



Unibee Construction Limited v Lorot & another (Suing as the Legal Administrator of the Estate of Lomerinyang Chepsien) (Environment and Land Appeal 24(B) of 2024) [2025] KEELC 4721 (KLR) (17 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4721 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND APPEAL 24(B) OF 2024
CK NZILI, J
JUNE 17, 2025**

BETWEEN

UNIBEE CONSTRUCTION LIMITED APPELLANT

AND

MARGARET LOROT 1ST RESPONDENT

KAMOYO TULIAKONG LOMERINYANG 2ND RESPONDENT

**SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF
LOMERINYANG CHEPSIEN**

*(Being an Appeal from the Judgment derived from SPM Court at Kapenguria
by Hon. B.O. Ondego (SPM) dated 04/07/2023 in Civil Case No. 33 of 2018)*

JUDGMENT

1. The appellant has approached the court through a Memorandum of Appeal dated 27/7/2023. As the defendant at the lower court, he had been sued by the respondents through a plaint dated 18/2/2018, as the legal representative of the estate of the late Lomerinyang Chepsien [herein after the deceased], for trespass or encroachment and excavation of murram out of approximately 2 acres of the deceased's land in April 2018, which suit land was described as plot for Member No. 253 Parua 'A' Group Ranch.
2. The respondents had prayed for:
 - [a] Permanent injunction.
 - [b] General damages for the loss or damage occasioned to the suit land.
 - [c] Costs of the suit.



3. The appellant opposed the claim through a statement of defense dated 2/11/2020 averring that it was contracted by the Government of Kenya to construct the Kochiy-Sebit road, following which it sought murram for construction from several persons within the locality, out of which it found a site, a previously extracted site belonging to one Robert Lomerinyang, a brother of the defendant to which the appellant had entered into an agreement dated 23/2/2018, to extract murram for purposes of construction, who at the time had authority to deal with the said property.
4. The appellant averred that the local authority and the relevant government agencies were aware that it had sought consent, with the approval of the respondents herein, who never objected to the same, including the activities of excavating the murram. The appellant denied the alleged trespass or encroachment, since at the time it agreed, already the site had previously been utilized by third parties in excavating murram, hence the respondents were not entitled to any reliefs sought in the plaint.
5. By a reply to the defense dated 16/11/2020, the 1st respondent denied being party to the contract between the appellant and the government, or any other contract over the excavation of the murram on suit land. The respondents termed any agreement between the appellant and Robert Lomerinyang as null and void and the resultant activities out of it by the appellant as tainted with illegalities, which the court should not sanction.
6. The lower court record shows that the initial judgment in default dated 21/1/2020 was set aside, subsequently to which Margaret Lorot and Richard Kimutai testified as PW1 and PW2. PW1 relied on a witness statement dated 18/12/2018 and 30/7/2021 as her evidence in chief. She told the court that she was a legal administrator of the estate of her late father Lomerinyang Chepsien, a Member No. 253 of a plot in Perua 'A' Group Ranch, which was encroached upon by the appellant without any color of right, or consent in April 2018, to extract murram for construction of a road. PW1 told the court that despite a demand notice concerning the appellant to cease its illegal activities, the appellant's agent refused or neglected to stop their illegal activities, leading to loss and damage as assessed by the valuer. The respondents relied on a copy of the grant of letters of administration intestate dated 14/1/2016, issued by the High Court Kapenguria, in Succession Cause No. 4 of 2015, demand letter dated 22/5/2018, photographs, confirmation of membership letter dated 27/9/2012 by the District Land Adjudication and Settlement Officer, West Pokot, an authority to sue signed by the 2nd respondent dated 15/12/2018 and a confirmed grant dated 18/7/2019.
7. Equally, PW1 stated that she never gave permission of any kind, or was never consulted or aware of any such consent, otherwise she could have signed an agreement. She said that the value of the loss as per Afriland Valuers was Kshs.5,700,000/=. PW1 denied that her only brother one Robert Lomerinyang was an administrator of her father's estate whose grant was confirmed on 18/7/2019, granting the said Robert Lomerinyang only 7 acres, and the deceased children 7.4 Ha. PW1 said that the excavation occurred before the grant was confirmed and therefore, before the estate was distributed. PW1 told the court that Robert Lomerinyang had a case with her late father at the High Court when her late father wanted to share out his land among the four children of the third house, for he had four wives, which Robert was opposed to, and went to an extent of threatening to assault her father but the late father was successful, in the case by obtaining a permanent injunction barring the brother from interfering with the intended subdivision. PW1 produced a copy of the judgment and decree in Kitale ELC No. 9 of 2012 as P. Exhibit No. 8[a] and [b]. PW1 said that her late father passed on before affecting the subdivision. PW1 therefore insisted that Robert Lomerinyang had no right over the land to cede to the appellant regarding the deceased's land, otherwise, he conspired with the area chief to do so even before his late father passed on.



