

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NYERI**  
**CIVIL APPEAL NO. E054 OF 2025**

**WINFRED WANGUI MUGO .....**  
**APPELLANT**

**VERSUS**

**AMARS** **TRADERS**  
**LIMITED.....RESPONDENT**

*(Being an Appeal against the whole Ruling and Order of  
the Magistrates Court at Karatina delivered by Hon.  
Kaimenyi Kanyiri on 22nd August 2025 in Karatina Civil  
Case Number E071 of 2024)*

**JUDGMENT**

1. This is an appeal against the whole Ruling and Order of the Magistrates Court at Karatina delivered by Hon. Kaimenyi Kanyiri on 22.08.2025 in Karatina Civil Case Number E071 of 2024. The same related to a preliminary objection to the effect that:
  - a. THAT the suit is contrary to and offends Section 4 (2) of the Limitation of Actions Act, Cap 22 Laws of Kenya.
  - b. THAT as per the Plaintiff's own averments as contained in paragraph 4 of the Plaint, the cause of action arose between 6th February 2019 and 11th October 2019, more than four years ago and thus the suit is time barred.

c. THAT the Plaintiff offends Order 2 Rule 10 of the Civil Procedure Rules and is fatally defective for want of particulars of fraud.

d. THAT the whole matter as filed is vexatious and an abuse of the solemn judicial process and is thus fatally defective and should be struck out in limine and with costs to the Defendant.

2. The defendant filed a defence for which the only defence raised was at paragraphs 5 and 6 as follows:

5. In response to the contents of paragraphs 5, 6 and 7, the Defendant admits that the Plaintiff commenced criminal proceedings which proceeded and ended as pleaded by the Plaintiff. The Defendant however states that the findings in the criminal matter are not summarily binding on this court for purposes of civil liability.

7. The Defendant states that as per the Plaintiff's own averments in paragraph 4 of the Plaintiff, the cause of action is alleged to have occurred between 6th February 2019 and 11th October 2019, more than four years ago and therefore, pursuant to section 4(2) of the Limitation of Actions Act, Cap 22 Laws of Kenya, the claim as filed is time barred. The Defendant shall raise the requisite Preliminary Objection at the opportune time.

3. The impugned plaint dated 12.11.2024 was to the effect that:

4. Between 6.2.2019 and 11.10.2019 the defendant as a servant of the plaintiff stole Ksh. 499.813.50/=.

5. The plaintiff avers that from the stealing pleaded in paragraph 4 the defendant was, vide Karatina PM Criminal case number 769 of 2019 charged with stealing by servant contrary to section 281 of the penal code and found guilty and sentenced to a fine of Ksh. 200,000/= in default 2 years imprisonment which fine she paid.

6. In the same sentence the defendant was ordered to compensate a sum of Ksh. 499.813.50/= failing which the complainant to pursue a civil claim.

4. Further to the foregoing, the Respondent made the following prayers:

a. Wherefore the plaintiff prays for judgment and orders against the defendant for;

a) Ksh. 499.813.50 as ordered on 31.05.2023.

b) Interest from 31.05.2023 until payment in full.

5. The parties filed submissions herein. The appellant filed submissions dated 9.03.2026. She submitted that the appeal is merited and should be allowed. It was their case that the

Appellant was charged with the offence of stealing by servant, the particulars of the charge being that between 6th February 2019 and 11th October 2019, she stole cash and goods worth Ksh. 568,081/= from the Respondent, which came to her possession by virtue of her employment.

6. The Appellant was convicted of stealing Kes. 499,813.50/= and sentenced to pay a fine of Ksh. 200,000/= or in default to serve imprisonment for a period of 2 years. The Appellant was also ordered to compensate Ksh. 499,813.50/= to the Respondent. The Respondent filed a civil suit in Karatina MCCC E071 of 2024, seeking payment of Ksh. 499,813.50/=. The Appellant filed *inter alia* the aforementioned Notice of Preliminary Objection, contending that the suit was time-barred pursuant to the provisions of **Section 4 (2) of the Limitation of Actions Act, Cap 22 Laws of Kenya.**

