REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. E004 OF 2024

RASHAD MAALIM ISAACK.....APPELLANT

VERSUS

MOHAMMED ADAN ALI.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

(Being an Appeal from the Judgement and decree of Hon. R.Ongira (SRM) delivered on 11th December,2023 in Tigania SPMCC No. E24 of 2021)

JUDGEMENT

1. Vide a plaint dated 3rd February,2021, the 1st Respondent filed a suit, being Tigania Civil Suit No. E024 of 2021, seeking the following prayers;
    a) A return of his one female camel together with its 2 off-springs at the time of filing the suit and a further one

off-spring for each subsequent year till determination of the suit or

b) In the alternative, payment of Ksh. 250,000/= for the mother camel and for each offspring;

c) Ksh. 119,000/= as special damages;

d) General damages for unlawful arrest and malicious prosecution;

e) Exemplary damages

f) Costs of the suit.

2. In a nutshell the 1st respondent's case was that he was arrested on 24th October 2018, by police officers from Isiolo Police Station over a report filed by the appellant alleging that the respondent had stolen his camel and injured another, allegations which were false. That despite his protests, the respondent was charged before the Tigania Court vide Criminal case No. 1555 of 2018 with two counts of stealing stock and injuring an animal, contrary to sections 278 and 338 of the Penal Code respectively. That he was subsequently acquitted by the court on both counts under section 210 of the Criminal Procedure Code.

3. Upon his acquittal the 1st respondent filed the suit in the lower court.
4. After a full hearing, the trial court entered judgment against the appellant and the 2nd respondent jointly and severally and awarded the 1st Respondent Ksh.250,000/= as general damages for unlawful arrest and malicious prosecution, costs of the suit with interest from the date of delivery of judgement until payment in full.
5. Being aggrieved by the Judgment of the trial Court, the Appellant has proffered the instant appeal. By the memorandum of appeal dated 10th January,2024, he raises the following grounds of appeal: -
    a) The Learned Senior Resident Magistrate erred in law and in fact in holding that the alleged arrest and prosecution of the 1st Respondent was malicious and unlawful without the mandatory all or indeed any of the ingredients for proving a case for malicious prosecution.

b) The Learned Senior Resident Magistrate erred in law and in fact in failing to find that it was the 1st Respondent's burden to prove his case.

c) The Learned Senior Resident Magistrate erred in law and in fact apportioning liability for the alleged false arrest, wrongful imprisonment and malicious prosecution jointly and severally against the Appellant vis a vis the 2nd Respondent while the duty of arrest, custody and preferring of charge is that of the National Police Service and the Directorate of Public Prosecutions under the constitution and both of whom are represented by the 2nd Respondent while the Appellant's role was only to make a report that his stolen camel had been found injured in the herd belonging to the 1st Respondent.

d) The Learned Senior Resident Magistrate erred in law and in fact in awarding damages for malicious prosecution that were so inordinately high as to constitute a misapprehension of the law on award of

damages and the facts of the case; particularly the amount in issue in the criminal case.

e) The Learned Senior Resident Magistrate erred in law and in fact in coming to a conclusion that the Appellant was malicious based that he had married the 1st Respondent's divorced wife.

f) The Learned Senior Resident Magistrate erred in law and in fact in coming to the conclusion that the Appellant had been courting the 1st Respondent's wife for three years and used it as the basis of finding malice yet the Appellant testified to have known the 1st Respondent's wife and only courted and married her after divorce.

g) The Learned Senior Resident Magistrate erred in law and in fact in arriving at a judgement wholly against the weight of evidence before the court and the applicable law.

6. The Appellant thus prays for the Judgment of the trial Court to be set aside and be replaced by an order dismissing the

1st Respondent's claim against him with costs and costs of the Appeal and of the trial court to be granted to him.

