



**Gogar Farm Limited v Pannar Seed (K) Limited (Civil Suit  
5 of 2017) [2023] KEHC 20946 (KLR) (20 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20946 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL SUIT 5 OF 2017  
RB NGETICH, J  
JULY 20, 2023**

**BETWEEN**

**GOGAR FARM LIMITED ..... PLAINTIFF**

**AND**

**PANNAR SEED (K) LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff described as large-scale farmer in Rongai Kenya filed this suit through plaint dated 11<sup>th</sup> January, 2013 and amended on the 1<sup>st</sup> September, 2019 against the defendant following supply of maize seed variety known as Pan 4m-19 which did not perform to the plaintiff's expectation. The plaintiff sought the following prayers: -
  - a. The sum of Kshs.90,402,562/-
  - b. General damages
  - c. Costs of this suit
  - d. Interests on item (a) and (b) above at commercial rates from the date of filing this suit until payment in full.
  - e. Any other or further remedy that the Honourable court may deem fit to grant.

**Plaintiff's Case**

2. The plaintiff's argument is that the Defendant was at all times fully aware or ought to have been aware of the conditions on the Plaintiff's farm including the fact that the Plaintiff's farm is 1900m above sea level as the Defendants representatives had visited the farm several times each year since 2004 and the defendant had grown trial crops for various maize varieties on the Plaintiff's farm.



3. The plaintiff further avers that the defendant through its managing director Mr. Craig Neilson represented to the plaintiff that a maize variety known as Pan 4m-19 which is described as very quick variety and has good drought tolerance was perfect variety for the plaintiff's farm as it would take 90-120 days to maturity.
4. The Plaintiff avers that in the year 2009, its first crop of maize planted in the month of April failed due to drought and sometime in the month of July 2009 or thereabouts, the plaintiff requested the defendant to recommend and supply an early maturing maize variety suitable for its conditions for planting during the October 2009 rains.
5. Further, that the Plaintiff checked the defendant's website to familiarize itself with the variety and found that the defendant had in its website, represented that the Pan 4m-19 variety takes 90-120 days to maturity and acting on the said representation, the plaintiff purchased the said variety (Pan 4m-19) from the defendant and planted from 2<sup>nd</sup> October, 2009 with the expectation that the crop would mature between 1<sup>st</sup> January and 1<sup>st</sup> February, 2010 allowing a further one month for the crop to dry out fully and for harvest from 1<sup>st</sup> February, to 1<sup>st</sup> to 1<sup>st</sup> March, 2010. However, contrary to plaintiff's expectation, the crop took a period of 180 days to reach 20% moisture content and did not mature until after the onset of the rains in 2010 with disastrous results.
6. The plaintiff aver that it later discovered that each of the said representations was untrue in that: -
  - i. The defendant at all material times knew that the said variety could not mature within 90-120 days as represented by the Defendant.
  - ii. The Variety was not appropriate for use in Kenya above 1500m above sea level.
  - iii. There was no mention of an altitude restriction in the defendant's recommendation and or representations.
  - iv. Trials conduct on the variety and within the full knowledge of the defendant revealed that considering that physiological maturity is twice planting to flowering the variety would even at the recommended altitude take much longer to reach maturity.
7. The plaintiff further argue that the Defendant made the said representations fraudulently knowing that they were false and untrue or recklessly not caring whether they were true or false and or in the alternative, if the said representations were inadvertent, they were grossly misleading and the plaintiff is entitled to reliefs sought.

### **Defendant's Defence**

8. In response, the defendant filed a statement of Defence dated 26<sup>th</sup> March, 2013 and amended on 21<sup>st</sup> February 2019 denying allegations of misrepresentations to the Plaintiff nor being aware of the conditions of the plaintiff's farm. The defendant avers that it has 1,000 farmers who are its customers and cannot be expected to know conditions of each and every customer's farm.
9. The defendant further denied making the alleged misrepresentations and stated that the period of 90-120 days for maize variety PAN 4M-19 to reach physiological maturity were similar to the information provided by KEPHIS which is the seeds regulatory authority as evident from the Kephis' letter dated 22/03/2013 addressed to the Plaintiff's advocate.



10. The defendant argue that the plaintiff opted to take unreasonable and costly risks by planting off-season and overly protracting the period of planting and should accept responsibility for any losses it may have suffered.
11. The defendant denied that the plaintiff suffered the alleged losses but qualifies that if the plaintiff suffered any losses as alleged, the same were attributable to its own negligence by planting out of season and the change in weather patterns including El Nino rains of 2010 which saw heavy rainfall, low temperature and humidity in Nakuru in the early part of the year 2010.
12. The defendant further argue that pleadings do not disclose a reasonable cause of action against it and should be dismissed with costs.

### **Plaintiff's Evidence**

13. Pw 1 Hamish Grant who is the plaintiff's managing director testified that in the year 2009, the Plaintiff had an initial crop failure and around 2<sup>nd</sup> July 2009, through an email, he asked Craig Neilson who was the Defendant's managing director if he would recommend to the Plaintiff another variety of seed for planting for the October rains specifically for that year 2009. He said that on 2<sup>nd</sup> July, 2009, Craig Neilson wrote to him email indicating that PAN 4M-19 takes about 120 days to maturity. He checked the Defendants website for details of the variety described as taking 90-120 days and found that the website indicated that it works very well in Kenya and South Africa.
14. He testified that the Defendants knew where the plaintiff's farm was and he informed pw1 that physiological maturity for the variety was 120 days drying down and acting on the faith of the representation and email received on 10/7/2009, he accepted to plant the Pan 4m-19 in October 2009. The Defendant supplied them with seeds and they started planting on 2/10/2009 and expected it to reach maturity anytime up to the beginning of January as there was no rain in January and it would have been the best time to harvest.
15. He stated that the crop looked good in January but they were not able to harvest until middle of March onwards. He testified that if March would have been their last harvest, they would not have had any problem but they started harvesting from 15<sup>th</sup> March, 2010 and 14/6/2010 was the last day of harvest; the bulk of it being in early June.
16. He proceeded to state that they could not harvest using machines and they had to bring people to harvest and they never harvested what they expected to harvest as they harvested 11,291 bags from 1148 acres they had planted but they expected to get 23,390 bags; the value of the bag being Kshs.2,600. Pw1 further testified that the grain they harvested had toxins and they managed to sell to Unga Farm Limited at Kshs.1,400 and the consequential loss was bigger than original loss for year 2010.
17. He further testified that they were not able to prepare land for the next planting season and were not able to plant in time; they were not able to plant maize in substantial portion; they were forced to leave it. He drew court's attention to breakdown of loss for the year 2009 at page 6 of his statement and loss for 2010 at page 7 of his statement.
18. He further stated that 2010 would have been proper harvest as the rain was moderate and the prices in 2010 had gone to 2041. He said they had to plant beans in 2010 because they were late and most of the maize crop went into silage. He stated loss on items as hereunder: -
  - i. Silage ..... Kshs 5.2Million
  - ii. Beans .....Kshs 8.5M.



