

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY
CIVIL APPEAL NO. E036 OF 2024

**THIRD ENGINEERING BUREAU OF
CHINA CITY CONSTRUCTION
LIMITED.....APPELLANT
VERSUS**

**FRANCIS O MOBEGI &
NAOMI KALEJI (suing as legal Administrators of the Estate of
SIMON ACHIRA MOBEGI.....1ST
RESPONDENT**

**STANBIC BANK (K) LIMITED.....2ND
RESPONDENT**

(Being an appeal from the Judgment and Decree of the Hon. S. O. Ongeri, Senior Principal Magistrate, delivered on 13th May 2024 in Oyugis SPMCC No. E118 of 2022)

JUDGMENT

[1] The appellant, **Third Engineering Bureau of China City Construction Ltd**, filed this appeal vide its Memorandum of Appeal dated 28th May 2024 seeking that the judgment and decree passed in **Oyugis Senior Principal Magistrate’s Civil Case No. E118 of 2022: Francis O. Mobegi & Naomi Kaleji (suing as the Administrators of the Estate of Simon Achira Mobegi, Deceased) v Standard Bank (K) Limited & another**, be set aside and that the Court be pleased to re-evaluate and reduce or vacate and or dismiss the award on damages for loss of dependency. The appellant also prayed that the costs of this appeal be borne by the respondents.

[2] The 1st respondents herein, **Francis Mobegi** and **Naomi Kaleji**, (hereinafter, “the respondents”) had jointly sued the

appellant and the 2nd respondent in **Oyugis SPMCC No. E118 of 2022**, seeking for compensation by way of general and special damages on behalf of the estate of **Simon Achira Mobegi** (the deceased). They filed the lower court matter in their capacity as the administrators of the estate of the deceased. In their Complaint dated 14th June 2022, the respondents had averred that, on or about the 21st day of October 2021 or thereabout, the deceased was lawfully walking along Oyugis-Kisumu Road at Oyugis Town when, due to the negligence of the appellant and the 2nd respondent, their driver violently knocked down the deceased while driving Motor Vehicle Registration No. KCQ 161L Isuzu Lorry. They averred that the deceased suffered fatal injuries from which he succumbed, thereby occasioning his estate loss and damage.

[3] The respondent supplied the Particulars of Negligence of the appellant's driver at Paragraph 5 of the Complaint. They also relied on the doctrine of *Res Ipsa Loquitur* and the Traffic Act, Cap 403 of the Laws of Kenya as well as the Highway Code.

[4] In terms of particulars pursuant to the Fatal Accidents Act, Cap 32 of the Laws of Kenya and the Law Reform Act, Cap 26 of the Laws of Kenya, the respondents had averred that the deceased was aged 58 years at the time of his death; and that he was a businessman earning about Kshs. 300,000/= per month. The respondents also averred that he was in good health and had a bright future with good prospects in life which was brought to an abrupt end by the subject accident. They also mentioned that the deceased was a polygamous man with many school-going

children who were dependent on him. They therefore averred that as a result, the deceased's family has been put to hardship and has suffered loss and damage for which they blamed the appellant and the 2nd respondent and prayed that they be held jointly and severally liable.

[5] At Paragraph 7 of the Plaint, the respondents set out the names of the deceased's four widows and children as well as the Particulars of Special Damages. They accordingly prayed for judgment against the appellant and the 2nd respondent as set out in their Plaint.

[6] On the 18th August 2022, the respondents filed a Notice of Withdrawal of Suit in respect of **Stanbic Bank (K) Ltd** (the 2nd respondent), who was the 1st defendant in the lower court suit. The proceedings of the lower court show that the parties thereafter entered into a consent on liability and apportioned liability at 80:20 in favour of the respondents. The consent was adopted as an order of the Court on 28th February 2024 and the learned magistrate then proceeded to assess the quantum of damages as follows:

Pain and suffering	Kshs. 30,000/=
Loss of expectation of life	Kshs. 100,000/=
Loss of dependency	Kshs. 4,500,000/=
Special damages	Kshs. 72,550/=
Total	Kshs. 4,702,550/=

[7] The appellant, being dissatisfied with the decision of the learned magistrate, filed this appeal on the following grounds:

[a] That the learned magistrate erred and misdirected himself in fact and law by awarding damages to the respondents that were manifestly excessive.

