had done legal work before him. He said he did not annex the register. He also did not seek leave to file a further statement to allege that the named email address did not exist. He also did not have evidence from the IT department to show that the emails were nonexistent. He stated that the email was sent by an advocate, and they replied to it. They did not follow up. He argued that the advocate had a duty to serve the insurance. The notices had

sufficient details. He stated that the documents sent by email were stamped by the reception.

12. On re-examination, he stated that if the notice was stamped, he would have agreed that it was received. He said it is not their duty to follow up every accident, but that of the claimant.

Analysis

13. The memorandum of appeal raises only a single issue for determination, that is, whether the respondent proved its case on a balance of probabilities. The rest of the so-called issues are merely ancillary, repetitive, and prolix, amounting to a waste of judicial time.

14. The appellant was aggrieved and filed a 6-paragraph memorandum of appeal. It is not necessary to set the same out herein as it is repetitive. It raises only one issue, that the court erred in finding, on the evidence, that the appellant was liable. It is not edifying to raise a single issue in thirteen paragraphs that serve only to obfuscate, rather than clarify, the real question for determination. The tenets of conciseness and precision in the drafting of a memorandum of appeal are well settled and are expressly provided for under Order 42 Rule 1 of the Civil Procedure Rules 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.**

15. Order 42 Rule 1 of the Civil Procedure Rules) is *pari materia* with Rule 88 of the Court of Appeal Rules. In the case of **Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] KECA 224 (KLR),** the Court of Appeal [**Nambuye, Karanja & M'Inoti, JJ.A.]** stated as follows while addressing the former rule 86 of the Court of Appeal Rules:

> "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…"

16. The court abhors repetitiveness of grounds of appeal which tend to cloud the key issues in dispute for determination. In the case of **Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] KECA 472 (KLR)**, the court of appeal [Nambuye, M. Warsame & Otieno-Odek JJA] 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."**

17. 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 firsthand. In the case of **Mbogo and Another vs. Shah [1968] EA 93** the Court stated:

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

18. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the

demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as in the lower court, as parties cannot read into them matters extrinsic to them. In the case of **Peters vs Sunday Post Limited [1958] EA 424,** 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…

19. However, it is a different story when it comes to documents. They must, as a corollary, speak for themselves. There can be no parol evidence introduced as to its meaning. The court of appeal in the case of **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 the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such

as the circumstances surrounding its writing or the history of the party or parties signing it.

20. The court will address the appeal in three limbs:
    a. The pleadings
    b. Evidence
    c. The law
    d. Contextualize the evidence and the law, in determining the single issue submitted to the court in the form of 6 grounds.

21. Having settled the principles to govern the decision of the law, parties must at all times be guided by Section 112 of the Evidence Act when dealing with insurance. Section 112 of the Evidence Act provides proof of special knowledge in civil proceedings. The same 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.*

22. The law regarding this matter is set out succinctly in sections 5, 10 and 12 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap. 405. In this context, only sections 10 and 12 are in issue.

23. Section 12 of the said Act provides as follows regarding the duty of a person against whom a claim is made to give information.

(1)Any person against whom a claim is made in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 shall, on demand by or on behalf of the person making the claim, state whether or not he was insured in respect of that liability by any policy having effect for the purposes of this Act or would have been so insured if the insurer had not avoided or cancelled the policy and, if he was or would have been so insured, give such particulars with respect to that policy as were specified in the certificate of insurance issued in respect thereof under section 7.
(1A)The insurer shall, upon being served with the statutory notice and documents, admit or deny liability for the claim or judgment by a notice in writing to the person or persons presenting the claim or judgment.

(1B)The claimant or judgment debtor or his representative shall upon receipt of the admission of liability shall allow the insurer a period of not more than sixty days to settle the claim or judgment out of court and both the insurer and the claimant or judgment debtor or his representative commit to arbitration or mediation during that period before resorting to court.

(2)If, without reasonable excuse, any person fails to comply with the provisions of this section, or wilfully makes any false statement in reply to any such demand as aforesaid, he shall be guilty of an offence.

24. Therefore, upon receipt of notice, an insurer, whether or not he is the one who insured a specific vehicle, must comply

with section 12, deny or admit liability. It is the appellant's witness who submitted that it is not their duty to follow up every accident, but that of the claimant. This piece of evidence must have been made out of sheer ignorance or misunderstanding of the provisions of Cap 405. It is important that parties handling insurance matters take time to read the Act, at least up to Section 12. It is not edifying to display such a lack of knowledge in a court of law.

25. Secondly, the question as to when notice is issued can be gleaned from the above section. The section covers both notices issued before or after the suit is filed.

26. In respect to the issuance of notice, section 10(2)(a) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap. 405 provides as follows:

> **(2) No sum shall be payable by an insurer under the foregoing provisions of this section-**
>
> a. **in respect of any judgment, unless before or within thirty days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or**

27. Therefore, notice can be given in one of the two instances as follows:

    a. Before filing of suit.
    b. Within thirty days after the commencement of the proceedings in which the judgment was given.

28. Timelines for notices before action are not given in section 10. However, they are extensively addressed under section 12 of Cap 405. It is not, therefore, true that the appellant was not under a duty to follow up the claim. Secondly, the question of whether the appellant was to be served with pleadings is not a statutory requirement but good manners. The law cannot legislate on good manners and practice.