- iii. Repair damaged roads ..... Kshs250,000/=
- iv. Maize seed..... Kshs1.4Million
- v. The farm inputs .....Kshs 10Million
- vi. Aggregate loss.....kshs 33,313.490s
- vii. Total loss .....Kshs. 90,402,572.

19. Pw1 further testified that the defendant had done trials in his farm for 3 years and according to the correspondents by Kephis it recommended that the crop should not be grown upon 1500 metres altitude above sea level; they recommended that it be grown between 900-1500 meters above sea level. He testified that nowhere in Kenya does that variety perform and there is no document filed by the defendant showing that PAN4M-19 does well anywhere in Nakuru between 90 to 120 days.
20. He said he exercised care by applying directly to the defendant Company and he did not take unreasonable risk; that the managing Director recommended specifically that variety and he had the data and from the data, the variety was capable of producing 30 to 35 bags and he claimed 20 bags.
21. Pw 2- Peter Cheruiyot Seronei testified that he worked for the Plaintiff as an office manager between the years 1998 to 2011 and left employment in August, 2011.He said his duties included helping Pw1 to run the office. He testified that on 9<sup>th</sup> November 2011, pw1 informed him of a meeting with the managing director of the defendant which was to take place at around 11: 00a.m. He said the meeting was attended by him, Hamish Grant(pw1), Mr Goma, Mr. Achola and Mr. Peter from the defendant company and the main agenda was to discuss losses incurred by the Plaintiff in reliance of the misrepresentation by the defendant.
22. He stated that during that year 2009, there was no rain and the seed was planted in October 2009 and both the Plaintiff and the defendant agreed that the maize variety PAN 4M-19 had taken much longer than it was expected. He said his duty was to record what they had agreed and Mr. Achola stated that even in National Performance Trials (NPT), it had taken an average of 134 days to mature at low altitude and could not therefore be expected to mature within 90 -120 days at Gogar farm.
23. PW3 Sammy Kweya Omlando who has worked for the plaintiff as Arable manager dealing with crops from the year 1997 to date, confirmed that the Plaintiff contacted the defendant who was a big supplier of seeds especially maize seeds 7M-97 and Pan 4m-19 and purchased PAN 4M-19 which came just after the crop of 2009 failed.
24. Pw3 testified that the plaintiff was looking for short rain variety seeds and Pan 4m-19 was recommended by Craig Neilson who first communicated to PW 1 through phone calls and later e-mails. He said the defendant recommended 90-120 days as maturity period for variety Pan 4m-19 and he was present when the crop was planted and they did not mix it with any other variety.
25. He further stated that together with Abdi Kaadir, they went around the field in the beginning of January and the crop was looking very good but it took longer than expected to mature as it took more than 165 days; it matured in March 2010 and they started harvesting on 1<sup>st</sup> March 2010 which was far more than the maximum expected 120 days.
26. He said the rain season started in mid-March 2010 and they had hard time harvesting; they resorted to manual harvest; the maize had not dried and the moisture content was a bit high. He said ordinarily they harvest maize at 13.5% moisture but most of the crop variety was 24% and they were forced to take them to dry though ordinarily they leave it to dry naturally in the field. He said the crop had Aflatoxins



- because they were harvested in wet condition and the buyers did not accept due to the high percentage of aflatoxins.
27. Pw3 testified that the plaintiff incurred losses as a result of tractors getting stuck in the fields and also costs of buying materials to repair the roads but if the crop had matured in 90-120 days, they would have been harvested before the rains started. He said the defendant had requested for space to do trials in the plaintiff's farm and therefore knew the farm.
  28. Pw 4 Abdikadir Osman testified that he has worked for the plaintiff since the year 2005 doing field work, planting maize. He said the defendant advised that Pan 4m-19's growth is within 3 months and the plaintiff accepted the offer and planted the variety on the farm on 1/10/2009; he said the planting took one-month planting and harvest was at around 165 days and the maize had a lot of moisture. He said the harvest started late and it rained during harvest; that rain was heavy in April. He said Pw 1 instructed him to conduct trials again to see the difference and it still took 165 days.
  29. Pw 5 Erick Cheruiyot a lecturer at Egerton University department of crops testified that he gave his opinion as sought by the claimant. He said the crop variety was submitted to KEPHIS for National Performance Trials (NPT). He said variety later released by Pannar seed Company as Pan 4M-19) was tested at various trials sites mostly at low altitude the mean altitude for the test sites was below 1200m above sea level which variety was expected to reach physiological maturity in 70.8 days x 1.9=134 days. He said since there is a more or less linear relationship between altitude and days to maturity, it is possible to estimate with accuracy the approximate days to maturity that would be expected at different altitudes.
  30. He testified that the graph plotting altitude against days to silking of all trial sites in the National Performance Trials (NPT) makes it clear that at 1900m above sea level, the days to silking would be expected to be about 78-80 days and hence days to physiological maturity would be about 148-152 days at 1900m and relationship between altitude and days to maturity is well understood by all agronomists in Kenya.
  31. He further stated that the managing director and other sales representatives of the defendant Company would definitely have been aware that in much higher altitude; colder growing conditions than the altitude at which Pan 4M-19 was tried, the variety would definitely take much longer than the 90-120days to maturity contrary to days as advertised on the website.
  32. He further stated that there is no way under any circumstances that Pan 4M-19 could have matured at 1900m within the range of 90-120 days as stated on the defendant's website; and to recommend this specific variety without any warnings after the customer had made clear when and where to plant, was reckless given the losses the farmer could suffer if the crop took longer to mature than period advertised.
  33. Pw5 Leah Chege who worked for the plaintiff in accounts office during the period of 2009-2010 gave a summary of the losses suffered in the years 2009 and 2010. She said the plaintiff purchased seeds from the defendant between June and August 2009 first batch being Pannar 4M-19 of 8800 Kgs which costed Kshs.14M delivered on 27.08.2009 and 2<sup>nd</sup> batch on 8/10/09 being 4800kgs paid twice first invoice for Kshs. 816,000 and 2<sup>nd</sup> invoice was for Kshs. 680,000/=.
  34. She further stated that there were farm inputs of 10,305,017.52 earlier purchased and put in their stores which included fertilizers and fuel for 1<sup>st</sup> crop. She said they were sourced from the store and referred to Invoices at page 681-926 in respect to inputs from the stores delivered to the field. She said they debit the store for goods taken to the field and page 681 relates to field No. 1. That first is gapping/in-filling of seeds which did not germinate and it was Kshs.30,002.40, planting Kshs. 36,666.9, uprooting weeds



