



**Ogare v Bank of Africa Kenya Limited & another (Civil Appeal  
101 of 2023) [2025] KEHC 6296 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 6296 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL 101 OF 2023  
DKN MAGARE, J  
MARCH 27, 2025**

**BETWEEN**

**JEREMIAH KENNEDY OTUNDO OAGARE ..... APPELLANT**

**AND**

**BANK OF AFRICA KENYA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**KEYSIAN AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

*(Appeal arising from the Judgement and Decree of Honourable S.N  
Abuya CM dated 2.8.2023 in the Kisii CMCC No. 590 of 2017)*

**JUDGMENT**

1. The Appeal arises from the Judgement and Decree of Honourable S.N Abuya CM dated 2.8.2023 in the Kisii CMCC No. 590 of 2017. The Appellant was the Appellant in the lower court. The court heard the matter and dismissed the Appellant's case with costs.
2. The Appellant was aggrieved and filed this appeal vide a memorandum of appeal dated 4.8.2023, raising the following Grounds>
  - a. The Learned Magistrate erred in law and fact in finding that the Appellant did not prove his case despite enough evidence tendered.
  - b. The Learned Magistrate erred in law and fact in endorsing inaccurate valuation of the suit property
  - c. The Learned Magistrate erred in law and fact in not giving a notice for judgment
  - d. The Learned Magistrate erred in law and fact in not giving notice for ruling dated 30.6.2023



- e. The Learned Magistrate erred in law and fact in not giving a notice to the Appellant to enable him file submissions
  - f. The Learned Magistrate erred in law and fact in not taking into consideration the documentary evidence
  - g. The Learned Magistrate erred in law and fact in failing to afford the Appellant time to be heard on the issues of illegalities
3. In the plaint dated 11.12.2017, the Appellant sought a declaration that the property be reevaluated before auction according to its current market value. The Appellant did not value the property to show a rival value before going to court. A valuation was done years later, in 2022.
  4. The Appellant pleaded that he obtained a loan from the 1st Respondent and charged his two properties, Nyaribari Chache/B/B/Boburia/7726 and Nyaribari Chache/B/B/Boburia,/8066, measuring 0.11 ha and 0.02 ha respectively, as security. However, the Appellant's business closed, resulting in the Appellant losing the capacity to service the loan, which the 1st Respondent indicated as standing at Ksh. 1,052,500.19 at the time of the intended auction in 2017.
  5. The 1<sup>st</sup> Respondent instructed the 2<sup>nd</sup> Respondent who issued a redemption notice of 21 days. The Appellant however contended that the valuation done by the Respondents for the properties at Ksh. 6,750,000 underestimated the value as the valuation was Ksh. 12,000,000 at the time, being 2013.
  6. The Respondents entered appearance and filed a statement of defence dated 4.2.2019 and amended on 4.2.2019, denying the averments in the plaint. they pleaded that, as a fact, the valuation was carried out by an accredited firm of the valuers and showed a forced sale value of Ksh. 6,750,000 and a market value of Ksh. 9,000,000/-.

### **Evidence**

7. The Appellant testified as PW1 he relied on his witness statement and bundle of documents dated 17.12.2017. He also relied on his further witness statement dated 10.6.2022. It was his testimony that the valuation was 12,000,000 and not Ksh. 6,750,000. The charge entry in the proprietor section of the tile was recorded under part B instead of part C and was not legal. It was his case that the market value of the two properties ought to have been Ksh. 12,000,000. he challenged the 1<sup>st</sup> Respondent valuation of Ksh. 6,750,000/=. His case was that the valuation grossly undervalued the property and should be set aside.
8. DW1 was Victor Keitany. He relied on the witness statement dated 16.9.2019, a further statement dated 5.10.2022, and a list of documents dated 4.10.2019. He testified that the Appellant had an overdraft and fixed deposit of Ksh. 3,000,000. The Appellant was given a principal sum of Ksh. 8,000,000. The Appellant fell into arrears. as a result, the 1<sup>st</sup> Respondent moved to realize the security as required under the law.
9. It was his further evidence case that there was a valuation that confirmed the market value of the two properties at Ksh. 9,000,000 and the forced sale value of Ksh. 6,750,000. The valuation was done before the statutory power of sale could be exercised.