7. The Appeal was canvassed through written submissions.

Appellant's Submissions

8. On grounds 1 and 3 of the Appeal, the Appellant submitted that he did not institute or control the prosecution but merely made a report to the police on what he reasonably believed to be a criminal offence. He posited that lodging a complaint does not per se amount to instituting a prosecution. In support of his position, he cited the case of ***Gitau vs Attorney General (1990) KLR 13***
9. The appellant argued that there must be demonstration of dishonesty and unreasonableness in institution of a criminal case for damages to ensue. In buttressing his submissions, the Appellant relied on the case of ***James Karuga Kiiru v Joseph Mwamburi & 2 others [2001] eKLR.***

10. With respect to ground 2 of the Appeal, the Appellant submitted that there was no evidence to show that his action against the 1st Respondent was actuated by malice.
11. With regard to ground 4 of the Appeal, the Appellant argued that award by the trial court was inordinately high and if the 1st Respondent had proved his case, an award of Ksh.500,000/= would suffice.
12. On grounds 5 and 6 of the Appeal, the Appellant submitted that the fact that he married the 1st Respondent ex-wife should not have formed a basis of malice as he had followed the due process of Sharia law.
13. In sum, the Appellant urged this court to allow his Appeal.

1st Respondent's Submissions

14. Citing Order 42 Rule 13(4) of the Civil Procedure Rules, the 1st Respondent submitted that the appeal is fatally defective for failure to attach a decree and it should therefore be struck out.
15. In further buttressing the above position, the 1st Respondent placed reliance on the case of ***Salama Beach Hotel***

Limited & 2 others v Kenyariri & Associates Advocates [2016] eKLR.

16. The 1st Respondent submitted that the trial court rightly found that he had proved his case for malicious damage because there was evidence to show the Appellant and the 2nd respondent instituted criminal proceedings against him; he was not put on his defence due to lack of evidence and such ruling was never appealed against; no reasonable cause was established for believing he was guilty of the criminal cases lodged against him; and that the prosecution was actuated with malice as there was no evidence to suggest that he committed the crimes he was accused of. In support of his submissions, the 1st respondent relied on the cases of ***Stephen Gachau Githaiga & another v Attorney General [2015] eKLR***, ***Paramount Bank Limited v Vaqvi Syed Qamara & another [2017] eKLR***, ***Chrispine Otieno Caleb v Attorney General [2014] eKLR***, ***Kagane & others VS Republic [1969] EA 643***, ***Samson John Nderitu vs The Attorney General (2010) eKLR***, ***Katarega V Attorney General (1973) EA 289*** &

***Samuel Gitonga Ringera v Henry Mutegi Maingi & 2 others* [2021] eKLR**

17. The 1st Respondent submitted that the trial court rightly found that he had a burden of proving his case and reached a finding that he had discharged the same. In support of this position, he referred this court to page 13 paragraph 3 of the trial court's judgement.

18. The 1st Respondent argued that the trial court was right in apportioning liability between the Appellant and the 2nd respondent since it was the Appellant who lodged a complaint against him with the Police and the 2nd Respondent through the Director of Public Prosecutions preferred charges against him without conducting proper investigations and colluded with the Appellant to frame him.

19. On whether the General damages award was inordinately high, the 1st respondent submitted that in fact the same was relatively low based on comparable awards of similar matters. To buttress his submissions, the 1st Respondent relied on the cases of ***Daniel Waweru Njoroge & 17 others v Attorney General* [2015] KEHC 1154 (KLR)**,

Chebor v Karuri, Chief Inspector OCS Mochongoi Police Station & another; National Police Service Commission & another (Interested Parties) [2025] KEHC 5485 (KLR), Kioni v Mugo & another [2025] KEHC 8993 (KLR), & ***Simiyu v Attorney General of Kenya & 3 others [2024] KEHC 16374 (KLR)***

20. On grounds 5 and 6 of the Memorandum of Appeal, the 1st Respondent submitted that the evidence on record established that the Appellant took away his wife and children and was fined for the same as shown in the minutes dated 27th November,2011.