- Kshs.5,085, sealing 36,240, spraying. That the documents supporting payroll and invoices is from the store, the total from page 681 to page 926 will give 10,305,017.5.
35. She stated that she did a summary for the year 2009 which is on page 2069 volume 3 confirming total inputs for the year 2009 and Kshs 10,305,017.5 is as a result of field 1. She said they always do reports after each harvest and the 1<sup>st</sup> column is for the 2<sup>nd</sup> crop while the 2<sup>nd</sup> column is for the 1<sup>st</sup> crop. That the inputs for the 2<sup>nd</sup> crop is Kshs.10, 305,018 and each field has a cost giving total acreage as 1148.36 acres and the total inputs for the second crop based on seeds from Pannar was 9,549,956 which only came from fields they planted maize.
  36. Pw5 said there was maize cut as silage with inputs being Kshs 755,061.53 which is inputs for 2009 the second crop. That page 681 in cover page has quick report of expenses supported by invoices totaling to 10M. Page 681 gives an overview of the expenses, the rest has diesel, tractor depreciation and labour up to page 926. She clarified that page 931 to 1028 is labour for 2009 and from where they planted the crop is in October page 1005 up to 1028, diesel from page 1481-1695; the diesel was procured from Total Kenya.
  37. She testified that on 11<sup>th</sup> February 2010, her director and other colleagues did estimation of harvest and from where they have been planting, they estimated 23,390.9 bags but they harvested 11,291 bags and value per bag was 2,100 but they sold at Kshs 1400 because they harvested when it was very wet and the crop was affected by aflatoxins.
  38. She further said that they have earmarked the harvest with the yield of 2008, the summary of harvest of 2008; is shown at page 20068. She said in 2008, they planted 883.5 acres and yield was 18,041 bags; the total inputs were Kshs.41,180,220, profit of Kshs. 27,965,816.23. In 2009, they planted 1,148 acres and they would have gotten Kshs. 49,120,890 but they made 15,804,400. She stated that evidence of 2008 is on page 223 to 224 (bank statements). Payments from Unga Farm Limited who were buying from them is at pages 224 and 223. Page 223- 1,223,636.00, page 225. she said they sold to 2 different people being Golden harvest and Unga Farm Limited. That what follows is bank statement at page 228. Page 230 quick report shows who paid the money Unga Farm Limited and Golden Harvest, that the bank statements are supporting the quick report that the money was paid to plaintiff. She stated that in 2009 they only made Kshs.15M; that they cultivated 1148 acres and they got 11291 bags and were forced to cut down a lot of silage because the crop did not mature in time.
  39. She further testified that they sold grains to Unga Farm Limited at Kshs.1,400, and were paid being Kshs.15,807,400.00 and there is evidence showing the loss. She said the company lost a sum of 33M. she further stated that there was delay in planting for the next season and year 2010 was badly affected since the seeds from Pannar overstayed in the field; they started planting around June in 2010 and planted 623.2 acres as they were not able to plant as they were still harvesting the 2009 crop; they were not able to plant 315 acres and were forced to plant silage on 185 acres; and in the year 2010, they got 6922 bags from 623.2 acres and in the year 2010, the price was good being 28000 but the yield was very low.
  40. She further stated that she took average for that year to be 3,012 because of the loss of a number of bags as compared to 2010 and 2008. Per acre in 2008 was 20.4 and 2010 average of 11.11; she took average in prices of 2010 and got a figure of 21M; the number of bags harvested multiplied by price and compared with 2008. The difference in bags is 9.28 multiplied with price of 3041 and got a loss of Kshs.28, 191.55 per acre which finally arrives at Kshs. 17M.
  41. Pw5 further stated that silage was a loss of 28191.55 per acre multiplied by number of acres comes up to 52.27M. That they were forced to plant 305 acres of beans multiplied by 28,191.55 to get 8,598,422/=; that there was a loss of 1.8M from the beans. She said they did not plant anything in 350 acres and in calculating the loss, she took income of 2008 and price for that year and number of acres they did not



manage to plant and the total loss was 13.258,241/=; and finally, the total claim is Kshs.90,402,572, the data being what they have collected from their records done at the end of every season.