8. In cross-examination, PW1 told the court that all the children of the deceased live on the suit land and denied any alleged murrum excavation that took place in 2005. Further, PW1 said that she was the one who legally possessed exclusive rights over the suit land, otherwise though the brother had an interest, it could only occur once the share was given to him, otherwise, the agreement was signed before the estate was shared. PW1 said that P. Exhibit No. 8[b] was clear in the subdivision that was to be authorized as per the order dated 20/1/20215, but which was never effected, and was put in abeyance. PW1 said that up to the time the deceased passed on, he had not shown the brother his share of the land. PW1 said that the subdivision was eventually effected in 2019 after the grant was confirmed. PW1 said that the beneficiaries were yet to effect the subdivision on the ground.
9. According to PW2, he was contracted by the respondents to assess the damage and the material extracted therein, which he did and produced a report dated 22/7/2019 as an exhibit. PW2 told the court that the approximate area where the murrum and stones were extracted was 0.6 Ha, a depth of 20 meters, leaving the land unusable, due to issues of erosion. In his estimation, PW2 told the court that the owner had lost the use and value of the land assessed at Kshs. 5,700,000/=, for the extracted mass. PW2 said that his report was silent on the period that the excavation took place. Equally, PW2 said that there was no evidence of a prior murrum excavation on the site undertaken in 2005 or 2011. PW2 said that his report had not included the value of the property but only the excavated murrum whose cost and value were indicated, as was the standard practice, without breaking down the figures of what was found on the site. PW2 said that all that he saw on the site was fresh excavation after 2019.
10. Joseph Loria, testified as DW1, relying on a witness statement dated 12/7/2021. He told the court that he was a farmer and neighbor of the respondents. He added that he was aware that the appellant was undertaking a road construction project, requiring murrum. DW1 told the court that after a request was made by the road engineer to get murrum for the project, the company was introduced to Robert Lomirenyang and negotiated over the murrum to be extracted on the suit land for a fee payable to the owner at a cost of Kshs. 1,000/= per lorry. DW1 confirmed that the excavation took place on the land belonging to Robert.
11. He said that a dispute over the ownership only arose after the road was completed, otherwise, the respondents did not complain during the exercise. DW1 told the court that he was neither a witness to the agreement between the appellant and DW2, nor did he see the respondents signing the agreement, or Robert producing any ownership documents for the land. DW1 confirmed that Robert was paid Kshs. 1,000,000/=, for the murrum.
12. Robert Lomerinyang testified as DW2. He relied on a witness statement dated 12/7/2021 as his evidence in chief. He told the court that in 2018, the appellant approached him together with DW1 since they wanted to start an irrigation project for the county within the Sebit area, hence needed an access road, and since his land had deposits of murrum, he accepted that they excavate the murrum through an agreement dated 23/2/2018 which was marked as DMFI-1. DW2 told the court that he was paid Kshs.1,000/= per a lorry. He admitted that his father in 2018 had sued him at Kitale Law Courts, whose outcome was that the land be subdivided among all his siblings. DW2 insisted that the suit land had been demarcated in the presence of his late father and an elder brother, to which the land committee showed the boundaries to his land, where he had since established a homestead.
13. DW2 denied any interference with the set boundaries and insisted that he leased out a portion of his land for the excavation of murrum, just like he had initially done in 2002, 2005, and 2020. DW2 confirmed that the title to the suit land is West Pokot/Perua 'A'/Group Ranch/1, whose subdivision to the individual members is yet to take place. DW2 told the court that his sister had a title deed for her portion but was yet to acquire one for his land. DW2 produced an allotment letter for the land dated