7. She submitted that the first appellate court is mandated to reconsider and re-evaluate the evidence and draw its own conclusions, bearing in mind that it did not see or hear the witnesses. Reliance was placed on the case of **Ng'ang'a v Matheri [2024] KEHC 6713 (KLR).**

8. She submitted that the claim before the court is for recovery of the funds stolen by the Appellant from the Respondent. It is undisputed and consistent with the court's finding in the criminal matter that the crime occurred

between 6.02.2019 and 11.10.2019. It was further submitted that a claim for recovery of stolen funds is based on the tort of conversion. Reliance was placed on persuasive cases of **Charles Mutuma M'kanake v Diocese of Meru Trustees Registered [2021] KEHC 4941 (KLR)** and **Simiyu v Wanyova & another (Civil Appeal 10 of 2023) [2023] KEHC 24966 (KLR)**.

9. She submitted that Section 4 (2) of the Limitation of Actions Act provides for a limitation period of three years. It was their position that accrues according to the Black's Law Dictionary 11th Edition, which is to come into existence as an enforceable claim or right. Reliance was placed on the case of **Diana Katumbi Kiio v Reuben Musyoki Muli [2018] KECA 860 (KLR)**, where the court of appeal stated as follows:

17. A cause of action in contract arises from breach of the contract and not at the time it is executed. According to the author in the Journal of International Banking and Financial Law: What's the Limit (2007) 11 JIBFL 642:-

In contract the cause of action accrues when the breach occurs, but in tort the cause of action accrues when damage is first sustained. The cause of action, whether in tort or contract, arises regardless of whether or not the claimant could have known about the damage.

We agree with that exposition.

10. They submitted that the lower court ignored the decision of **Simiyu V Wanyova & Another** (Civil Appeal 10 of 2023) [2023] KEHC 24966 (KLR) where Justice S. Chirchir clearly stated that time does not stop running merely because a criminal matter was pending, and the High Court struck out a very similar matter. They submitted further that the matter before the lower court is not a claim for enforcement of the order issued in the criminal matter. There is no law allowing such enforcement and the decision from the criminal matter is only persuasive evidence in the civil court.
11. The Respondent filed submissions that the appellant was charged and convicted of stealing a sum of Ksh. 499,813.50/=. She was sentenced to a fine of Ksh 200,000/= fine and ordered to compensate the Respondent a sum of Ksh 499,813.50 in Karatina MCCR E071 of 2021. They submitted that the claim in the plaint is for judgment and orders against the appellant for Ksh. 499.813.50 as ordered on 31.05.2023 together with interest from 31.05.2023 until payment in full.
12. They concluded that the claim was thus based on section 4(4) of the Limitation of Actions Act. The said section provides as follows:

An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any

property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

13. It was their position that the order was issued on 31.5.2023 to be paid within 14 days. The default, therefore, occurred after 14 days. Reliance was placed on the case of **Peter O. Ngoge t/a O.P Ngoge & Associates v Orina & 14 others [2025] KEHC 2957 (KLR) - Miscellaneous Civil Application 883 of 2007.**

14. They submitted that the question of fraud is misplaced as the suit is based on a judgment and not on fraud. The court was urged to dismiss the appeal with costs.

#### Analysis

15. The court herein had made a decision now reported as **Mugo v Republic [2024] KEHC 7648 (KLR)** and made the following orders:

*a. The appeal on sentence and conviction lacks merit and is accordingly dismissed.*

*b. The file is closed.*

16. The appeal related to the judgment of the Principal Magistrate's Court at Karatina in Criminal Case No. 769 of 2019 delivered by Hon. V.S. Kosgei (SRM) on 31st May,

2023 between the state as the complainant and Winfred Wangui Mugo as an accused.

17. In that case, the lower court meted out a two-year sentence and ordered compensation. The court proceeded to direct that if the appellant did not pay the same, it be recovered as a civil claim. This court addressed the question of compensation as follows:

**2. The matter proceeded to full hearing where 8 witnesses testified. The Appellant was placed on her defence and gave unsworn evidence. Appellant was found guilty of the offence charged and convicted to pay fine of Ksh 200,000/= in default 2 years imprisonment.**

**3. The Appellant was to compensate a sum of Ksh 499,813.50. If she complied with b, she was to be discharged unconditionally under section 35 of the penal code**

18. The Respondent filed a suit for recovery of the said amount as ordered by Hon. V.S. Kosgei. The appellant then raised the impugned preliminary objection, which was then dismissed in *limine*. The appellant filed humongous grounds of appeal:

a. THAT the learned magistrate erred in law by rendering a decision without analyzing the issues raised by the parties and thereby rendering a decision without any reasoning at all.