21. In light of the above, the 1st Respondent prayed that this appeal be dismissed with costs.

2nd Respondent's Submissions

22. The 2nd Respondent submitted that the trial court rightly found that the arrest and prosecution of the 1st Respondent was malicious and unlawful. It argued that the trial court meticulously analysed the four elements of malicious prosecution as established in the land mark case *of*

Murunga v Attorney-General [1976-1980] KLR 1251 and reaffirmed in the case of ***Attorney General v Peter Kirimi Mbogo & another [2021] eKLR.***

23. The 2nd Respondent posited that the Appellant's marriage to the 1st respondent's ex wife showed a clear pre-existing grudge between them and that provided a plausible reason for the Appellant to lodge a false complaint. It argued that the trial court was entitled to draw an inference of malice from this context coupled with the complete lack of credible evidence supporting the criminal charge.

24. Regarding the burden of proof, the 2nd respondent submitted that the finding of the trial court that the 1st respondent had discharged the same was sound.

25. With regard to apportionment of liability between it and the Appellant, the 2nd respondent argued that the same was apt for reason that the Appellant was the instigator of the malicious prosecution and the damage that resulted was from the combined wrongful acts of both the Appellant and itself.

26. On quantum of Ksh.250,000/- awarded by the trial court, the 2nd Respondent submitted that there was no evidence of loss incurred by the 1st respondent to warrant granting of the same. It was its position, that the trial court ought to have awarded only nominal damages. In support of this position, the 2nd respondent placed reliance on the case of **Ndiritu v Muigai & 3 others [2024] KEHC 11126 (KLR)** & ***Kimakia Co-operative Society v Green Hotel [1988] eKLR*** **.**

27. The 2nd Respondent therefore urged this court to review the General Damages awarded.

28. On whether the Appeal is merited, the 2nd Respondent submitted that the failure to attach the decree which is a mandatory document in the record of appeal rendered the Appeal defective and should therefore be dismissed. In buttressing this position, the 2nd respondent relied on Order 42 Rule 13(4) of the Civil Procedure Rules and the case of ***Ndegwa Kamau t/a Sideview Garage v Fredrick Isika Kalumbo [2016] eKLR.***

Analysis & Determination

29. This being the first appellate court, it has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bearing in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded. (See the decision in ***Selle & Another vs Associated Motorboat Co. Ltd (1968) EA 123.)***

30. It is also settled law that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they are not based on no evidence, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in ***Mbogua Kiruga v Mugecha Kiruga & another [1988] eKLR***

31. After analyzing the entire evidence, I find the issues pertinent for determination are: -

    a) Whether the Appeal is incompetent.
    b) Whether the 1st respondent proved the claim of malicious prosecution against the appellant and 2nd respondent.

c) If the answer to the above is in the affirmative, whether the trial court erred in apportioning liability between the appellant and the 2nd respondent.

d) Whether the quantum of general damages awarded was excessive or justified in the circumstances of the case.

e) Who should bear the costs of this Appeal?

32. The Respondents contend that the appeal is incompetent as the decree appealed against was not filed as part of the court record.

33. Section 2 of the Civil Procedure Act defines a “decree” as follows;

> **“decree” means the formal expression of an adjudication which, so far as regards the court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be preliminary or final; it includes the striking out of a plaint and the determination of any question**

within section 34 or section 91, but does not include—

(a) any adjudication from which an appeal lies as an appeal from an order; or

(b) any order of dismissal for default:

Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in

pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;

34. Order 42 Rule 13 (4) of the **Civil Procedure Rules**, 2010 provides:-

"**Before allowing the appeal to go for hearing, the Judge shall be satisfied that the following documents are on the court record, and that such of them as are as not in the possession of either party have been served on that party, that is to say:-**

a. **the memorandum of appeal;**

b. **the pleadings;**

c. **the notes of the trial magistrate made at the hearing;**

d. **the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;**

e. **all affidavits, maps and other documents whatsoever put in evidence before the magistrate;**

f. **the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal…"**

35. It is thus patent that under the said section of the Act and the Rules, what is required at the first appellate court is the judgment, order or decree appealed from. The use of the word 'or' in the above provisions shows that it is not mandatory for an appellant to include both the judgment and the decree of the subordinate court in the record of appeal.