- 19/12/1995 as D. Exhibit No. [2]. Further, DW2 told the court that after a dispute arose between him and his late father in 2012, it was resolved at the chief's office as per a letter dated 8/6/2012, which he produced as D. Exhibit No. [3].
14. Regarding the court case, DW2 admitted that there was a judgment in which a land surveyor was to subdivide the suit land among three houses. DW2 however said that the land committee had given him a separate land in 1995, that the court had ordered to be subdivided, which is 2 kilometers apart. DW2 told the court that after the court order, he obtained 8 acres of land, which included the portion that he had sold the murrum to the appellant. DW2 said that he was not involved in the succession cause, which according to him came after a surveyor had given him 7 acres of land, which PW1 had no right over and therefore, he had no obligation to seek any consent from the respondents before he leased out the land to the appellant.
 15. DW2 said that as of 2018, the land belonged to him following the group ranch intervention. He admitted that it was only his late father who was a member of the ranch as per P. Exhibit No. [2]. DW2 admitted that there was an injunction against him to cease interfering with the suit land. Similarly, DW2 admitted that he belongs to the 3rd house together with the respondent. He said that his father died on 30/5/2015 and the grant was only confirmed in 2019, which he did not participate in. DW2 confirmed that the land at the time of extraction of the murrum, belonged to his late father as per a decree dated 20/1/2015, even though the agreement had not specified the exact portion of the land the murrum was being excavated from. He, however, admitted that he was paid Kshs.1,000,000/= for the murrum. DW2 admitted that though he had indicated in his witness statement that he obtained consent from the respondents to deal with the murrum, that fact was not true.
 16. DW2 confirmed that the decree dated 20/1/2015, had said that the 3rd house be given their shares and by the time he dwelt with the appellant, he had no parcel number for his 7 acres of land, whose title deed was held by the group ranch. DW2 insisted that he did not require consent from the respondents while dealing with the appellant over the suit land.
 17. Kamoyo Tuliakong Lomerinay testified as DW3. He confirmed that his late father had 4 wives, the respondents and DW2 belonging to the 3rd house. He confirmed the existence of a suit between his late father and DW2 over the suit land. DW3 confirmed that he is one of the co-administrators of the estate of his late father as per the confirmed grant and also the co-plaintiff in the suit.
 18. John Maina Kimondo testified as DW4. He had no witness statement before the court. As a director of the appellant, he told the court that the appellant was awarded a contract by the government of Kenya to undertake the Kamina Irrigation Project, part of which was to put murrum on Sebit-Kochi road, West Pokot, to which they identified an existence quarry, next to the road. DW4 said that the local administration assisted them in identifying the owner, who was DW2 and made an agreement to which they deposited Kshs. 50,000/= and agreed at a fee of Kshs. 1,000/= per lorry, a trip as per an agreement dated 23/2/2018. DW4 said that the owner had shown them ownership documents indicating that he was awaiting a transfer of the land from the group ranch. DW4 said that the excavation went on at DW2's land with no objection from the respondents. DW4 said that the agreement was executed on their behalf by the site agent Stephen Gatundo and secretary, which he produced as D. Exhibit No [1].
 19. DW4 told the court that he was not aware that D. Exhibit No. [1] should have been signed and sealed by the director of the appellant. DW4 said that he was not aware that at the signing of the agreement, DW2 was not the legal administrator of his late father's estate, though he remembers seeing some succession cause papers. DW4 said that he dwelt with the owner based on the introduction made to them by the local administrators. DW4 denied seeing the demand letter seeking to stop the excavation by the