### **Defendant's Evidence**

42. Dw1 Danson Birenga a certified public accountant who is a finance manager for the defendant for 15 years now testified that the witness statement filed by Leah Chege who says she was working at Gogar Farm Accounts office during the year 2009-2010 has not indicated the role/work she was doing in accounts department; what her position was and her qualification and which month of the year she left the employment of the Plaintiff and in the absence of that, it is difficult to establish the credibility of the figures provided; and it is also important to note that the witness has provided information for the years 2008, a period which is unclear if she was in the employment of the Plaintiff.
43. He further stated that there is doubt on the credibility of the figures as the figures have been generated within the organization without any verification by an independent third party and it is notable that there are no financial statements for the plaintiff audited by a qualified independent auditor approved by the institute of certified public accountants of Kenya and it is therefore difficult to establish the effect on the financial position of the Plaintiff.
44. The witness stated that the alleged value per bag for the year 2009 was Kshs. 2,100/= against the alleged value of Kshs. 1,400/= per bag received for sale of Pan 4m-19 and there is no evidence provided for both alleged figures; and further the production per care for year 2010 is being compared against year 2008 and PAN 4M-19 was only planted in 2009 and in that year 2009, PAN 4M-19 was planted off season. He said the yield is a product of many factors, some of which are under the control of the Plaintiff; that such factors would include but are not limited to agronomic practice before and at planting, selection and application rates of fertilizers, pesticides, herbicides, fungicides and previous management of the soil in those lands; and they cannot establish how factors that are under control of the plaintiff affected the alleged production and due to the said inadequacies, it is difficult to establish the validity of the said claim.
45. Dw2 Dr. Haron Karaya who was employed by the defendant as a Research Scientist/ maize breeder testified that his work is to develop maize seeds for the highlands. He stated that physiological maturity occurs in crops at the time when grain stops accumulating starch; that during growth it accumulates starch; this occurs during photosynthesis. He said physiological maturity occurs when the plant is no longer growing; that at the start of physiological maturity, the crop can be eaten but it is not hard or soft enough; and after attaining physiological maturity, it starts the phase of drying down. He said altitude is a factor that affects physiological maturity and other factors are adaptability, rainfall (less rain affects time of physiological maturity while more rain extends the physiological maturity), relative humidity, farm inputs and management of the crop especially if it has weeds. He said there are other factors other than the altitude which affect maturity which include failure of seed to germinate immediately if there is no moisture.
46. He said after attaining maturity, the maize starts losing water through evaporation depending on temperatures at the time. He referred to the meteorological data dated 27.3.19 which showed that the 1<sup>st</sup> rain was on 4<sup>th</sup> February, 2009 and on 5<sup>th</sup> February, there was heavy rainfall then there was break for some days and resumed on 15<sup>th</sup> February to the end of the month. That meteorological department confirmed that 2010 was unusual year where it received 151.9mm which was recorded in 1979; that it was way higher than usual. In that in February, 2008 was 2.5m and February 2010 was 151mm; there was a lot of rain. He stated that in 2009 the rain was 11.6mm; data shows that the rain started in February, 2010 and in that year 2010 April and the plaintiff indicated that he was not able to harvest



- in February, 2010 because it was raining. He stated that timing of planting the crop has an effect on maturity
47. He further stated that Nakuru has one type of rainfall and this is an area where you cannot do two types of crops in a year because it will overlap. He said the variety herein was planted in October 2009 and it was the plaintiff's decision to spread out the planting; that he was waiting for drying down from 1<sup>st</sup> February 2010 to the end of the month and from the plaintiff's statement, the crop attained physiological maturity but it was wet.
  48. He testified that the plaintiff's documents filed on 18.11.19 shows data run by the plaintiff for a period of three years; that there is data from 2004,2005 then 2011 and 2012, that the plaintiff's data is for the year 2011 and 2012 while KEPHIS is for the year 2004 to 2006 hence there is period difference of between 5 to 7 years and scientifically you cannot combine data recorded in 2004 and 2005 together with data of 2011 and 2012 and come up with a graph; that Kephis data is only used as secondary data. That the plaintiff's data shows manipulation but if Kephis used the data to produce a graph, you cannot manipulate. He stated that there is no rain data to support the primary data of the plaintiff as the plaintiff did not file rain data.
  49. The witness proceeded to testify that he summarized response to the scientific research filed by the plaintiff on 12.7.18 and the research was a collection of a number of papers which are already published and available to the public and the focus is North America which is in temperate kind of environment. That the area where the seed was planted is in the tropic and the environment is quite different from North America. However, there are some facts that cut across one of them is Grown degree days (GDD) which is found in article No.2 which talks about growing stages in crops physiological maturity but our region is different from North America.
  50. He further stated that as per page 41 of the plaintiff's documents estimated date of maturity is 8<sup>th</sup> February and 30 days of drying down will go to the 1<sup>st</sup> week of March, 2010 for harvesting; reducing moisture of 1% in ideal situation and that was bound to delay the harvesting.

### **Plaintiff Submissions**

51. The plaintiff submitted that there existed a fiduciary relationship between the plaintiff and the Defendant; that the Defendant was asked by the plaintiff to give advice on the PAN 4M-19 maize variety and from the evidence adduced by the plaintiff, it is clear that the Defendant misrepresented to the Plaintiff that the maturity period of the variety PAN 4M-19 was 90-120 days to maturity.
52. The plaintiff argues that it acted on the faith in the representations made by the Defendant and purchased the Maize variety Pan 4m-19 from the Defendant and planted from 2<sup>nd</sup> October, 2009. That on the basis of the said representations, the crop was expected to mature between 1<sup>st</sup> January, and 1<sup>st</sup> February, 2010 allowing a further one month for the crop to dry out fully and for harvest from 1<sup>st</sup> February to 1<sup>st</sup> March; but on the contrary, the crop took more than 180 days to reach 20% moisture content and did not mature until well after the onset of rains in 2010 with disastrous results.
53. The plaintiff further submits that it relied on the advertisement of Pan 4m-19 in the Defendant's website by the defendant; the key features/characteristics of PAN 4M-19 as illustrated in the website and proceeded to plant the variety and the plaintiff having relied on the advertisement in the Defendant's webpage, has action against the Defendant. The plaintiff restated facts on misrepresentation as captured in paragraph 6 above.
54. On whether the defendant was negligent, the plaintiff submits that in the common law parlance, it is an implied term of a contractual relationship that the goods should be of merchantable quality and



fit for purpose. That it is of much significance to note that the implied terms regarding merchantable quality and fitness for purpose applies only to those who supply goods in the course of business.