36. In the persuasive case of **Nyota Tissue Products v Charles Wanga & 4 Others (2020) eKLR,** when addressing the issue of failure by an appellant to file a decree, the court stated thus-

> **“The rule applicable to the appeals to the High Court makes provision under Order 42 rule 13 (f) of the Civil Procedure Rules for the filing of a copy of the “judgment, order or decree appealed from and does not make it mandatory to attach the judgment and the decree. The Record of Appeal herein attached the Judgment of the trial court according to the requirements of Order 42 rule 13 (4) (f) of the Civil Procedure Rules, and in my respectful view, I would agree with the Court in Silver Bullet Bus case on the point, that it would be too draconian to strike out the appeal in these circumstances."**

37. Equally, in **Joel Mwangangi Kithure v Priscah Mukorimburi** (2022) eKLR in determining whether an

appeal was incompetent for want of a copy of decree appealed against, it was held that;

> **“Whereas the Appellant failed to annex a certified copy of the decree, he did attach a certified copy of the judgment which would suffice in the absence of a certified copy of the decree. Further, it has not been shown what prejudice the Respondent suffered by the failure to annex the certified copy of the decree. I therefore find that the Appellant’s failure to annex the certified copy of the decree cannot be the basis for dismissing the appeal.”**

38. The appellant duly filed a copy of the judgment of the lower court. For purposes of the appeal, the appellant fully complied with the law and failure to attach a decree is not detrimental to the appeal as a whole.

39. Consequently, the appeal is properly before this Court.

40. In ***Murunga v Attorney General*** **(supra)** the Court of Appeal set out the ingredients for the tort of malicious prosecution as follows;

    i. The plaintiff must show that prosecution was instituted by the defendant, or by someone for whose acts he is responsible;
    ii. That the prosecution terminated in the plaintiff's favour;
    iii. That the prosecution was instituted without reasonable and probable cause;
    iv. That the prosecution was actuated by malice.

41. **In Clerk, John Frederic, *Clerk and Lindsell on Torts* (18th ed., 2000)** at page 823 Paragraph 16-06, regarding the elements of the tort of malicious prosecution states as follows: -

    *"**In an action of malicious prosecution the claimant must show first that he was prosecuted by the defendant, that the law was set in motion***

against him on a criminal charge; secondly that the prosecution was determined in his favour; thirdly that it was without reasonable and probable cause; fourthly, that it was malicious. The onus of proving everyone of this is on the claimant. Evidence of malice of whatever degree cannot be invoked to dispense with or diminish the need to establish separately each of the first three elements of the tort".

42. According to the record, the 1st and 2nd elements of the tort were duly established and have not been challenged in this Appeal. In ***Gitau v Attorney General*** **[(supra)**, the court held that:

To succeed in a claim for malicious prosecution the plaintiff must first establish that the defendant or his agent set the law in motion against him on a criminal charge. "Setting the law in motion" in this context has not the meaning frequently attributed to it of having a

police officer take action, such as effecting arrest. It means being actively instrumental in causing a person with some judicial authority to take action that involves the plaintiff in a criminal charge against another before a magistrate.

43. The Appellant herein lodged a complaint against the 1st Respondent and at his behest, the 2nd Respondent instituted a criminal case against the 1st Respondent vide Tigania Criminal Case No. 1555 of 2018 and on 25th September,2020, the 1st respondent was acquitted under section 210 of the Criminal Procedure Code.

44. With respect to whether there was reasonable and probable cause, the trial court, relying on ***Kagane v Attorney General (supra)*** & ***Samson John Nderitu vs The Attorney General (supra)*** opined that evidence on record did not point at the 1st Respondent as the one who cut or slaughtered the Appellant's camel and that the police did not conduct thorough investigations to pinpoint the real culprit.