### **Submissions**

10. The Appellant's submissions filed submissions impugning the rules on 30.03. 2023, 30.6.2023, and proceedings of 29.3.2024 when the court declined to allow an amendment. They stated that amendments help to deal with issues in controversy.



11. He stated that the supplementary record of documents reveals illegalities. Reliance was placed on article 25 and 50(2) of *the constitution*. None of the other grounds of appeal was submitted on.
12. On the part of the Respondent, they filed submissions dated 29.11.2024. It was submitted that the lower court heard the suit on the merits. Further, it was submitted for the 1st Respondent that the court was correct in its finding that the Appellant failed to produce the valuation report to prove that in 2013 the value was Ksh. 12,000,000/= . Reliance was also placed on Amosam Builds Development v Betty Ngendo Gachie & 2 Others (2009) eKLR to submit that the opinion of the valuer would be persuasive but not necessarily binding.

### **Analysis**

13. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
14. This Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong. In the case of Mbogo and Another vs. Shah [1968] EA 93 the court stated:

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

15. The duty of the first appellate court was set out in the case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the court in their usual gusto, held as follows; -

“.. 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 re-subordinate and the Court of Appeal is not bound to follow the subordinate Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

16. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the subordinate court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

17. This court’s the jurisdiction to review the evidence should be exercised with caution. In the cases of Peters vs Sunday Post Limited [1958] EA 424 , the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

18. Although the court does not have the advantage of seeing and hearing the witnesses as did the lower court, this court must reconsider the evidence, evaluate it itself, and draw its own conclusions.



19. The Appellant's case was also that he had no notice of the Ruling and Judgement of the lower court. That he was not given ample time to prosecute his case. Parties are bound by their pleadings. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

20. The Appellant pleaded in the Plaint that he did not oppose the auction to recover the loan but only opposed the undervaluation. It was his case that the proper valuation was for Kshs. 12,000,000/- as opposed to the Kshs. 6,750,000 for which the Respondent valued the property. These are questions of evidence. The Appellant filed all the documents he needed and also testified and produced the evidence and so did the 1<sup>st</sup> Respondent. without evidence of any move to amend the pleadings, I do not think that the character of the pleadings could have metamorphosized into something other than what the lower court dealt with and determined.

21. The 1<sup>st</sup> Respondent's valuation report is dated 13.9.2017, which projected a market value of Kshs. 9,000,000 in respect of the two plots as follows:

- i. Plot No. 7726 (0.11ha) Ksh. 5,000,000
  - ii. Plot No. 8066 (0.02ha) Ksh. 1,000,000
  - iii. Improvements Ksh. 3,000,000
- Total Ksh. 9,000,000.

22. On the other hand, the valuation report by the Appellant is dated 25.5.2022. The report was, under clause 3, described in part as follows:

Market value is defined as the estimated amount for which a property should be exchanged on the date of valuation between a willing buyer and a willing seller... From the description, the valuation report clearly depicted the property's value as at its date. It did not render the position at the time the property was valued by the Appellant in 2013.

23. Regardless, the report estimated the value of the two properties as follows:

- Parcel No. 7726 Ksh. 6,600,000/-
- Parcel No. 8066 Ksh. 1,200,000
- Improvements Ksh. 3,200,000/-.

24. The only available and reasonable valuation produced in court was the valuation by the 1<sup>st</sup> Respondent, which reflected the price at the time of the statutory sale of the property. The Appellant, in my view, acknowledged the owing amount as it was not his case that the interests and deductions were erroneous.