- b. THAT the learned magistrate erred in law by finding that the suit was for adoption of the decree issued in Karatina Criminal Case Number 769 of 2019 (R Vs. Winfred Wangui Mugo) yet the suit's cause of action was clearly anchored on the tort of conversion, being a suit for recovery of funds allegedly stolen by the Appellant herein between 6th February 2019 to 11th October 2019.
- c. THAT the learned magistrate erred in law by failing to find that time did not start running when the Appellant was convicted in Karatina Criminal Case Number 769 of 2019 (R Vs. Winfred Wangui Mugo), rather when the cause of action accrued, that is between 6th February 2019 to 11th October 2019.
- d. THAT the learned magistrate erred in law by failing to find that the suit was time barred.
- e. THAT the learned magistrate erred in law by making a finding that the court was not trying the matter afresh, a finding which the court had not been invited to make and which is indicative of the court's predetermined and biased mind.
- f. THAT the learned magistrate erred in law by making a finding contrary to express provisions of Section 4 (2) of the Limitation of Actions Act, Cap 22 Laws of Kenya.

g. THAT the learned magistrate erred in law in making a finding that was bereft of any legal and statutory basis at all.

19. The Appellant sought the following prayers:

- a. THAT this appeal be allowed.
- b. THAT this Honourable Court sets aside the whole Ruling and Order of the learned magistrate Hon. Kaimenyi Kanyiri of 22nd August 2025 in Karatina Magistrate's Court Civil Case Number E071 of 2024 and substitute the same with an order allowing the Notice of Preliminary Objection dated 29th December 2024.
- c. Cost of the appeal be borne by the Respondent.

20. These grounds are prolix and a waste of judicial time. It is not edifying to set out sub-issues and facets of the same issues and propose to argue them together. It is proper to raise one or two cogent, succinct issues. Such a memorandum of appeal offends Order 42 Rule 1 of the Civil Procedure Rules, which provides 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.**

21. While addressing the compliance with Rule 86 (now Rule 88) 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] KECA 224 (KLR)**[Nambuye, Karanja & M'Inoti, JJ.A.] stated:

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 prolix grounds of appeal does not in any way 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...

22. 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.

23. The only issue was whether, in the circumstances of this matter, the suit in the court below was time-barred. The rest of the issues are ancillary, repetitive, prolix, and a waste of judicial time.

24. The lower court matter proceeded by way of submission. Therefore, this court is in the same position as the lower court regarding the evidence. In the case of **Sugut v Jemutai & 3 others (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment)** (KLR Kiage JA stated as doth: -

I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; *Selle Vs Associated Motor Boat Co* [1968] EA 123). I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular

circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge.

25. A preliminary objection has to be based on non-disputed facts. It cannot be based on disputed facts or argumentative postulations. The Court is not involved with questions of fact. In hearing a preliminary objection, this court proceeds on an understanding that what is pleaded is true. It is what the English common law used to call a demurrer. The locus classicus case of *Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd* [1969] E.A. 696, made this pertinent observation. It said: -

The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of a preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuses issues. This improper practice should stop.

26. In a Tanzanian case of **Hammers Incorporation Co. Ltd Versus The Board Of Trustees of the Cashewnut Industry Development Trust Fund**, the Court of Appeal (Rutakangwa, N. P. Kimaro and S. S. Kadage JJA), sitting in Dar Es Salaam in their decision given on 17/9/2015,

regretted that the practice of raising preliminary objections that was frowned upon by the Court of Appeal in Kampala in the Mukisa biscuit case (Supra) still persists. They stated as doth:

**It was hoping against hope. We believe that had that Court survived to this day it would have issued a sterner warning. This is because the improper practice never stopped. Neither did it ebb away. On the contrary, it is on the increase. This forced the Full Bench of this Court in Karata Ernest & Others V The Attorney General, Civil Revision No. 10 of 2010 (unreported) to mildly urge all parties in judicial proceedings to pay heed to what was aptly pronounced in the MUKISA BISCUIT case (supra). The late call appears to be falling on deaf ears as this ruling will demonstrate.**

27. In the case of Martha Akinyi Migwambo v Susan Ongoro Ogenda [2022] eKLR, Kiarie Waweru Kiarie, summarized the preliminary objection nicely as seen from Mukisa Biscuit Manufacturing Co. Ltd (supra):

A preliminary objection must be on a point of law. The Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969]EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the

Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

At page 701 paragraph B-C Sir Charles Newbold, P. added the following:

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....