45. The decision in ***Simba vs. Wambari*** ***(1987) KLR 601*** defines what constitutes a reasonable and probable cause as:

> ***"The plaintiff must prove that the setting of the law in motion by the inspector was without reasonable and probable cause….if the inspector believed what the witnesses told him then he was justified in acting as he did and I am satisfied the plaintiff has not established that he did not believe them or alternatively that he proceeded recklessly and indifferently as to whether there were genuine grounds of prosecuting the plaintiff or not"***

46. With regard to what constitutes reasonable and probable cause to justify prosecution, the test was laid down by Rudd, J. in ***Kagane and others v The Attorney General & another*** (supra) and informed by the decision of Hawkins, J. in ***Hicks v Faulkner, (1878) 8 QBD 167(at 171)*** thus:

Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed. Justice Rudd thus remarked (at 647): Consequently, the subjective test should only be applied where there is some evidence directly tending to show that the prosecutor did not believe the truth of his case. Such evidence could be afforded by words or letters or conduct on the part of the prosecutor which tended to show that he did not believe in his case, as for example a failure or reluctance to bring it to trial, a statement that he did not believe in it and, I think possibly, an unexplained failure to call an

essential witness who provided a basic part of the information upon which the prosecution was based.

47. I have perused the lower court proceedings in Criminal Case No.1555 of 2018. The 1st Respondent was charged with two counts, namely; Injuring an animal contrary to Section 338 of the Penal Code and Stealing Stock contrary to Section 278 of the Penal Code.

48. The Appellant was the complainant and the 1st Respondent was his neighbor for over 40 years. The appellant said that on 25th June,2018 he was in a meeting at DO's office when his herder one Isaac Matkiri called and informed him that his camel had been cut by the 1st respondent as it passed through his farm to take water. He rushed to the scene and found the camel on the road near the 1st Respondent's farm and saw it had been cut on the leg with a panga. It was his testimony that his two herders Isaac Matkei and Isaak Ibrahim were at the scene. He stated that three of his camels also got lost and on 29th November,2018 one of them

was found amongst the 1st Respondent's camels. He further stated on this day the 1st Respondent's camels were not in his homestead but at Emiret. That his camel was the only one in the 1st Respondent's homestead and it was photographed while there. He did not produce the photograph of the recovered camel.

49. PW2 was Isaac Matkiri. He confirmed that Appellant's camel was cut on the leg on 25th June,2016, however, he did not know who cut it.

50. PW3 was Patrick Muthui, a veterinary officer. He stated that the Appellant called and informed him of his injured camel. He thereafter referred him to Dr. Diba who attended to his camel and prepared a report. He said as per the report the camel was cut on the leg using a sharp object, and was treated and given pain killer.

51. Thereafter the prosecution's case was closed. In ***Hicks v Faulkner*** (supra), the test for and the definition of reasonable and probable cause requires that the prosecutor hold an honest belief in the accused's guilt, based on a firm conviction founded on reasonable grounds. These grounds

must support the existence of circumstances which, if true, would lead an ordinary, prudent, and cautious person in the accuser's position to conclude that the accused committed the alleged crime.

52. It is apparent from the above evidence that no one witnessed the 1st Respondent cut the Appellant's camel. It is discernible from the prosecution's case that investigations were conducted into the matter, leading to the arraignment of the appellant in court. During the trial, the investigating officer did not testify, for unknown reasons. It was thus clear on how the decision to arrest and charge the 1st Respondent was arrived at.

53. On the issue of malice, the law is settled that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor. Actual spite or ill will must be proved as was held by the Court of Appeal in ***Nzoia Sugar Company Ltd v Fungututi*** **[1988] KLR 399**, a decision duly considered by the trial court. It was held;

"Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor. The mental element of ill will or improper motive cannot be found in an artificial person like the appellant but there must be evidence of spite in one of its servants that can be attributed to the company".

54. With regard to proof of malice, the court in ***Gitau v East African Power and Lighting Company Limited*** **[1986] KLR 365** held that:

"In a claim alleging malice the facts constituting malice ought to be particularized as per Order V rule 8(1) Civil Procedure Rules. In order for a claim of malicious prosecution to succeed, the plaintiff must not only show that he was prosecuted but that he was prosecuted upon the instigation of the defendant and that there existed malice and which malice he must prove.

In this instant the plaintiff failed to prove malice."