If this was the Appellant's case, the only part of the pleadings that ought to have raised it was the Plaintiff. None was raised. Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:

'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'

Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party

25. The 1<sup>st</sup> Respondent moved to yield the security in the ground that the Appellant failed in his obligations to repay the loan and fell in default. Under Section 90 of the *Land Act*, a chargee who intends to exercise the statutory power of sale is also required to issue a notice under Section 90 and 96 of the *Land Act* which provide;

90 If a chargor is in default of any obligation, fails to pay interest or any  
(1) other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

(2) The notice required by subsection (1) shall adequately inform the recipient of the following matters—

(b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;

96. Where a chargor is in default of the obligations under a charge and remains in  
(1) default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90(1), a chargee may exercise the power to sell the charged land.

(2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.

26. There is no dispute that the 1<sup>st</sup> Respondent complied with the procedure under the law. The conditions were reiterated by the Court of Appeal in *Kenya Commercial Bank Ltd. vs. Pamela Akinyi Ochien'g* Civil Appeal No. 114 of 1991, as doth:

"Before a Chargee, which the bank was in this case, can exercise its statutory power of sale, certain procedures must be complied with, which, in the case of registered land, are set out in section 74(1) of the Registered *Land Act* Cap 300. For instance they must serve on the chargee three months' written notice of the default and require her to comply with the conditions broken before exercising the powers of sale or taking steps to recover the sums due. These safeguards are designed to prevent oppressive behaviour by banks in realising their securities over land, which often forms the only home of the chargor. The loss thereof would in many cases cause real hardship to the borrower and his or her family...



The circumstances in which a chargee exercising its statutory power of sale can be restrained from doing so have been set out. The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged; but will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgage claims to be due to him, unless, on the terms of the mortgage, the claim is excessive; but where he was, at the time of the mortgage, the mortgagor's solicitor, the court will fix a sum probably sufficient to cover his claim... The Court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under mortgage."

27. On the merits, the issue before the lower and which the court correctly identified was the question of valuation. Regularly, in the sale of the securities, the burden is on the Appellant to show that they were sold, to whom they were sold and at how much. The Respondent herein produced the valuation report, which the Appellant challenged based on undervalue. Therefore, the burden was on the Appellant to prove the undervalue. 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."

28. The Appellant would be expected to file a report that would depict a more probable market and forced value to the two suit premises than what the 1st Respondent projected. This is so because there was a valuation report by the 1st Respondent, and the issue was not whether the valuation was not done. If this were the case, then the burden would remain with the 1<sup>st</sup> Respondent to demonstrate and prove that a valuation was done. What the 1<sup>st</sup> Respondent was only expected to do was to prove that the valuation was correctly done and the projected sale value was the best that could be attained at the time and circumstance. In my view, this was well articulated. In *Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another* (2015) eKLR, the judges of Appeal held that:

"Denning J. in *Miller Vs Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

29. In the absence of a valuation done at the same time as the valuation by the 1<sup>st</sup> Respondent, it was difficult for the court to establish a finding otherwise than what the lower court found that in the



circumstances, the valuation by the 1<sup>st</sup> Respondent constituted a reasonable price. In *Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others* [2012] eKLR the court stated as follows:

“Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:

‘In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.’

Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of *Kimotho –vs- KCB* (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession.”

30. It is also not in dispute that the 1<sup>st</sup> Respondent offered the loan facility in the manner pleaded and which the Appellant accepted and defaulted in payment. Faced with similar issues in the case of *William Kanyi Hezekiah v Equity Bank Ltd & another* [2017] eKLR, I am persuaded by the reasoning of the Court as follows:

Exceptions to the general rule must relate to issues like whether the mortgagor is in default and whether statutory power of sale has arisen. Where the agreed amount has not been paid and the borrower is still in default on the agreed amount, the right of the bank to sell is established and what the court can do is to cause the ascertainment of the right value for forced sale of the property.