55. Plaintiff further submits that Section 16 of the *Sale of Goods Act* and section 5(1) of the *Consumer Protections Act* which provides that the supplier is deemed to warrant that the goods or services supplied under a consumer agreement are of reasonably merchantable quality; that the implied conditions and warranties applicable to the sale of goods under the *Sale of Goods Act* shall apply with necessary modifications to goods that are leased, traded or otherwise supplied under a consumer agreement.
56. The plaintiff submits that on 2<sup>nd</sup> July, 2009 at 8:30am the defendant respondent through its managing director Craig Neilson to its inquiry, recommending PAN 4M-19 for late planting indicating that the same was a very quicker variety and had good drought tolerance.
57. The plaintiff submits that it expressly made it known to the Defendant the particular purpose for which the goods were required and placed reliance on the Defendant's skill and judgement, and the goods being of a description which is in the course of Defendant's business to supply, there a rose implied condition that the goods would be reasonably fit for that particular purpose. Further in the defendant's website which plaintiff was referred for details, the defendant claimed the variety is widely adaptable in Southern Africa as it does in East Africa with maturity of 90-120 days.
58. Counsel for the plaintiff submits that the plaintiff suffered loss and damage as a result of variety known as PAN 4M-19 due to seed's failure to perform as per representation; failure to mature within 90-120 days hence the Defendant breached its implied warranties of merchantability and fitness and plaintiff is entitled to the compensation in special damages in the sum of Kshs. 90,402, 572/= or any part thereof for loss of damage as particularized in paragraph 18 above being the sum of the total inputs of the year 2009, the total loss incurred in the year 2009 (second crop) and loss incurred in the year 2010 (Kshs. 10,305, 017.52 + Kshs. 33, 313,490 + Kshs.46,784.03= kshs.90,402,572); being special damages not only specifically pleaded but also proved.
59. The plaintiff submits that Pw6 produced invoices and payrolls as documentary evidence and in some cases, it has relied on estimates; and from the authorities listed, the law on special damages is settled and courts have been urged to be realistic and accept that particularity must be tailored to the facts and referred to the case of *Jacob Ayiga & Another v Simeon Obayo* [2005] eKLR.
60. Counsel further submitted that it would be a great injustice to expect a plaintiff to provide documentary evidence to prove all the losses suffered or sustained as the plaintiff does not go about its business collecting and keeping all necessary documents in anticipation of financial loss; and further it has not been alleged anywhere that the Defendant visited the plaintiff and offered to audit the plaintiff's loss but the Plaintiff declined; and further in cross examination Dw1 conceded that he had no workings to fault the breakdown given by the Plaintiff on loss of revenue and had no contrary evidence to confirm what was made by the plaintiff in the year 2004.
61. As to whether the plaintiff is entitled to compensation by way of general damages from the Defendant in respect of the loss, the plaintiff submits that the Defendant is liable to the plaintiff for breach of contract for supplying the Plaintiff with seeds which did not meet the purpose for which they were procured and urge the court to be guided by the decision in *Ken Aluminum Products Limited v High-Tech Air Conditioning & Refrigeration Limited* [2018] eKLR where the court stated as follows:-

“...accordingly, it is my finding that the Defendant is liable to the Plaintiff for breach of contract for supplying a product that failed to meet the purpose for which it was procured.”



62. That the principles to take into account in assessing general damages were set out in [\*Amina Abdul Kadir Hawa v Rabinder Nath Anand & Another\*](#) (2012) eKLR. The plaintiff further relies in the case of [\*Mbaka Nguru and Another v James George Rakwar\*](#) [1998] eKLR.
63. Counsel further submits that the Plaintiff's claim for general damages is premised on the direct and natural consequences of the negligent misrepresentation made by the Defendant, breach of contract and the Plaintiff's consumer rights; and it also based on the principle of restitution of the plaintiff to the position it would have been had the misrepresentation and breach not occurred and referred to the case of [\*Safaricom Plc v Iphone Global Systems Limited\*](#) [2019]eKLR where the plaintiff was awarded Kshs.20,000,000/= as general damages for breach of contract and the case of [\*Precast Portal Structure Limited v Riccardo Lizier & 3 others\*](#) (2015)eKLR where the court awarded a sum of Kshs. 30,000,000/= as general damages for breach of contract.
64. The plaintiff submits that an award of Kshs.30,000,000/= as general damages is appropriate in the circumstances and in the unlikely event the court will not be inclined to award the above figure as general damages for breach of contract, the plaintiff urges the court to award a nominal general damages of Kshs.200,000/= considering the length of time this matter has taken in court invoking the powers vested in the court by Section 3A of the [\*Civil Procedure Act\*](#) and referred to the case of [\*Ngoigwa Company Limited V Dorcas Wanjiku Ikinu\*](#) (2019)eKLR.
65. In respect to prayer for any other or further remedy that the court may deem fit to grant, the plaintiff submits that this is a good case to grant punitive damages in that publishing false representation in its website, the Defendant did misrepresent not only to the plaintiff but the entire citizenry and the actions of the Defendant were calculated at increasing its sales at the expense of the innocent farmers such as the Plaintiff herein who suffered loss and damage as a result of the misrepresentation made by the Defendant; and submits that an award of Kshs.2,000,000/= exemplary or punitive damages would be appropriate in the circumstances and referred to [\*Tabitha Atsinga Musambi V Standard Limited & Another\*](#) (2019)eKLR in which the court awarded a sum of Kshs. 2,000,000/= as exemplary damages.
66. In respect to costs of the suit, plaintiff submits that it is trite law that costs should follow the event; that plaintiff in its pleadings, and during the hearing demonstrated how its rights were infringed by the defendant resulting in loss and is therefore entitled to enforce its rights in the manner it has done by approaching this court and is entitled to the costs of the suit as a matter of course. He urged this court to enter judgement in favor of the plaintiff as prayed in its amended plaint and submitted herein.

### **Defendants submissions**

67. The defendants filed written submissions dated 26<sup>th</sup> September,2022 and argue that plaintiff must demonstrate that the defendant made a statement which was untrue and which was intended to induce plaintiff to enter into the contract and relies on the case of HCC No. 593 of 2010; [\*Sachin Shaba v Jagat Mahendra Kumar Shah & Another\*](#) [2020] eKLR.
68. Counsel further submits that by its email of 02/07/2009, the plaintiff had already made up its mind about replanting maize in October 2009 due to the drought that hit the country earlier in April 2009 and the defendant suggested two tolerant varieties being PAN 4M-19 and Pan 67; and submit that it is therefore misleading for the plaintiff to claim that he was induced into planting the crop given that Pw1 was already dead set on planting whether or not they received any yield. Further that the Plaintiff's



manager clearly understood the risks it was about to take by planting off season as stated in paragraph 29 of plaintiff's amended witness statement dated 22<sup>nd</sup> November 2018 where he says

“no farmer in his right mind would consider planting maize after September in Rongai even in a wet year”.