28. A Tanzania Court of Appeal sitting in Dar es Salaam, in **Karata Ernest & Others vs Attorney General** (Civil Revision No. 10 of 2020) [2010] TZCA 30 (29 December 2010), (Luanda, J.A. , Ramadhani, C.J. , Rutakangwa, JJA), put the issue of preliminary objections in a more succinct manner: -

At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only consists of a point of law which has been pleaded, or which arises by dear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is

supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the normal manner when deliberating on the merits or otherwise of the concerned legal proceedings.

29. Prof J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of **Oraro v Mbaja [2005] KEHC 3182 (KLR)**:

I think the principle is abundantly clear. A preliminary objection, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo, that where a Court needs to investigate facts, a matter cannot be raised as a preliminary point. This legal principle is beyond dispute, as there are divers weighty authorities carrying the message. In addition to the ones I have cited, Mr. Ougo drew my attention to yet others. In *El-Busaidy v. Commissioner of Lands & 2 Others* [2002] 1KLR 508 Mr. Justice Onyancha in this Court remarked as follows (pp. 515 - 516):

I have considered the arguments and the legal authorities quoted from both sides. It is my prima facie finding of the Defendant's application basing it on affidavit that the origin of the title known as Mombasa/Block IX/102, needs to be investigated to establish whether or not the title was an absolute title under the Registration of Titles Act. It should be established in evidence whether or not the conversion of the said title to operate under [the] Government Lands Act, Cap. 280 by [the] first Defendant was proper and lawful and therefore effective and not null and void. It is my further finding that until that is done, all the relevant facts thereto are in dispute. Under those circumstances, the law applicable in relation to the issue of a preliminary point of objection is that laid in the case of Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd [1969] E.A. 696 at page 700...

30. It is therefore my view that a preliminary objection must be based on current law, and be factual in its constitution. It cannot be based on disputed facts or facts requiring further inquiry. In determining a preliminary objection, therefore, only 3 documents are required in addition to the constitution. The impugned law, the plaint, and the preliminary objection. If you have to refer to the defence, then the preliminary objection is untenable.

31. Turning to the matter in question, the appellant proceeded to set her exams and mark them and awarded herself top marks, and on taking to her teacher, she dismissed the results. It is true that the original theft by the appellant was between 6.2.2019 and 11.10.2019. However,

the Respondent did not file a claim for the original debt. They filed for a cognizance having regard to the judgment on 31.05.2023.

32. The Respondent had an option to enforce the criminal judgment by having the order for compensation adopted as an order of the court, or filing a suit for recovery of the enforcement. They chose the latter. It must be remembered that, although the court ordered compensation equal to the amount claimed in the original suit, it could have ordered less or more. The amounts were ordered pursuant to section 175 of the Criminal Procedure Code as follows;

(1) A court which-

(a) on convicting a person of an offence, imposes a fine, or a sentence of which a fine forms part;

or

(b) on appeal, revision or otherwise, confirms such a sentence, may, when passing judgment, order the whole or any part of the fine recovered to be applied in defraying expenses properly

incurred in the prosecution of the offence.

(2) A court which-

a. convicts a person of an offence or, on appeal, revision or otherwise, confirms the conviction; and

b. finds, on the facts proven in the case, that the convicted person has, by virtue of the act constituting the offence, a civil liability to the complainant or another person (in either case referred to in this section as the injured party), may order the convicted person to pay to the injured party such sum as it considers could justly be recovered as damages in civil proceedings brought by the injured party against the convicted person in respect of the civil liability concerned.