- respondents as the legal administrators of the estate of the deceased owner of the land. DW4 said that the respondents never objected to the excavation though they were aware of it.
20. After the close of the defense and written submissions, the trial court rendered a judgment dated 4/7/2023 to which the appellant faults for:
- [1] Awarding Kshs.5,700,000/= contrary to the facts, evidence and the law.
 - [2] Find that the suit land belonged to the estate of the deceased instead of DW2.
 - [3] For holding that the land belonged to the estate, yet ELC No. 9 of 2012 had directed for its sharing among the children of the 3rd house among them DW2.
 - [4] For holding that the valuation report was not challenged yet serious issues were raised during cross-examination about it.
 - [5] For finding that the respondent's consent was paramount, yet it was not necessary given the execution portion belonged to DW2 as a beneficial owner.
 - [6] For holding that there was no proof of prior excavation while DW1 confirmed the same.
21. This appeal was canvassed by way of written submissions due for filing by 15/3/2025. The appellant relies on written submissions dated 29/4/2024. It is submitted that the valuation report did not indicate the market value of the land to justify the report. Reliance was placed in Rhoda Kiilu v Jiangxi Water & Hydropower & Another ELC No. 34 of 2018. The appellant equally submitted that the figure of Kshs. 5,700,000/= was not pleaded. At the same time, it was submitted that the trial court failed to indicate the factors and circumstances it took into account in arising at Kshs. 5,700,000/= and consider also the question raised in cross-examination regarding the valuation report.
22. On grounds numbers 2, 3, 5, and 6 of the Memorandum of Appeal, the appellant submits that there was evidence that the land belonged to DW2 after it was apportioned by his late father while alive, following the judgment and decree in Kitale ELC No. 9 of 2012, which was done by land surveyors, in the presence of an OCS and the group ranch committee members as per page 167 of the board and which DW2 also confirmed in his testimony. Therefore, the appellant submits that once the subdivision was made, in favor of DW2, the land was no longer subject to succession since the land was in the name of the group ranch, and by pages 63 and 170 of the record of appeal hence, there was no need for a consent from the respondents. The appellant submits that after the decree in ELC No. 9 of 2012, the land did not belong to the estate as per Section 3 of the *Law of Succession Act* [Cap 160], hence DW2 had a right to lease it to the appellant.
23. On grounds 4 and 7, the appellant submits that the valuation report was thoroughly challenged through cross-examination, its veracity was questioned, and that it had no probative value to be used as a basis for awarding Kshs. 5,700,000/=. Further, and in particular, the appellant submits that the report did not point out on what portion of the land the maker visited to ascertain the extent of the loss or damage, casting doubts as to the respondent's case given the appellant's witnesses on where it occurred. Additionally, the appellant submits that the valuation report was marred with many loopholes to be held reliable, in view of prior excavation of murram on the same site in 2008, 2009, and 2015, based on the evidence of DW1 and DW2.
24. The respondents rely on written submissions dated 3/3/2025. It is submitted that the appellant failed to produce a valuation report to counter the one relied upon by the respondents, as to where it extracted the murram, or to show prior excavation of the murram or its site by other parties. The respondents submit that the appellant did not produce documents to show that the respondents consented to the



- excavation of the murrum on the deceased's land, which they did even after a demand letter was issued to them, regarding the legal capacity of DW2 to transact with them. The respondents submit that the appellant cannot blame the court for awarding damages when they declined to stop the activities after a demand letter was served upon them.
25. The role of an appellate court is to re-assess, re-analyze, and re-hear the record of the lower court and come up with independent findings on both facts and the law, while giving credit to the trial court which had a first-hand opportunity to see and hear the witnesses testify. See *Selle & another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123.
 26. The issues calling for the court's determination in this appeal are:
 1. If the respondents proved that the appellant had trespassed into or encroached on the suit land without justification, consent, or approval of their late father.
 2. If the agreement between the appellant and DW2 dated 23/2/2018 was binding in law, enforceable and was enough justification for the appellant to enter into the suit land, excavate and remove murrum and stones from the suit land.
 3. If the respondents pleaded and proved trespass and encroachment of the suit land by the appellant.
 4. If the respondents were entitled to the reliefs sought at the lower court.
 5. If the appeal has merits.
 6. What is the order as to costs?
 27. It is trite law that parties are bound by their pleadings and issues calling for court determination arise therefrom. In an adversarial system, a party is required to disclose all its claims and avail all the material facts by way of pleadings. Therefore, a party may not divert without leave of court from its pleadings. Pleadings both at the trial and on appeal. Equally, a court of law may not determine issues not pleaded or at the appellate stage consider new issues that were not before the trial court. See *IEBC & Others v Stephen Mutinda Mule & 3 Others* [2014] eKLR and *Raila Odinga & Others v IEBC & Others* [2017] eKLR.
 28. In this appeal, the cause of action as pleaded by the respondents was based on trespass or encroachment on land belonging to the estate of the late Lomerinyang Chepsien, who passed on in 2015, leaving the estate under the legal administration of the respondents. In support of the capacity to oversee the deceased's estate, PW1 testified and produced a grant of letters of administration intestate dated 14/1/2016 to the respondents and confirmed on 18/7/2019. The respondents equally produced letters dated 21/9/2012 from the DLASO, confirming that the deceased was a member No. 253 of the Parua 'A' Group Ranch, hence a beneficial owner of the suit land.
 29. Further, the respondents produced a copy of a judgment in Kitale ELC No. 9 of 2012 and decree dated 29/1/2015, which was issued against the DW2 herein, barring and restraining him from preventing his late father from subdividing the suit land, namely; a share of his 3rd wife's as per his wishes in favor of the children of his 3rd house. In the said judgment this court made a finding that the land was governed by Land [Group Representatives] Act Cap 287 Laws of Kenya, to which members are identified by entry of names in the register kept for that purpose. Further, the court made a finding that the Land Adjudication Officer, West Pokot had confirmed that the register of members kept by his office showed the owner as the deceased, member No. 253 with effect from 1984 and not DW2. The extract of the register was produced as D. Exhibit No. 6, in line with Section 24 of Cap 287.