69. Counsel further submits that none of the defendant's statements gave any representation on altitude with regard to PAN 4M-19 as the emails dated 10/07/2009 by the plaintiff on whether the seed could perform at 6000 feet above sea level was not answered by the defendant affirmatively or at all. That there was simply no meeting of minds as regards the issue of altitude and it cannot therefore be claimed that the defendant made false /fraudulent or any misrepresentations to the plaintiff in this regard.
70. Further that there is no information on the website with regard to altitude but there is a caveat; and if the plaintiff consulted the website for information on altitude and did not find any on the website, he ought to have called or visited the office of the defendant for a positive clarification on altitude but instead he sought to make decision to plant notwithstanding the issue of altitude which was important to him not being answered positively.
71. Counsel further submit that silence does not constitute misrepresentation and common law includes the notion of the maxim of caveat emptor which implies that a party does not have a duty to disclose apparent defects voluntarily and referred to the case of *Sachin Shaba v Jagat Mahendra Kumar Shab & Another* [2020] eKLR.
72. Counsel for the defendant submits that the plaintiff has not established a case on liability against the defendant in that it has claimed that the PAN 4M-19 maize variety planted in its farm in the year 2009 did not mature within the 90-120 days but has not availed evidence to prove that PAN 4M-19 failed to attain physiological maturity within the 120 days from planting or that there was delayed maturity with regard to the variety and argument that the maize variety was not capable of maturing within the projected period is not supported by any evidence.
73. Counsel further submits that the defendant did not make any false misrepresentations to the plaintiff and having failed to prove the allegations, plaintiff must embrace the consequences of the risks it took by planting off season and referred to the case of Environment and land Appeal 22 of 2020 *David Ntirika M'baracha v Mutuerandu Mungatia Timothy* [2022] eKLR.
74. Counsel urged the court to take note of some of the statements made by the Plaintiff or its witnesses on the performance of the maize variety PAN 4M-19 and submitted that there is no tangible evidence from the plaintiff on when the PAN 4M-19 achieved maturity and the only fall back is the records of planting and harvesting that were filed in Exhibit 1 of the plaintiff's evidence.
75. That allegation by plaintiff that the maize variety did not reach maturity as described ought to be treated with the contempt it deserves as no raw data has been filed on the alleged tests by the plaintiff; that the plaintiff should have invited the defendant or the seed Regulatory Authority KEPHIS to participate in the trial and there is therefore no independent body to corroborate the alleged trials or the outcome.
76. Counsel submits that it is an established fact that the EL Nino rains commenced in Mid-February 2010 a fact confirmed by the data provided by the ministry of environment and Forestry, Kenya meteorological department for Nakuru County filed in the defendant's list of documents. That the report shows the unusual amounts of rainfall experienced in the Nakuru region in February, 2010 where an average of 151.9mm was recorded in February which was an abnormally last experienced in February, 1979.



77. The defendant submits that the two expert witnesses Prof. Cheruiyot who testified for the Plaintiff and Dr. Karaya for the defendant agreed that moisture has a direct effect on prolonging the length of the dry down period; the higher the moisture the longer the dry own period.
78. Counsel for the defendant further submits that the plaintiff has not tendered any evidence to controvert evidence by the meteorological department which show that the El nino rains started in the month of February, 2010; El nino rains was unexpected, unusual and fits the description of an act of God; that the plaintiff has a burden of proving that the alleged losses were attributed to late maturity of the crop and not the 2010 EL Nino rains and it is the defendant's submissions that the alleged losses and expenses incurred in harvesting and drying down of the maize by the Plaintiff are a direct consequence of the El nino phenomenon.
79. Counsel further submits that the plaintiff's case is based on two misconceptions namely; that the defendant made representations to it with regard to the presumed ideal altitude in which PAN 4M-19 should be grown and the defendant knew or ought to have known the conditions of its farm and in particular that it was 1900 ft above sea level whereas it has been established that the defendant did not make any positive statement with regard to altitude and cannot therefore be said to have made a misrepresentation let alone a fraudulent one.
80. Further the misconception that the Defendant knew or ought to have known the conditions of the Plaintiff's farm has also been debunked and there is no proof that the defendant's staff had visited the Plaintiff's farm and had run trials and having established that no misrepresentations were made by the defendant to the Plaintiff with regard to the altitude and the plaintiff having failed to prove that the defendants knew the conditions of its farm, the claim that the plaintiff was duped with regard to altitude fails.
81. Further that the plaintiff failed to prove that variety Pan 4M-19 it planted was late in maturing as no evidence was placed before the court to lend credence to this allegation; that no data or records have been produced before the court to show when exactly any crop from a single field attained maturity.
82. The defendant submits that Kephis NPT trials having been carried out during normal planting season, only confirm that there are climatic factors other than altitude which affect the physiological maturity of maize. That there was consensus in the testimonies of Professor Cheruiyot who testified for the plaintiff and Dr. Karaya who testified for the defendant that moisture /rain has direct effect on prolonging the length of the dry down period and the plaintiff has not controverted evidence that El nino rains started in the month of February 2010 and that the defendant did not give assurance or promise with regard to dry down period since it is determinable by vagaries of nature.
83. On whether the plaintiff is entitled to the reliefs sought, the defendant submits that the plaintiff failed to establish defendant's liability. That the plaintiff's case herein essentially rests on two premises; that the PAN 4M-19 seed did not mature in 90-120 days of planting and that the said seed variety could not attain such maturity at high altitudes such as the plaintiff's farm; and from these premises are then drawn the deductions that the Defendant had made fraudulent misrepresentations and that the resultant delay led to destruction of the crop by the onset of 2010 El-Nino rains and also ruined the 2010 season and puts the plaintiff to loss.
84. Defence counsel submits that on the first premise, plaintiff failed to adduce evidence to show when the crop on each field attained maturity relative to the diverse planting dates; and the second premise in respect to altitude, the suggestion of linear relationship between maturity time relative to altitude is discounted by observation of the data by Kephis and defendant did not make any representation as regards the relationship between maturity and altitude and it follows therefore that the allegation of



fraudulent misrepresentation which requires one to prove on a standard higher than the balance of probability stands unproven.

