

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MIGORI**  
**CIVIL APPEAL NO. E043 OF 2025**

**CHINA HENAN INTERNATIONAL  
COOPERATION GROUP COMPANY**

**LTD.....APPELLANT**

**VERSUS**

**ALEX MUGE**

**OKUMU.....RESPONDENT**

**JUDGMENT**

1. This is an appeal against the Judgment and decree delivered by Hon. Naomi Wairimu (Senior Principal Magistrate) on 18th February 2025 in the Chief Magistrates Court at Migori in Civil Case Number E081 of 2022.
2. The court entered judgment on 18.02.2023 as follows:
  - a. 90% liable for the accident against the appellant and 10% against the Respondents.
  - b. General damages - Kshs. 300,000/=
  - c. Special damages - Kshs. 9,500/=
  - d. Costs of the suit.
3. The appellant filed a humongous 10 ground of appeal. They raise only 2 grounds. It is not edifying to raise 10 grounds and then argue only 2 in summary. A

memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. The grounds should not be obscure, imprecise, or argumentative. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules (which is *pari materia* with Order 42 Rule 1 of the Civil Procedure Rules) in the case of **Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -**

“We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See *Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR*) and *Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR*. In the latter case, this Court lamented:

“We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance

the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs.” The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues...”

4. Repetitive grounds of appeal tend to cloud the key issues in dispute for determination by the Court. The same issue was addressed succinctly court of appeal in the case of **Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR** as follows:

“Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether *Section 62* of the **Kenya Ports Authority Act** ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In **William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013**, this Court stated:

**“The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this**

**regard, precise, concise and brief is wiser and better.”**

5. The grounds are thus ancillary, repetitive, prolix, and a waste of judicial time. The appeal raises only two issues, that is, quantum and liability.

#### Appellant's Submissions

6. The appellant filed submissions dated 17.12.2025. They set out the duty of court as addressed in the case of **Ndungu Dennis v Ann Wangari Ndirangu & Eddah Mwihaki [2018] KEHC 8799 (KLR)**. They submitted that there was no dispute that an accident occurred on the date and place mentioned involving motor vehicle registration No. KCZ 433T. What was in dispute was the Respondent's involvement in the said accident.
7. It was their submissions that the burden of proof is set out in sections 108-109 of the Evidence Act. Reliance was placed on the case of **Mohammed Iqbal & 2 others - vs- Agnes Mbayaki Shikami** [2016] eKLR where the Court addressed the burden and standard of proof in civil cases as follows:

The appeal herein raises the twin issues of liability and quantum. Before making my findings, this court is aware of the principle that proof in civil cases is on a balance of probabilities and that parties are always bound by their pleadings. See the case of Karugi & Another - vs- Kabiya & 3 others (1987) KLR 347 wherein the Court of Appeal

stated that the burden was always on the plaintiff to prove his case on a balance of probabilities and that such burden was not lessened even if the case was heard by way of formal proof.

8. They lamented that the Respondent testified that he was walking along Migori-Uriri Road and on reaching Oyani bridge, a motor vehicle registration number KCZ 433T hit him and he fell into a river. It was his further testimony that he sustained injuries and was taken to the Uriri County hospital. In support of his claim, the Respondent produced a police abstract report dated 02.11.2021, which indicated that an accident occurred involving motor vehicle registration number KCZ 433T, and he was injured. The police abstract also indicated that the case was pending under investigation.
9. They further submitted that DW1 witness statement gives a detailed account of how the accident occurred. It was his testimony that on 22nd June 2021, he was called by Johnstone Kipkoech, who was driving motor vehicle registration number KCZ 433T, and informed him that he had been involved in an accident. It was his evidence that he arrived at the scene of the accident about 7 minutes after he was called. It was further submitted by them that his evidence showed the accident was recorded under OB No. 35/22/6/2021. It was his evidence that, according to the OB, the driver of motor vehicle KCZ 433T lost control while traveling from Uriri to Migori and ended up in a ditch on the right side of the road, facing the river bank.

It was his evidence that the scene was visited, and according to the OB, no one else was involved. During reexamination, he clarified that the Respondent was not indicated in the initial report. It was his evidence that the accident was self-involving.