31. Consequently, the Appellant had to prove that the valuation was below the current value. On the proof of the allegations of breach of contract in *Raghibir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR the Court of Appeal stated thus:

“When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given.”...

...First of all a mere denial is not a sufficient defence in this type of case there must be some reason why the 1<sup>st</sup> Respondent does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given.”

32. In relation to the valuation reports, the observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In *Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd* (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth; -

“Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed...”



33. The Appellant failed in the duty to prove that the sale was an undervalue of the properties. Further, the Appellant has a remedy of seeking damages if the subject premises are lawfully sold at an undervalue as provided in Section 97(3) of the Land Act, which states that: -

“(3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market.

(a) there shall be a rebuttable presumption that the charge is in breach of the duty imposed by subsection (1); and

(b) the charger whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the charge at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the charge has complied with the duty imposed by subsection (1).”

34. In some of the cases like *Simon Njoroge Mburu v Consolidated bank of Kenya Ltd* (2014) eKLR, *Nancy Kahoya Amadiva vs Expert Credit Ltd & another* (2015) eKLR and *Lawrence Mukiri vs Attorney General & 4 others* (2013) eKLR; *Twin Buffalo Safaris Ltd. v Business Partners International Ltd* (2015) eKLR, The Court had this to say about Section 99 and the position of a purchaser in *Simon Njoroge Mburu v Consolidated Bank of Kenya Ltd* [2014] eKLR:

That section [99] now statutorily encompasses the right of the charger prejudiced by unauthorized, improper or irregular exercise of the power of sale to have a remedy in damages. In my view, such is where the Appellant’s remedy lies in this case. In this regard, the Appellant would do well to note the powers of the Court in respect of remedies and reliefs set out in under section 104 of the Land Act, 2012....

What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the charger is extinguished. The only remedy for the charger who is dissatisfied with the conduct of the sale is to file suit for general or special damages...

35. Therefore, the Appellant offered his property, which became a commodity for the Respondent, and the Respondent rightly yielded it. In *John PO Mutere & Another v Kenya Commercial Bank Limited* HCCC No. 3125 of 1995, the Court opined as follows:

Once a power of sale has arisen, a mortgagee has the right to exercise it. The court has no power to prevent the exercise of the power if the power is being properly exercised. It is a power parliament has granted a mortgagee, and courts cannot interfere if it is being exercised.

36. In *Nancy Wacici v Kenya Women Microfinance Bank Ltd* (2017) eKLR, the court stated as follows:

By offering the suit premises as security, the charger was equating it to a commodity which the charge may dispose off so as to recover his loan together with interest thereon. If the charge were to sell off the suit property, the chargor’s loss could be calculable on the basis of real market value of the said property...

37. In the case of, the Court of Appeal [*Waki, Karanja & Koome, JJ.A*] posited as doth regarding this kind of claims. :



27. The respondents' main arguments appear to be based on impropriety of security documents and not whether any loans were disbursed on the basis of those securities; the accuracy of accounts; and assertions that the securities were unique and irreplaceable. We take the view, however, as this Court did in the case of *Ecomil Pasag Co. Limited & 2 others v UAP Insurance Co. Limited* [2017] eKLR, that the properties were offered as security in a commercial transaction and the consequence of alienation was anticipated if there was default. The value is quantifiable and there is no evidence that the bank is incapable of paying the damages if the main suit ultimately succeeds.
28. We may also reiterate what this court stated in the case of *John Nduati Kariuki t/a Johester Merchants v National Bank of Kenya Ltd* [2006] eKLR that: -

"The applicant may well in due course make out a case to challenge the calculations of his indebtedness to the bank. He may or may not be successful. The legal issue, however, is whether the dispute on the outstanding loan can scuttle the exercise by a chargee of its power of sale. On that legal proposition this Court has expressed itself before and we need only refer to *J.L. Lavuna & others V. Civil Servants Housing Co. Ltd. & Another – Civil Appl. No. NAI 14/95* where Kwach J.A. stated: -

"I have always understood the law to be that a court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage. The legal position on this point is to be found in *Halsbury's Laws of England, Volume 32, 4th edition* at paragraph 7255:

"725 When mortgagee may be restrained from exercising power of sale.