[b] That the learned magistrate was in error of law and fact in failing to distinguish between a company and a shareholder and thus arriving at a wrong assessment of damages for loss of dependency.

[c] That the learned magistrate was in error of law and fact by failing to find that the deceased's income was not proved as required.

[d] That the trial court was in error of law and fact in failing to find that loss of dependency was not proved.

[e] That the learned magistrate erred and misdirected himself on the principles applicable to assessment of damages and therefore erred in his findings on loss of dependency.

[f] That the learned trial magistrate erred in law and in fact in failing to take into account the uncertainties and vicissitudes of life and consequently failed to give due allowance for that.

[g] That the learned magistrate erred in failing to consider and critically analyze the submissions made on behalf of the appellant and thus arrived at an unjustifiably high award.

[h] That the learned magistrate's award on damages was so inordinately high.

[i] That the learned magistrate's award of damages for loss of dependency was based on no evidence at all.

[j] That the award on loss of dependency was based on no or wrong legal principles.

[k] That the learned trial magistrate misdirected himself in fact and in law in assessing damages for loss of dependency.

[l] the learned magistrate was in error of law and fact in failing to take into account certain considerations material to an estimate of evidence.

[8] Accordingly, the appellants prayed that their appeal be allowed and the award of general damages by the lower court be set aside and substituted with an award as the Court may deem fit and just to grant in the circumstances. The appellant also prayed for costs of the appeal.

[9] The appeal was urged by way of written submissions, pursuant to the directions given herein on the 21st January 2025. In the appellant's written submissions dated 27th March 2025 it proposed the issue for determination to be loss of dependency and whether the learned trial magistrate misdirected himself on

principles applicable to damages and in his findings on loss of dependency. The appellant submitted that the award of Kshs. 4,500,000/= for loss of dependency was manifestly excessive and/or inordinately high and should be reviewed and/or varied. The appellant relied on the book, **Measure of Damages for Bodily Injuries** by Richard Kuloba, with regard to the duty of an appellate court on an appeal against quantum. The learned author stated:

"On appeal, every member of the appellate court is anxious to do all he can to ensure that the damages are adequate for the injury suffered as far as there can be compensation for an injury and to help the parties and others to arrive at a fair and just figure in all circumstances. An endorsement of extravagant damages in one case becomes a yardstick of the next so that no margin is left for certain losses for example total disability."

[10] It was the submission of the appellant that this court has authority to interfere with quantum of damages if the amount is so inordinately high. In support of this assertion, the appellant relied on **Butt v Khan** [1977] 1 KAR in which it was held that:

"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

[11] The appellant also impugned the decision of the lower court on the ground that the learned magistrate failed to distinguish between a company and a shareholder and thus arriving at a wrong assessment of damages for loss of dependency. According to the appellant, the earnings of the company known as **Nyamusi General Contractors** which deals with supplies of goods to the government, ought not to have been taken as the income of the

deceased, considering that a company is a legal entity separate and distinct from its shareholders. It relied on **Re Estate of Boniface Mutinda Kabaka (Deceased)** (Succession Cause E185 of 2021) [2021] KEHC 12031 (KLR) (Family) (27 May 2022) (Ruling), in which it was held that:

The Company is a separate legal entity from the persons who hold shares in it. The law which governs limited liability Companies is the Companies Act, Cap 486, Laws of Kenya, in terms of the formation, operations and liability of Companies. Any Orders against a limited Company by persons who claim entitlement to shares in and directorship of the Company can only be properly brought within the framework of the Companies Act, in proceedings properly brought before a Commercial Court.

[12] The appellant urged the Court to note that the respondents tendered Local Purchase Orders as proof of the deceased's income, yet the LPOs were addressed to the company, **Nyamusi General Contractors** and not the deceased. Additionally, the appellant faulted the learned magistrate for failing to take into consideration that, in the absence of books of account for the company, it was impossible to ascertain the company's net income, or the amount due to the shareholders. In this regard, the appellant relied on **Daniel Toroitich Moi v. Mwangi Muriithi**: Civil Appeal No. 240 of 2011 where the court held that:

"...We have no doubt that the Companies Act provides that a shareholder has property in the shares that entitles him/her to vote at meetings, elect officers/directors and the rest. But a shareholder has no ownership or right to the properties held by the company — a legal entity, separate and distinct from its shareholders. (see Salmon vs Salmon 11895-91 All ER 33).