10. They submitted that it is our submission that the trial court misapprehended the facts and evidence adduced and relied on insufficient, inconsistent, and questionable evidence of the Respondent arriving at a wrong finding on liability. They submitted that the onus was on the Respondent to prove, on the balance of probabilities, that the Appellant's driver was negligent by proving any of the acts of negligence pleaded against him.

11. They further submitted that the Appellants police abstract indicated that only its driver, Johnstone Kipkoech, was slightly injured, while the Respondent's abstract, issued 5 months after the occurrence of the accident, indicated that he was a pedestrian and also injured in the accident. The Appellant's Abstract report does not mention the Respondent or any pedestrian having been involved in the accident. The Appellant produced an OB extract corroborating its defence that the accident was self-involving and that only its driver was injured.

12. There was no consistent, unbroken chain linking the Appellant's vehicle and the Respondent. While the police

abstract and OB extracts are admissible under Section 35 of the Evidence Act, courts have held that a police abstract alone is not conclusive proof of involvement in a road accident and it can be rebutted. Reliance was placed on the case of **Catherine Mbithe Ngina v Silker Agencies Limited [2021]** eKLR where Odunga J (as he then was) held that:

I must point out, however, that the contents of the police abstract as extracted from the records held by the police are merely evidence that a report of an accident was made. It is prima facie evidence of the occurrence of the accident and the particulars of those involved. It can, however, be rebutted. It was therefore held in **Peter Kanithi Kimunya v Aden Guyo Haro [2014]** eKLR

A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was reported at a particular police station.

13. They stated that the causation of the accident and/or the contribution to the causation of the accident by motor vehicle registration No. KCZ 433T was not proved at all. Reliance was placed in the case of **Statpack Industries v James Mbithi Munyao [2005]** eKLR.

14. On damages, they stated that the principle is that an Appellate Court will only interfere with an award of damages if it is satisfied that the award is inordinately low or high, or that the trial court took into account

irrelevant factors in assessing the damages. Reliance was placed on the case of Butt vs. Khan (1982-88)I KLR.

15. They submitted that, according to Dr. Idagiza A. Akidiva the Claimant sustained the following injuries:
  - a. Cut wound on the right lower limb.
  - b. Dislocation on the right knee joint.
  - c. Cut wound on the right knee joint.
  - d. Bruises on the right shoulder joint.
  - e. Dislocation on the right shoulder joint.
16. They submitted that the doctor classified the injuries as soft tissue injuries and that they were expected to heal. They stated that the good doctor assessed total bodily injury at 4%. They continued that the veracity of the medical report by Dr. Idagiza was questionable for the following reasons: Firstly, the report was prepared 4 months after the accident and it is thus of little value.
17. Secondly, the report does not indicate which documents were referenced. Thirdly, the report indicates that the Respondent was treated at Uriri Sub-County Hospital, but the injuries listed in the said report do not tally with the injury captured in the treatment note from Uriri Sub-County Hospital. Therefore, no reliance could be placed on the said report.
18. The court was urged to find guidance in the holdings in **Samuel Karani Muriithi v Eutyclus Wanjohi & 2 others** [2019] eKLR where the Court held that:

The main issue in contention in this appeal is whether or not the trial Magistrate erred in dismissing the Appellants' claim of General Damages and medical expenses. Looking at the trial Court records, it is clear that the Appellant did not attach any initial treatment notes. The medical report by Dr. Kiama equally does not state the medical records he relied on to make the medical report. The trial court also found that the P3 form was faint and lacked information on the injuries sustained. These are important foundational documents in a claim for general damages and medical expenses for injuries sustained....

“Therefore, absence of initial treatment chits or some form of reliable and admissible record or evidence thereto, denies any connexion between the injuries set out in the medical report and the accident as the alleged cause of the injuries. There is absolutely nothing to show that the appellant was treated at KNH. The possibility that the injuries may have been sustained elsewhere other than out of the accident herein is not remote. Consequently, there is no plausible basis for an award in general damages or medical expenses.