The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive"

The Court observed in the process, that 'a bank has no money of its own and it is axiomatic that it uses public funds to trade with. The applicant obtained a large amount of those funds and had full benefit of it.' And so it is in this case.

38. The last aspect is the issues raised in the Appellant's submissions. The questions raised did not flow from the main decision. Failure to file submissions cannot be used as a basis to disturb a court finding. The Court of Appeal was more succinct in that Submissions cannot take the place of evidence when they addressed the question in the case of *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR:

"Submissions cannot take the place of evidence. The 1<sup>st</sup> respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally



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

39. I have perused the entire file, and I do not find any breach of the right to be heard. The appellant must never equate the right to a fair trial with the right to a fair hearing. These are totally different rights. A right to a fair hearing can be limited, while the right to a fair trial is non-derogable. It is thus unfathomable that the appellant will abandon all the prayers and clutch on to straws. The right to a fair hearing is intertwined with fair administrative action as addressed by Onguto, J in Kenya Human Rights Commission vs Non-Governmental Organizations Co-ordination Board [2016] eKLR a case in which the powers of the same Respondent were in question, in which the learned Judge expressed himself inter alia as follows:

"As to what constitutes fair administrative action, the court in *President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others* (CCT16/98) 2000 (1) SA 1, stated thus:

"Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades..." [Emphasis supplied]

Thus, a person whose interests and rights are likely to be affected by an administrative action has a reasonable expectation that they will be given a hearing before any adverse action is taken as well as reasons for the adverse administrative action as provided under Article 47 (2) of *the Constitution*. Generally, one expects that all the precepts of natural justices are to be observed before a decision affecting his substantive rights or interest is reached. It is however also clear that in exercising its powers to superintend bodies and tribunals with a view to ensuring that Article 47 is promoted the court is not limited to the traditional judicial review grounds. The *Fair Administrative Action Act*, 2015 must be viewed in that light.

The Petitioner also alleges violation of its right to fair hearing. Article 50(1) of *the Constitution* makes provision for fair hearing. The Article is to the effect that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

The right to fair hearing is evidently closely intertwined with fair administrative action. The often cited case of *Ridge vs. Baldwin* [1964] AC 40 restated the right to fair hearing as a rule of universal application in the case of administrative acts



or decisions affecting rights. In his speech to the House of Lords in 1911, Lord Loreburn aptly put it as a ‘duty lying upon everyone who decides anything’ that may adversely affect legal rights.

Halsbury Laws of England, 5th Edition 2010 Vol. 61 at para 639 on the right to be heard states that:

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court.”

I would state that it now appears that the court, effectively has a duty to look into not only the merits and legality of the decision made due to the requirement of “reasonable” action under Article 47, but also the process and procedure adopted due to the requirement of following all precepts of natural justice under both Articles 47 and 50 (1) of *the Constitution*. The court proceeding under Article 47 of *the Constitution* is expected not only to pore over the process but also ensure that in substance there is justice to the petitioner. The traditional common law principles of judicial review are, in other words, not the only decisive factor.

It may sound like stretching the precincts of traditional judicial review, but clearly by *the Constitution* providing for a “reasonable” administrative action and also enjoining decision makers to provide reasons, the constitutional scheme was to entrench the blazing trend where courts were already going into merits of decisions by innovatively applying such principles like proportionality and legitimate expectation. I must however confess that the line appears pretty thin and, perhaps, more discourse is required on the subject of traditional judicial review and the now entrenched substantive constitutional judicial review.”