[13] Consequently, the appellant submitted that the income of the company cannot be regarded as the income of the deceased who was only a director and/or a shareholder in the aforesaid company. On the authority of **CMC Aviation Ltd v Cruise Air**

Ltd (1) [1978] KLR 103 the appellant reiterated its stance that it was not enough for the respondents to plead income at Kshs. 300,000/=; and that they were to go further and provide proof that indeed the deceased was earning that amount prior to his demise. In that case, the Court held:

Pleadings contain the averments of the facts concerned and until they are proved or disapproved or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence.

[14] In the absence of proof of income, the appellant urged the Court to conclude that the deceased was a general labourer for purposes of the Regulations of Wages (General) (Amendment) Order 2018 which stipulated that the minimum wage of a general labourer was Kshs. 13,572.90. The appellant also submitted that Courts are always enjoined to take into account the uncertainties and vicissitudes of life and give due allowance for that; and that a lump sum payment paid at once, if properly invested, can amount to reasonable compensation for the loss.

[15] The appellant placed reliance on **Roger Dainty v Mwinyi Omar Haji & another** [2004]eKLR in which the court held that the determination of the multiplier is a question of fact to be determined from the peculiar circumstances of the case. In determining the multiplier to be adopted, the court may consider the nature of employment of the deceased and the fixed retirement age, the period of expected dependency, the conditions of life of the deceased could have lived, keeping in mind that the standard of life and the life expectancy in Kenya

has reduced over the years due to factors such as poverty, impact of HIV and the risk of road traffic accidents. The appellant urged the Court to adopt a multiplier of 2 years as was the case in the following authorities:

[a] Martha Bosibori Arisa & Geoffrey Ayiera Zablon v Gladys Nyarabu Matundura [2019] eKLR in which the High Court affirmed a multiplier of 2 years for a deceased aged 58 years.

[b] Muasya Mhuri Kiseli v Martin Mutisya Kiio & Another [2010] eKLR the High Court used a multiplier of 2 years for a 58 year old deceased.

[c] Monicah Muthoni Mwangi v Peterson Wanjohi & Another [2004] eKLR in which the High Court adopted a multiplier of 2 years for a deceased aged 58 years.

[16] On the issue of the dependency ratio, the appellant had not quarrel with the evidence that the deceased was survived by four widows and children. It had no objection to the ratio of 2/3 being applied. Accordingly, in the appellant's view the learned magistrate ought to have applied the following formula in computing loss of dependency:

Kshs. 13, 572.90 x 12 x 2 x 2/3

[17] In the alternative, the appellant made submissions on the global sum approach should the court be inclined to take that

option. It proposed an award of Kshs. 800,000/= for loss of dependency and based that proposal on the following authorities:

[a] Albert Odawa v. Gichimu Githenji [20071 eKLR, where **Koome J** (as she then was) quoted **Ringera J** in **Mwanzia v. Ngalali Mutua v Kenya Bus Services** (Msa) Ltd & another where he stated that:

"The multiplier approach is just a method of assessing damages. It is not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do. However, in resorting to the lump sum principle, a trial Court should be guided by the age of a deceased, the expected length of dependency and the estimated income. The award should not be so inordinately high or low as to be a wrong estimate of damages"

[b] Nzuki v Maithya & another (Suing as the Legal Representatives of the Estate of Joseph Wambua - Deceased) (Civil Appeal E024 of 2022) [2024] KEHC 2752 (KLR) (11 March 2024) (Judgment) in which it was held that:

"The adoption of a global figure is an accepted method of assessment of damages which has been adopted by various courts. Mabeya J in Michael Rimiri M'ingetha & another v Zipporah Mukomua M'ituri P0201 eKLR stated as follows on dealing with situations where proof of income is not presented to the court;

All that documentary evidence does is to give the Court an estimation of the actual income a person derives from his economic activities. Where there is no such documentary evidence the Court should then resort to the principle of lump sum"

[c] Mwasuna v Kilonzo (Suing as the Administrator of the Estate of Isaac Maingi Nzioka - Deceased) (Civil Appeal E029 of 2022) [20231 KEHC 4041 (KLR) (28 April

2023) (Judgment) the High Court substituted the Trial Court's award of Kshs 1,000,000 with an award of Kshs. 800,000/= for loss of dependency where the deceased was aged 59 years.