19. Reliance was placed on three 2018 cases, which I do not wish to replicate herein since they are over 8 years old.

20. The respondent filed submissions dated 19.12.2025. They submitted that a police abstract was produced and

showed that the accident occurred. The appellant filed to the respondent whose evidence was uncontroverted. He stated that the appellant had a police officer testify and produced an abstract and not an OB. Reliance was based on the case of **Thadeo Ndungu Njoroge Vs. Thika County Council H.C.C.C.NO. 2453 OF 1998.**

21. Further, the appellant wants to give evidence through submissions. They posited 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 1<sup>st</sup> 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.”**

22. Further submissions were that the appellant did not avail the driver. They relied on the private investigator. He submitted that the appellant did not attempt to prove that the appellant was an imposter. Reliance was placed

on the case of **Teleposta Pension Scheme Registered Trustees v InterCountries Importers and Exporters Limited & 5 others [2016] eKLR.**

23. On the standard of fraud, he submitted that the burden was on the appellant to prove fraud. Reliance was placed on the case of **Susan Nyokabi Ngoci & another v Kimson Holding Limited & another [2015] KEELC 719 (KLR)**, where J. L. Onguto, J held as follows:

Thirdly, the burden was always on the Plaintiffs to prove fraud on the part of the Defendants. The standard of proof where fraud is alleged is high. Though it is the same civil standard of proof on a balance of probabilities, it is certainly higher than the ordinary proof on a balance of probabilities but lower than proof beyond reasonable doubt. It all depends on the nature of the issue and its gravity: see **Hornal - v- Neubeger Production Ltd [1957] 1 QB 247**. Evidence of especially high strength and quality is required to meet the civil standard of proof in fraud cases. It is more burdensome: see also the cases of **Mpungu & Sons Transporters Ltd -v- Attorney General & another [2006] 1EA 212**. In the instant case the Plaintiffs alleged that the Defendants made an agreement of sale and purported the same to have been signed by the Plaintiffs. The Plaintiffs however did not provide a copy of the said fraudulently drafted and executed Agreement. That left the court as well as the Plaintiffs' case in limbo. The Plaintiffs, in short, have failed to prove any of the allegations of fraud.

24. They submitted that the appellant failed to show that he was an imposter. Reliance was placed in the case of **National Bank Of Kenya Limited V Ebenezer Electronics & Communications Limited & 3 Others [2008] KEHC 370 (KLR)**, where Lesiit, J as she then was, held as follows;

I agree with Mrs. Were that it is trite that averments in a written statement of defence are not evidence but are mere allegations, the truth of which should be proved in evidence. Mrs. Were relied on the case of Economic Housing Group Limited vs. David Kamau Githinji, HCCC (Nai) 1094 of 1996 for that preposition. I agree with that preposition.

The 1st Defendant did not adduce any evidence to substantiate its statement of defence. The Statement of defence remained mere allegations without proof. In any event, they cannot withstand the Plaintiff's case.

25. He submitted that fraud must not only be pleaded but must be particularized and then proved. Reliance was placed on the case of **Kiarie & 2 others v Magera [2018] KECA 467 (KLR)**, where the court of appeal [PN Waki, MS Asike-Makhandia & DK Musinga, JJA] held as follows:

The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria vs Nansingh Madhusingh Darbar &

Another [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:

It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.

26. On quantum of damage, they submitted that a sum of Ksh 300,000/= was proper and not excessive. Reliance was placed on the case of **Catholic Diocese of Kisumu v Sophia Achieng Tete, Kisumu Civil Appeal No. 284 of 2001; (2004) eKLR.** They prayed that the appeal be dismissed.

#### Analysis

27. In the circumstances, I am inclined to dismiss the appeal with costs to the Respondent.
28. There is actually no material placed before the court to warrant review. It is thus unnecessary to find whether the material is insufficient. It is simply not there. The net effect is that I find the appeal lacks merit and accordingly dismiss it. This leaves the issue of costs, which 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.**

29. 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.

30. 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.

31. The Respondent has unnecessarily been vexed on non-existent material. The costs of the appeal will be paid. A sum of 85,000/= will suffice.

### Determination

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

- a) The appeal lacks merit, and it is accordingly dismissed with costs of Ksh. 65,000/= to the Respondent.
- b) 30 days stay of execution.
- c) The file is closed.

**DELIVERED, DATED and SIGNED** at **NYERI** on this **17<sup>th</sup>** day of **March, 2026**. Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**  
**JUDGE**

### **In the presence of: -**

Mr. Mugwe for the Appellant

Mr. Abisai for the Respondent

Court Assistant - Michael/Martin