30. Additionally, the court was availed the allotment letter dated 19/12/1995, and a chief's letter dated 8/6/2012 as Exhibit [2], which it held the same as collusion between DW1, the area chief, and the land committee. The court made a finding that the two exhibits lacked reliability and credibility. The judgment and decree of this court still stands. Equally, the certificate of grant and its confirmation by a court of competent jurisdiction have not been appealed against, reviewed, or set aside.
31. Coming to the capacity to sue and advance the cause of action as pleaded, it is not in dispute that the deceased passed on in May 2015. His estate was then administered through letters of grant issued in favor of the respondents on 14/7/2016.
32. Therefore, the estate vested and devolved on the personal representatives with effect from 14/7/2016, until the grant of letters of administration was confirmed in 2019. Anyone dealing with the deceased property except the respondents bordered with intermeddling with the estate of the deceased. The appellant's defense was that entry into the suit land had been authorized by DW1 through a brother of the respondents as the owner of the portion, where the murrum was extracted, which fact was confirmed and approved by the relevant government agencies. The appellant further pleaded that consent was also sought from the respondents who approved the transaction, and did not raise any objection during the extraction exercise. Further, the appellant averred that there had been previous excavation of murrum by third parties hence, the respondents were not entitled to the reliefs sought in the plaint.
33. Trespass is defined under Section 3 of the Trespass Act as unjustified entry into and commission of destruction on private land without consent or approval of the owner. In order to prove trespass, a party is required to establish ownership of the land, the unjustified entry and commission of acts, and injuries to the right of the owner. Trespass is a tort that is actionable per se without proof of any injury, loss, or damage. See *Kenya Power & Lighting Company Ltd v Ringera & Others* [2022] KECA 104 KLR.
34. In this appeal, there is already a decree and judgment of this court confirming that the late Lomerinyang Chepsien was the bona fide owner of the suit land under his membership No. 253 Parua 'A' Group Ranch. There is evidence that the deceased had passed on and as of April 2018, his estate comprised of the suit land had devolved and vested in the names of his legal representatives – the respondents herein. Even though DW2 had been listed as a beneficiary of the estate, the estate had not been distributed to the respective beneficiaries as of April 2018.
35. It is trite law that any agreements entered between parties who do not represent the estate of a deceased is a nullity ab initio. A court of law cannot rewrite contracts but enforces the same unless the contract is illegal, procured through misrepresentation, and or unconscionable. See *National Bank of Kenya v Pipe Plastic Samkolit [K] Ltd* [2002] E.A. 503. The laws governing contracts generally and contracts touching on land interests are the Law of Contract Act and the Land Act.
36. The appellant faults the trial court on grounds No. 2, 3, and 6 for holding that the subject to the contract belonged to the estate of the late Lomerinyang Chepsien and not the son, DW2, and brother of the respondents. As indicated above, parties are bound by their pleadings. Based on the doctrine of stare decisis the decrees from the High Court bound the trial court regarding what property belonged to the estate of the deceased.
37. The decrees from the High Court were against DW2. They had not been challenged by way of review or appeal. To date, they still stand. This court is bound by the doctrine of departure. It cannot sit on appeal on findings and decisions of a court of concurrent jurisdiction. The appellant was not a party to the former proceedings and decrees produced before the trial court. The said decision on capacity



and the subject matter were determined before entry into the agreement dated 23/2/2018. DW2 merely became a beneficiary of 7 acres after the confirmation of the grant, pursuant to the grant dated 18/7/2019. He is therefore, alongside the appellant estopped in law from contradicting the certificate of grant and a decree made before a court of competent jurisdiction on 20/1/2015 and 18/7/2019. The court finds grounds 2, 3, and 6 of the Memorandum of Appeal incompetent, misleading and lacking basis both in fact and law.