55. In **Thomas Mutsotso Bisembe v Commissioner of Police & another** ***[2013] eKLR*** the Court relied on the case of **James Karuga Kiiru v Joseph Mwamburi & 3 others**(supra) where it was held:

"….. to prosecute a person is not prima facie tortuous, but to do so dishonestly or unreasonably is the burden of proving that the prosecutor did not act honestly or reasonably being on the person prosecuted. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, the mere fact that a complaint is lodged does not justify the

institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence."

56. The writings by **CLERK & LINDSELL ON TORTS (20TH EDITION**) at **page 1072 par. 16-11** deal with claims of malicious prosecution. The authors posit;

"In establishing the first essential element of the tort of malicious prosecution two key issues must be addressed, what constitutes a prosecution? And who is the Prosecutor? To prosecute is to set the law in motion, and the law is only set in motion by an appeal to some person clothed with judicial authority in regard to the matter in question, and to be liable for malicious prosecution a person must at least be actively instrumental into setting the in motion….."

57. The trial magistrate found that malice was proved as there was no evidence to show the 1st Respondent was culpable for the offences he faced, and that the police did not conduct investigation considering that the Appellant and his witness stated that they did not witness the incident, so as to establish the real culprit. That the Appellant reported the 1st Respondent had injured his camel without concrete evidence. The trial magistrate also inferred malice on the part of the Appellant for reason that there was bad blood between the Appellant and the 1st Respondent for reason that the Appellant married the 1st Respondent's ex-wife despite her having 9 children and still married to the 1st respondent.

58. It is clear from the above that the trial magistrate's finding of the alleged bad blood between the Appellant and the 1st Respondent as contended by the Appellant, was premature as the 1st respondent was not called upon to deny that allegation.

59. I have carefully analysed the proceedings before the criminal trial court. The appellant stated that he went to the police on

account of what one of his herders told him. Having reported the case, it was upon the police to record the relevant witness statements to establish if indeed there was reasonable cause to have the 1st respondent charged. Thereafter, it was upon the Office of the Director of Public Prosecution (ODPP) to peruse the file and make the decision to charge. Once the 1st respondent was charged, then the duty lay on the ODPP and the police to avail the necessary witnesses. The record in the criminal case file shows that on 11th September 2019, after the veterinary doctor testified, the prosecuting counsel closed the prosecution case, without calling the investigating officer or any other witness.

60. Clearly, the dismissal of the case was due to lack of sufficient evidence to implicate the 1st respondent. This was due to the failure of the ODPP in closing the case before calling all the witnesses. Such failure cannot be construed to mean that there was malice in prosecuting the 1st respondent. The appellant did his part and testified. He was clear that he did not witness the incident but relied on the

information he received from one of his herders. There can be no malice imputed in such circumstances.

61. In my view the alleged bad blood between the appellant and the 1st respondent should not have clouded the trial court's mind in failing to appreciate the extent of a complainant's role in the criminal justice system. The fact is that his animal was injured, as stated by the doctor. Another was allegedly stolen. That was sufficient cause for him to report the matter to the police. Thereafter it was upon the offices that I have mentioned to play their constitutional and statutory roles.

62. The 1st respondent was acquitted because there wasn't sufficient evidence to meet the high degree of proof in a criminal case, that of proof beyond reasonable doubt.

63. On the basis of the above, I am inclined to set aside the judgment of the trial court as against the appellant. The judgment is substituted with a finding that the suit against the appellant was not proven and is dismissed.

64. As against the 2nd respondent, there was no appeal against the trial court's finding and therefore, I will not delve into the matter.

65. On costs, this court is aware that even though they follow the event, the court has the discretion to make any orders it deems fit.

66. Given the history of the case, I am of the view that each party as between the appellant and the 1st respondent, ought to bear their own costs, both in this appeal and in the lower court.

67. Consequently, the following orders do issue;

a) The judgment of the lower court is set aside and is substituted with an order dismissing the 1st respondent's suit as against the appellant.

b) The finding against the 2nd respondent is not disturbed.

c) As between the appellant and the 1st respondent, each party shall bear its own costs in this appeal and in the lower court.

68. Orders accordingly.

Dated, Signed and Delivered at Meru this 7th day of May, 2026.

H. M. NYAGA,
JUDGE.