[d] In Awale Transporters Ltd Mombasa v Wakhungu & another (Suing as Legal Representatives of the Estate of Alfred Sabwami Namasambu-Deceased) (Civil Appeal E103 of 2022) [20241 KEHC 2680 (KLR) (6 March 2024) (Judgment), the High Court substituted the Trial Court's award of Kshs 1,500,000 with an award of Kshs 800,000 for loss of dependency where the deceased was aged 61 years.

[18] Further to the foregoing, the appellant urged the Court to ensure that there is no duplication in the awards under the Law Reform Act and the Fatal Accidents Act. It relied on **Joseph Wachira Maina & Another v Mohammed Hassan** [20061 eKLR and otherwise prayed for the dismissal of the appeal with costs.

[19] The respondents compressed the appellant's 12 Grounds of Appeal into one, namely, whether the trial court erred in law and fact in awarding Kshs. 4,500,000/= for loss of dependency. The respondents cited the case of **Uhuru Highway Development Ltd & 3 others v Central Bank of Kenya & 4 others** [2003] eKLR and submitted that the issues raised and addressed in paragraphs 9 to 17 of the appellant's submissions were not raised

in the pleadings and proceedings at trial. They urged the Court to disregard the same as parties are bound by their pleadings and the evidence placed before the lower court.

[20] In response to the appellant's submission that **Nyamusi General Contractors** is a separate legal entity from the deceased, the respondents referred the Court to page 40 of the Record of Appeal where a copy of the Certificate of Registration is reflected to confirm that the business is a sole proprietorship and not a company as alleged by the appellant. They also asserted that, by producing the different Local Purchase Orders (page 41-50 of the record of appeal), they were only demonstrating that **Nyamusi General Contractors** as a business entity was doing well and the deceased was capable of earning a salary of Kshs. 300,000/= monthly. They relied on **Samuel Ndegwa Waithaka v Agnes Wangui Mathenge & 2 others** [2017] eKLR at paragraph 12 for the proposition that the standard of proof in civil cases is on a balance of probabilities.

[21] The respondents resisted the appellant's proposal that the deceased be treated as a general labourer and the multiplicand be based on the sum of Kshs. 13,572.90/ = as provided for under the Regulation of Wages (General) (Amendment) Order 2018. They asserted that, in effect, the appellant was calling upon this court to speculate and conclude that the deceased was a casual labourer. They cited the case of **E W O (suing as the next friend of a minor, C O W) v Chairman Board of Governors-Agoro Yombe School** [2018] eKLR for the proposition that the

court itself is bound by the pleadings of the parties and that speculation by the court is equivalent to an unfair hearing and a denial of justice.

[22] On proof of earning, the respondents relied on the decision of the Court of Appeal in **Jacob Ayiga Maruja & Another v Simeon Obayo** Civil Appeal No. 107 OF 2002 (2005) ECLR and submitted that such proof need not be by way of documentary evidence. They posited that sufficient evidence was availed to demonstrate that deceased's income was in the region of Kshs. 300,000/=.

[23] On the multiplier, the respondents submitted that it is an undisputed fact that the deceased was 58 years of age with 26 children, the youngest being one (1) year old as at 4th May, 2022 and that he enjoyed a healthy life and would have lived for many more years. Accordingly, they supported the decision of the lower court on the authority of **John Wamae & 2 others** (supra) in which a multiplier of 10 was applied in the case of a 60-year-old deceased person. In the same vein, the respondents urged the Court to avoid the global award proposal made by the appellant, contending that the authorities relied on to propound that option are distinguishable.

[24] Thus, the respondents prayed that the appellants appeal be dismissed with costs and that the judgement of the lower court be upheld.

[25] This being a first appeal, it is the duty of the Court to re-evaluate the evidence adduced before the lower court with a view of coming to its own findings and conclusions thereon; while giving due consideration for the fact that it did not have the advantage of seeing or hearing the witnesses who testified before the lower court. This is in line with **Selle & Another v Associated Motor Boat Co. Ltd & Others** [1968] EA 123 wherein it was held that:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

[26] As was correctly pointed out by the appellants, the appeal challenges only one aspect of the decision of the lower court, namely the award under the head of loss of dependency. It is trite that assessment of damages is a matter of discretion; and that an appellate court ought not to disturb an award simply on the ground that it would have arrived at a different outcome. In **H. West & Son Ltd v Shephard** [1964] AC 326, for instance, it was held that:

"...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

[27] Similarly, in **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja v Kiarie Shoe Stores Limited** [2015] eKLR, the Court of Appeal held that:

"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages." (Also see **Butt v Khan** [1981] KLR 349)

[28] A perusal of the proceedings and judgment of the lower court confirms that, indeed, no evidence was adduced by the 1st respondent in proof of the deceased's income with exactitude. Therefore, the lower court adopted the global sum approach in its decision to award the sum of Kshs. 4,500,000/= for loss of dependency.