29. The pleadings relate to service under Section 10 before the action. The appellant admitted only service and lamented that there was no service thereafter. This was done on the insured. Further, the appellant did not comply with section 12. Effectively, they removed themselves from the need to serve them again.

30. What the Respondent was bound to prove was set out succinctly in the case of **Cannon Insurance v Muindi**.

31. A question was raised in respect of electronic evidence. The same is provided under section 106B(4) Of the evidence Act as follows:

In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following-

(a) Identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) Giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) Dealing with any matters to which conditions mentioned in subsection (2) relate; and

(d) Purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

32. The information that is dealt with in such a manner is provided under section 106(B):

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence

of any contents of the original or of any fact stated therein where direct evidence would be admissible.
(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following-

(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the
computer;
(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the
accuracy of its content; and
(d) The information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

33. The objection is otiose and has no basis. The document itself was produced. The contents of the notices were not in issue. The appellant admitted no evidence that the notice was received. A party cannot require another to prove an

admission by another. Further, there is an email purporting to be from the defendant. The original of such an email is with the defendant. Once it is shown that the original is in the hands of an adverse party, there is nothing to prove. Secondary evidence can be produced. This is provided under section 69(1)(a)(1)of the Evidence Act as doth:

> (1) Secondary evidence may be given of the existence, condition or *contents of a document in the following cases-*
>
> *(a) when the original is shown or appears to be in the possession or power of-*
>
> *(i) the person against whom the document is sought to be proved; or*

34. The objection is thus clutching of straws for a dying man.

35. The last aspect is the evidence vis-à-vis the law. The evidence of the appellant was embarrassing at best and otiose at worst. The appellant sought to prove one thing and ended up proving with another. I had set out the questions raised in the defence. They ended up admitting all of them. They did not show how the claim was vague and bad in law.

36. The question as to whether motor vehicle registration number KAW 196 J was not involved in an accident was settled. There is a decree showing it happened. They freely admitted that the appellant was the insurer of motor vehicle

registration number KAW 196 J. Further that Lilian Wairimiu Gachahi, the defendant in the primary suit, was their insured. Further, whether or not they were aware of the primary suit is irrelevant, as they had been served with statutory notices. If they did not follow up, it is their business. That is why, upon service, they must strictly comply with section 12 of Cap 405, which they did not. The allegation that the appellant was not aware of Migori E024 of 2021, therefore, has no basis.

37. Though they alleged that they are not bound legally to settle the claim in Migori E024 of 2021, there was no basis laid. The allegation that they were not bound to settle the claim under section 10 of Cap 405 as the suit was not reported to it or disclosed to it, is without basis. Reporting or disclosure is a business of the insured. There was no repudiation of liability before judgment was entered. They must pay, then deal with their insurer. It is not up to the appellant to decide whether or not to pay. It is a matter of law. The evidence of DW1 reminds me of the lamentations by Odunga J, as he then was, in **Kioko Peter v Kisakwa Ndolo Kingóku** [2019] KEHC 11387 (KLR) that:

> ….Parties and Counsel ought to give the court's some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or no iota of truth. It is these kinds of allegations that Madan, J (as he then was) had in mind

when in N vs. N [1991] KLR 685 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."

5. In the South African case of Matatiele Municipality & Others vs. President of the Republic of South Africa & others (1) (CCT73/05) (2006) ZACC 2: 2006 (5) BCLR (CC); 2006(5) SA 47 (CC) it was held that:

> "In my view a person who deliberately either by commission or omission misleads the court and the public that a particular state of affairs exist while knowing very well that that is not the position cannot be said to be open, candid and transparent. Dishonest in my view is an Act which is antithesis to transparency and vice versa…"

38. The new issues raised both in evidence and submissions cannot change the results of the case. A party must first plead before tendering evidence. Tendering evidence without pleading cannot help. Parties are bound to plead their cases fully. In the case of **Migore v South Nyanza Sugar Co Ltd** [2018] KEHC 5465 (KLR), 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: -

.....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.

39. 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.

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

> 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.

41. As regards raising issues in submissions, this ground has been well travelled and settled. A Party cannot find a claim in submissions. They are neither evidence nor pleadings. Mwera J posited as follows when postulating on the role of submissions. He stated that they are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim. In the case of **Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993** it was stated as follows:

> **"Indeed, and strictly speaking, submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."**

42. Submissions are not, strictly speaking, part of the case, the absence of which may do no prejudice to a party. Their presence or absence does not in any way prejudice a case as held in **Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749**, that:

> "As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

43. The Court of Appeal was more succinct in that Submissions cannot take the place of evidence when they addressed the question in the case of **Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR**:

> **"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law**

> **and we are unable to countenance it. Submissions are generally parties' "***marketing language***", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."**

44. The statutory notices were properly served. The appellant ignored them to their own peril. On the whole, the court finds that the appeal lacks merit and is accordingly dismissed. The next issue is who is to bear costs. The issue of costs is governed by Section 27 of the Civil Procedure Act, which provides as follows:

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

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

45. 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.

46. 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.

47. Costs follow the event. The event is the dismissal of the appeal. The respondent is entitled to costs. A sum of Ksh. 115,000/= will suffice.

Determination

48. In the upshot, I make the following orders: -

(a) The appeal is unmerited and is dismissed *in limine*.

(b) Costs of appeal of Kshs. 115,000/= to the Respondent.

(c) 30 days stay of execution.

(d) The file is closed.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **16th** day of **March, 2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Anyango for the appellant

Mr. Abisai for the Respondent

Court Assistant – Michael