85. In conclusion the defence counsel submit that the active agency in the Plaintiff's claimed loss was the damage occasioned by the onset of the EL Nino rains while the crop delayed in the fields. That the plaintiff undertook planting of Pan 4M-19 seed crop over an extended period and both delay in planting and erratic weather would impact on the date of maturity of planted seed relative to the onset of the 2010 El Nino rains and submit that the plaintiff has failed to isolate and exclude the attribution of these factors to the loss; that plaintiff has failed to establish cause attributable to the defendant.

### **Analysis and Determination**

86. I have considered the pleadings on record, the evidence tendered in court and the written submissions by the parties as well as authorities cited. I find the following as issues for determination:-
- i. Whether the plaintiff proved allegations of misrepresentations against the defendant on a balance of probabilities
  - ii. Whether the plaintiff is entitled to reliefs sought and to what extend

### **Whether the plaintiff proved allegations of misrepresentations against the defendant on a balance of probabilities**

87. The Plaintiff's argument is that in the year 2009 its first crop of maize planted in the month of April failed due to drought and sometime in the month of July 2009 or thereabouts, the plaintiff requested the defendant to recommend and supply an early maturing maize variety suitable for its conditions for replanting during the October 2009 rains.
88. The plaintiff further argue that the defendant was aware of the conditions on the Plaintiff's farm including the fact that the Plaintiff's farm is 1900m above sea level and through its managing director Mr. Craig Neilson represented to the plaintiff that a maize variety known as Pan 4m-19 which is described as "very quicker variety and has good drought tolerance" was perfect variety as it would take 90-120 days to maturity.
89. Pw1 for the plaintiff testified that the defendant in its website represented that the variety Pan 4m-19 takes "90-120 days to maturity and acting on this faith of the said representation, the plaintiff purchased the said variety (4m-19) from the defendant and planted from 2<sup>nd</sup> October, 2009.
90. Following the said representation, the plaintiff expected the crop to mature between 1<sup>st</sup> January and 1<sup>st</sup> February, 2010 allowing a further one month for the crop to dry out fully and for harvest from 1<sup>st</sup> February, to 1<sup>st</sup> March, 2010 but on contrary, the crop took more than 180 days to reach 20% moisture content and did not mature until well after the onset of rains in 2010. The plaintiff later found out that Variety was not appropriate for use in Kenya above 1500m above sea level; the plaintiff therefore argue that representations by the defendant were grossly misleading and is entitled to the reliefs claimed herein.
91. The plaintiff referred to the case of Carill v Carbolic Smoke Ball Company and argues that it relied on the advertisement about Pan 4m-19 in the Defendant's website. That it relied on the key features/ characteristics of PAN 4M-19 as illustrated in the website and proceeded to plant the variety and having relied on the advertisement in the Defendant's webpage and communication from the defendant, has an action against the Defendant.



92. The Defendant on their part argue that in order to succeed in proving misrepresentation, the plaintiff is required to show that the Defendant made a statement which was untrue and which was intended to induce it to enter into the contract but in this case, the plaintiff did not enter into the contract based on inducement.
93. The defendant further argues that through email of 02/07/2009, the plaintiff had already decided to replant maize in October 2009 due to the drought that hit the country earlier in April, 2009 and the defendant suggested two tolerant varieties being Pan 4M-19 and Pan 67; and it is not correct for the plaintiff to claim that it was induced into planting the crop given that it had decided to plant the variety and the manager understood the risk of plating off season.
94. The defendant further argue that emails dated 10/07/2009 by the plaintiff on whether the seed could perform at 6000 feet altitude was not answered by the Defendant affirmatively or at all and there was no agreement on the issue of altitude and it cannot therefore be said that the defendant made false / fraudulent or any misrepresentations to the plaintiff in this regard; further there is no information in the website with regard to altitude but there is a caveat and the plaintiff ought to have called or visited the office of the Defendants for a positive clarification on altitude but opted to plant without getting clarification on altitude.
95. According to Halsbury's Laws of England, misrepresentation is a positive statement of fact, which is made or adopted by a party to a contract and is untrue. It may be made fraudulently, carelessly or innocently. The applicable law to the dispute between the parties herein is the [Sale of Goods Act](#), Cap 31 of the Laws of Kenya. Of relevance to this case are the provisions of Sections 15, 16, 17, 35 and 36 of the [Sale of Goods Act](#). For ease of reference, the Sections provide as follows: -

“Section 15: “Where there is a contract for the sale of goods by description – there is an implied condition that the goods shall correspond with description; and if the sale is by sample as well as description; it is not sufficient that the bulk of the goods correspond with the sample if the goods do not also correspond with the description.”

Section 16: Subject to the provisions of this Act and of any Act in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows: -

- a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for that purpose: provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;
- b) where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacture or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regard defects which that examination ought to have revealed;
- c) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;



- d) An express warranty or condition does not negative a warranty or condition implied by the Act unless inconsistent therewith.”

96. Further Section 17 provide as follows: -

“In the case of a contract for sale by sample there is:

- (a) an implied condition that the bulk shall correspond with the sample in quality;
- (b) an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;
- (c) an implied condition that the goods shall be free from any defect rendering them un-merchantable which would not be apparent on reasonable examination of sample.

97. In the case of *Prudential Printers Limited -v- Carton Manufacturers Limited* [2012] eKLR the court held that a reading of Section 16 of the *Sale of Goods Act* shows there is no warranty or condition as to the merchantability of goods; the only time such a warranty will be implied is when the buyer relies on the skill and judgment of the seller or where the goods are bought by description from a seller dealing with such goods.

98. Pleadings and evidence adduced herein show that the plaintiff approached the defendant for a recommendation of maize variety to plant during off season. The defendant indicated that they recommended two varieties being PAN 4M-19 and Pan 67 for the plaintiff. The plaintiff chose PAN 4M-19 Maize variety for purposes of planting off season; It is not disputed that the plaintiff went ahead to purchase variety PAN 4M-19 from the defendant. It is not also disputed that the variety failed to perform to the plaintiff's expectation.

99. Further evidence show that the plaintiff sought the services of the Defendant on a preferred maize variety that will do well during off season following failure of the crop planted in April 2009. There is prove of communication concerning variety that would mature within 90-120 days. The defendant admits proposing 2 varieties to the plaintiff which include Pan 4m-19. At the time of purchase, the defendant knew the purpose of the variety being purchased by the plaintiff and the plaintiff's expectation on period of maturity.