(3) No order shall be made under subsection (2)-

a. so as to require payment of an amount that exceeds the amount that the court making the order is authorised by law to award or confirm as damages in civil proceedings; or

b. in any case where, by reason of-

i. the complexity of evidentiary matters affecting the quantum of damages;

ii. the insufficiency of evidence before it in relation to such damages or their quantum;

iii. the provisions of the Limitation of Actions Act ([Cap. 22](#)); or

iv. any other circumstances, the court considers that such an order would unduly prejudice the rights of the

convicted person in respect of the civil liability.

- (4) No order under this section shall take effect-
- (a) before the expiry of the time limited for appeal against the conviction or sentence in respect of which the order was made; or
  - (b) while any such conviction or sentence is the subject of appeal, unless and until the conviction or sentence, and the order, are confirmed by the court determining the appeal.

(5) A court determining an appeal referred to in subsection (4) shall affirm, quash or vary an order under this section, as justice requires.

(6) An order under this section that has taken effect is enforceable in the same manner as a judgment in civil proceedings for the amount awarded by the order.

(7) An award by order under this section in respect of a civil liability is, to the extent of the amount awarded, a defence in any subsequent proceedings instituted in respect of that liability.

33. Consequently, the order for compensation is enforceable as a civil judgment pursuant to Section 175(6) of the Criminal Procedure Code. In the circumstances, the appeal lacks merit. It is accordingly dismissed.

34. The court below was right to the extent that the issue of limitation does not apply since the compensation was part of a judgment in the lower court. The High Court dismissed the appeal on sentence as follows:

40. In this case, the money was lost; the appellant gained. She breached her position of trust. In the circumstances, the sentence was lenient. The court cannot interfere with a sentence simply because it could issue a different sentence. In the case of *S vs. Malgas* 2001 (1) SACR 469 (SCA), it was held that:

A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...

However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as shocking, startling or disturbingly inappropriate

35. Having found the sentence to be lenient, therefore, both the compensation and the fine were affirmed. The appellant cannot be heard to claim that the case is time-barred.

36. Before leaving, there are two vexing issues: the first one is the question of fraud, and the second one is the submission that the standards in civil and criminal law are different. While this is true, once it is confirmed in a criminal case that someone was a thief, as was the case in this case, the facts cannot change. This is because the standard of proof in criminal cases is higher, that is, beyond a reasonable doubt. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. Lord Denning in **Miller vs. Ministry of Pensions**, [1947] 2 ALL ER 372 had this to say:

That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.

37. In other words, once convicted for stealing, no magic will happen, and one be found not liable for the stealing. On the other hand, the civil standard is on a balance of probabilities. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru,

J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

**In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”**

38. The second question was the question of jurisdiction. That was addressed by the court. The case was not about jurisdiction. However, the court came to the correct conclusion that the matter is for the enforcement of a judgment in MMCR E071 of 2021. Being enforcement of a judgment, the respondent had up to 15<sup>th</sup> June 2025 to enforce the judgment. By entering judgment herein, the period of limitation will be extended for the new judgment for 12 years from the date of entry of judgment.
39. The only defence available is if the sum of Ksh. 499,813.50/= has been paid as ordered on 31.05.2023. The court, therefore, should proceed and deal with the matter as provided under Order 36.
40. The appeal lacks merit and is accordingly dismissed.

41. 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.

42. 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.**

43. 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.

44. Costs follow the event. The event is the dismissal of the appeal. The same is dismissed with costs of Ksh. 65,000/= to the Respondent.

Determination

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

- a) The appeal herein lacks merit and is consequently dismissed with costs of Ksh 65,000/= to the Respondent.
- b) 30 days stay of execution on costs only.
- c) The lower court file be placed before the trial court and be dealt expeditiously as provided under Order 36 of the Civil Procedure Rules and Section 175 of the Criminal Procedure Act.
- d) The lower court file be mentioned on 28<sup>th</sup> April, 2026 for finalization of the matter.
- e) The file is closed.

**DELIVERED, DATED and SIGNED at NYERI on this 16<sup>th</sup> day of April, 2026.** Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE  
JUDGE**

**In the presence of:-**

Dennis Maina for the Appellant

Mr. Maina Karingiti for the Respondent

Court Assistant - Michael/Martin

ORIGINAL