[29] Authorities abound for the proposition that where it is impossible to ascertain income, the preferable option would be for a trial court to employ the global sum approach. The words of **Hon. Ringera, J.** (as he then was) in **Mwanzia Ngalali Mutua v Kenya Bus Services (Msa) Ltd & Another**, are apt; namely, that:

"The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to

sacrifice justice on the altar of methodology, something a court of justice should never do.”

[30] Similarly, in **Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi** (supra) it was held:

“23. In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency. 24. The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.”

[31] The same approach was taken in **Moses Mairua Muchiri v Cyprus Maina Macharia** (supra) as follows:

“...where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.”

[32] A cardinal principle that ought to always be kept in view is that the award be in tune with the current range in comparable cases. In **Stanley Maore v Geoffrey Mwenda** [2004] eKLR, the Court of Appeal pointed out that:

“...It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

[33] Likewise, in **Milicent Atieno Ochuonyo v Katola Richard** [2015] eKLR where the Court held as follows:

"Awards must be reasonable and assessed with moderation. So far as possible, comparable injuries should be compensated by comparable awards. The court has to strike a balance between endeavoring to award a just amount so far as money can ever compensate and entering a realm of very high awards which can only in the end have deleterious effect. "

[34] Having given due consideration to the issues raised in this appeal, and in particular the submissions made by the parties as well as the authorities cited by them, I am persuaded that the lower court's award on loss of dependency was excessive. In this regard, I have noted the comparable awards made in the cases relied on by the appellant, and noted that they are fairly recent, having been decided in 2022 and 2023. The comparable decisions are:

[a] Mwasuna v Kilonzo (Suing as the Administrator of the Estate of Isaac Maingi Nzioka - Deceased) (Civil Appeal E029 of 2022) [20231 KEHC 4041 (KLR) (28 April 2023) (Judgment) in which the High Court substituted the trial court's award of Kshs 1,000,000 with an award of Kshs 800,000 for loss of dependency where the deceased was aged 59 years.

[b] Awale Transporters Ltd Mombasa v Wakhungu & another (Suing as Legal Representatives of the Estate of Alfred Sabwami Namasambu-Deceased) (Civil Appeal E103 of 2022) [20241 KEHC 2680 (KLR) (6 March 2024) (Judgment) where the High Court substituted the trial court's award of Kshs 1,500,000 with an award of Kshs 800,000 for loss of dependency where the deceased was aged 61 years.

[35] In the premises, the award by the lower court on the head of loss of dependency is hereby reduced to Kshs. 2,000,000/= taking into account the current range of awards and the effect of inflation.

[36] In the result, I find merit in the appeal. The same is hereby allowed in that the award by the lower court under the head of loss of dependency is hereby set aside and substituted with an award of Kshs. 2,000,000/=. The rest of the items awarded by the lower court remain undisturbed. The general damages awarded must be subjected to 20% contribution as per the consent of the parties.

[37] I have also given due consideration to the appellant's submissions on costs. Indeed, it is trite that costs follow the event and are at the discretion of the court. The Supreme Court case of **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others**, SC Petition No 4 of 2012; [2014] eKLR sets out the guidelines that a court must consider when exercising its discretion to either award or deny costs and its states:

"[14] So the basic rule on attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party; rather, it is for compensating the successful party for the trouble taken in prosecuting or defending the suit. In Justice Kuloba's words [Judicial Hints on Civil Procedure, at p.94]:

"[T]he object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure...Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action."

[38] The Supreme Court further stated:

"[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] Accordingly, it is my considered view that the justice of this case requires that each party bears own costs of the appeal.

Orders accordingly.

**DATED AND SIGNED AND DELIVERED VIRTUALLY AT HOMA
BAY THIS 13TH DAY OF MARCH 2026**

.....
OLGA SEWE

JUDGE