40. Thus Article 50(1) provides that every person has a right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or an independent and impartial tribunal or body. This was done in the court below. No form of bias was alleged or proved.
41. On the other hand, Article 25 protects a right to fair trial is decidedly criminal in nature and has no bearing on the right to fair hearing.
42. Before I depart, I am perturbed by the appellant’s cognitive dissonance relating to the conduct of this Appeal. Whereas there were seven grounds of appeal, the Appellant decided to address issues that do not arise from the appealed decision. the appeal, relating to the ruling of 30.6.2023, was not part of the decision made on 2.8.2023. it is thus not available for critiquing. however, the Appellant made it the



linchpin of their appeal knowing the dictates of section 79 B of the *Civil Procedure Act*, which posits as follows:

‘Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.’

43. There is no room for court decisions to be twined. Each decision ought to be appealed separately. It is only in criminal matters, where the procedure soils the end results that the court will frown upon the breach of a right to a fair hearing. Civil proceedings are matters of tilting scales that have no penal effect. The law abhors courts wasting judicial time dealing with small issues, *de minimis non-curat lex*, conjectures, and surmises. In the case of *Arithi Self Help Grazing Group v Buuri & another* (Civil Appeal 213 of 2019) [2022] KECA 665 (KLR) (8 July 2022) (Judgment), the Court of Appeal [W Karanja, F Sichale & KI Laibuta, JJA] while addressing questions of fears in minds of parties and hypothetical questions addressed the concept of *de minimis non-curat lex* as follows:
20. With all due respect, courts of law cannot sit to try mere intentions of any person, including those of the 1st respondent. As the immutable age-old common law principle holds, *De Minimis Non Curat Lex* - the law does not govern trifles, matters of little or no value. Simply put, the law ignores insignificant details or trivial transgressions, such as the fears and suspicions that ran through the minds of some of the members of the appellant that their interests in the suit property might be compromised in the process of demarcation, adjudication and registration of land in their adjudication section. We hasten to observe that such fears and suspicions do not merit judicial intervention. Judges will not sit in judgment or take notice of extremely minor transgressions or violations of the law or social convention, which are not justiciable.
21. As the High Court correctly observed in *Republic vs. National Employment Authority & 3 others Ex-Parte Middle East Consultancy Services Limited* [2018] eKLR –“A justiciable controversy refers to an existing case or controversy that is appropriate or ripe for judicial determination, not one that is conjectural or merely anticipatory.”
22. In the South African case of *Transvaal Coal Owners Association vs. Board of Control* 1921 TPD 447 at 452. “It is perfectly true that usually the Court does not solve hypothetical problems and abstract questions and declaratory actions cannot be brought unless the rights in question in such action have actually been infringed.”
44. What was the effect of the post-proceedings ruling on a belated amendment meant to delay the hearing of a suit? How can a court addressing a judge know that? There were issues on a past un-appealed ruling.
45. I have said enough to demonstrate that the Appeal is not merited. The same is dismissed. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:
- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction



to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

- (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
46. Costs are at the discretion of the court seized up of the matter. However, the discretion must be exercised judiciously. 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.

47. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, 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, before, during, and subsequent to the actual process of litigation.... 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.

48. The net effect of the foregoing is that the appeal has no merit and is thereby dismissed. I note that the costs follow the event. The event in this case is the dismissal of the appeal, which is not an invariable rule. The ultimate factor in the award or otherwise of costs is judicial discretion. In this case, the discretion is for the Appellant to bear costs. Ordinarily, I indicate the costs for the Appeal. however, the file is bulky and cannot easily be discernable. therefore, the costs payable should be taxed by the taxing master of the court or agreed.

### **Determination**

49. In the upshot, I make the following Orders:
- a. The Appeal is not merited and is dismissed with the costs.
  - b. 14 days right of appeal.
  - c. Stay 30 days of execution on costs.



d. The file is closed.

**DELIVERED, DATED AND SIGNED VIRTUALLY ON THIS 27<sup>TH</sup> DAY OF MARCH, 2025.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

No appearance for the Appellant

Ms Misikho for the Respondent

Court Assistant- Michael