100. It is not disputed that the crop did not mature within 90-120 days but period to harvest extended to 180 days and rains made harvesting difficult and resulted in additional costs in harvesting and delay in planting for the season. There was information concerning the seed variety both on the defendant's website and email communication between plaintiff and defendant; there is therefore confirmation that the contract of sale between the parties was principally a sale by description. Having found that the sale agreement between the parties was sale by description, under provisions of Section 15 of the *Sale of Goods Act* there is an implied condition that the goods shall correspond with description.

101. The defendant was required to supply variety which fit in the description in the website and with performance as per request by plaintiff through email but contrary to the description, crop took upto 180 days to reach 20% moisture content.

102. In *Nichol -v - Godts* (1854) 10 Ex. 191, the court held that where there is a sale of goods by sample as well as by description, the goods must correspond with the description as well as sample.



103. Further, evidence adduced demonstrate that defendant's representatives had visited the farm several times each year since 2004 and planted trial crops for various maize varieties on the Plaintiff's farm. They therefore knew the plaintiff's farm was 1900m above sea level but failed to give the right advice on seed variety suitable for plaintiff's farm. The defendant supplied to the Plaintiff goods that did not meet the description as per the e-mail and the information on the defendant's website. In my view, the Plaintiff has proved on a balance of probabilities that the description of the seed variety supplied was not as represented by the defendant and resulted in plaintiff running into a loss; the defendant was therefore in breach of Sections 15 and 16 of the Sale of Goods Act.
104. From the foregoing, the defendant's representatives knew the condition of the Plaintiff's land and was therefore under a duty to advise the plaintiff. The defendant's managing director Mr. Craig Neilson specifically recommended PAN 4M-19 for the late planting indicating that the same was a very quicker variety and had good drought tolerance as evidence by the e-mail correspondences.
105. The Defendant is therefore liable for misrepresentation to the Plaintiff. The Plaintiff has proved that the Defendant misrepresented to the Plaintiff on suitability of seed variety Pan 4m – 19 for planting in October 2009. The Defendant is therefore liable for loss incurred by the plaintiff as a result of the said misrepresentation.

#### **Whether the plaintiff is entitled to reliefs sought and to what extent**

106. The plaintiff argued that it suffered loss and damage as a result of the failure of the maize seed variety known as PAN 4M-19 which did not mature within a period of 90-120 days as per information received from the defendant and hence the defendant breached its implied warranties of merchantability and fitness. The plaintiff argued that it suffered loss in the year 2009 and in the year 2010 due to the late maturity of the totaling to sum of Kshs.90,402, 572/=being loss. In the year 2009 being Kshs.10,305,017.52 and Ksh.33,313,490 and loss in 2010 being 46,784.03 bring a total sum of Kshs.90,402,572.
107. It is trite law that special damages must not only be pleaded but specifically proved. Pw 6 did adduced evidence on the loss suffered by producing invoices and payrolls as documentary evidence and in some items, it has relied on estimates.
108. The plaintiff pleaded that it incurred a loss of Kshs. 10,305,017 being the total farm input for the year 2009 which includes the price of PAN 4M-19 seed which was bought at the total cost of Kshs. 1,496,000/=. That Pw 6 testified that the bags of maize seeds were bought in two batches; the first batch the plaintiff paid Kshs. 816,000/= and the second batch the Plaintiff paid Kshs. 680,000/= which figures is corroborated by documents produced in court. This cost of purchase of the seeds is not disputed by the Defendant.
109. Plaintiff further availed document to prove other expenses incurred which include farm inputs including cost of gapping, planting, security and spraying. The labor costs are evidenced in the payrolls at pages 931-1028 of the Plaintiff's supplementary list of documents; the other expenses are evidenced in the invoices at pages 681-986. The expenses incurred in fueling the tractors and other farm machineries have been evidenced from page 981-1695 of the Plaintiff's supplementary list of documents.
110. From evidence adduced, total loss incurred by the Plaintiff in the 2009 being 10,305,017 being farm inputs, labour and seeds and Kshs.33,313.490 being difference between estimated profit and actual profit in the year 2009.



111. Total loss from year 2010 resulted to prolonged harvest added up to 46,784,064.03. The above losses for year 2009 and 2010 bring up an aggregate figure of Kshs.90,402,572 which the Plaintiff has proved by way of documentary evidence.
112. In respect to Prayer for general damages, the Plaintiff submits that the Defendant is liable to the Plaintiff's for breach of contract, for supplying the plaintiff with seeds which did not meet the purpose for which they were procured. That the plaintiff claim for general damages is premised on the direct and natural consequences of the negligent misrepresentation made by the Defendant as well as breach of contract.
113. The court of appeal dealt with the issue of damages of breach of contract in length in the following cases *Gitobu M'ibutu Karatho v Christopher Murithii Kubai* (2014) eKLR and Gladys Morjorie Akinyi (*Supra*) as well as Provincial Insurance Co. Ltd.
114. The general principles running across all the authorities is that no general damages may be awarded for breach of contract except in very exceptional circumstances. In the Provincial Insurance Co. Ltd case such exceptions were stated as: -
- i. Oppressive Conduct
  - ii. High handedness outrageous insolvent
  - iii. Or vindictive character and in such cases, evidence has to be tendered to bring it to the exceptions.
115. None of the above circumstances were proved. I therefore decline to award general damages.
116. In respect to award under special damages I take note of the fact that Expert evidence showed that other factors may have affected growth of the crop variety and it was not entirely due to the seed planted. In my view therefore, the defendant is not entirely to blame for the delay in maturity and sale of the maize harvested and I do apportion plaintiff 30% of the loss inquired. Kshs. 90,402,572/= less 30%.
117. I enter judgment for plaintiff against the defendant for kshs.90,402,572 less 30% contribution plus costs and interest on special damages from the time of filing this suit.
118. Final Orders: -
1. Liability apportioned at 30:70 in favor of the plaintiff
  2. Special damages assessed at Kshs 90,402,572 less 30% contribution.
  3. Interest on 2 above at court's rate from date of filing suit.
  4. Costs to the plaintiff.

**JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 20<sup>TH</sup> DAY OF JULY 2023.**

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**RACHEL NGETICH**

**JUDGE**