38. As to ground number 5 of the appeal, there is already evidence that the estate of the deceased inclusive of the suit land was vested and devolved upon the respondents as of 2016, going by the grant of letters of administration dated 19/1/2016, which was eventually confirmed in 2019. The appellant dwelt with the property of a deceased person otherwise, than in accordance with the law. The agreement dated 23/2/2018 was not signed by the legal representatives.
39. The contents of the sale agreement do not define the suit land and the capacity in which DW2 signed the same. It does not define the suit land. It does not mention under whose authority DW2 signed it. The maker of the agreement as pleaded in paragraph 6 of the statement of defence dated 2/11/2020 was a site agent by the name Stephen Gatundo and not a director of the appellant. He was not called to testify. Equally, the appellant's secretary who signed the agreement was not called to give evidence and produce the same. It is trite law that the director of a company has to append signatures to an agreement. The agreement must also be endorsed with a company seal to it for it to be binding as provided by Section 35 of the *Companies Act*, 2015. There is no evidence that the site agent, who signed the contract was an authorised officer of the appellant with express or implied authority to sign it.
40. John Kimondo, the director of the respondent, who testified as DW4 was not a signatory to the agreement dated 23/2/2018. In his witness statement dated 16/8/2021, which he adopted as his evidence in chief, he wrote that the appellant acquired the necessary consent to excavate the suit land from the beneficiaries of the estate of Lomerinyang Chepsien, hence were lawfully on the suit land. Unfortunately, the said witness did not produce any documentary evidence to back his assertion that the legal representatives of the estate, signed, approved, authorized and were privy to the alleged lease of the suit land, which by law vested or devolved to them. He who alleges must prove.
41. The burden of proof to sustain the contents of the statement of defense was upon the appellant to bring before the trial court evidence that Robert Lomerinyang had the authority, capacity, and basis to deal with the estate of the deceased, without the participation of the bona fide legal representatives who as at 23/2/2018, had solely, the requisite capacity to enter into a binding agreement regarding the exploitation of interests or rights over the suit land belonging to their deceased parent. DW2 was already aware of the dispute over the said land with his deceased father and his sisters, the respondents. He knew that there was a pending succession cause before the High Court. DW2 however, chose to take advantage of the siblings and steal a match. Similarly, he failed to disclose material facts to the appellant, which were in the long run detrimental to their interests.
42. Equally, though DW4 told the trial court that the appellant saw the succession papers while signing the agreement and based the transaction on introduction to DW2 by the local administrators, and thought the family of the deceased had consented to the transaction and visited the suit land many times before the agreement, it is unbelievable that the appellant had undertaken any due diligence and failed to verify who was holding the grant of letters of administration for the land.
43. Equally, if the appellant had done any verification of the owners of the suit land, they could have visited and or consulted the Land Administration Committee of the Group Ranch, who going by the ground register, held at the Land Adjudication Office would have established the bona fide representative of the deceased.



44. The agreement was not between the appellant and the legal representatives of the estate of the deceased land owner. It was between a site agent Kamini Water Irrigation Scheme and DW2, owner of an undefined murrum site along Sebit to Kochy road. It does not define what part of the suit land the Murrum site falls. Unibee Construction Company Ltd is not a party to the agreement. The total consideration is not indicated in the agreement. The mode of payment of the same is not spelt out. The terms and conditions of the use of the site are not mentioned. When and how the payments were to be made is not clear. The period and the mode of use of the site are not set out. Compliance with environmental laws and regulations as well as issuance and approval of permits and licenses in compliance with the Environmental Management and Coordination Act is missing. The witnesses to the agreement from the Kamini Irrigation Scheme were not called to testify.
45. The role of a court is to interpret a contract within the four corners of the document. Extrinsic evidence as the appellant's witnesses sought to introduce may not be admitted by a court of law to contradict or vary clear terms and conditions in an agreement. Parties who were not witnesses to a contract may not be called to challenge, vary and or verify its contents and meanings.
46. The appellant has submitted that there had been a subdivision of the suit land in favor of DW2, which meant that the portion used for the quarrying belonged to him and hence was capable of dealing with it. The agreement was silent on what portion the appellant was supposed to enter into, its size, for what purpose, and the duration. Written submissions in law and witness statements cannot replace pleadings and evidence. See Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] KECA 642 [KLR].
47. Written submissions dated 29/4/2024 contained issues and facts that had neither been pleaded nor tendered as evidence at the lower court. For instance, no evidence was called by the appellant on the alleged subdivision of the suit land to carve out a portion measuring 7 acres in favor of DW2 before 23/2/2018, when the agreement was entered. Secondly, the process of subdivisions of land is through documents that the appellant did not call for from the Land Control Board or the Land Committee of the Group.
48. If the appellant had undertaken all that due diligence before signing the agreement, as submitted by its counsel on record, then the easiest thing at the trial or before this court was to call for the production of the said documents. Due diligence as held in *Sehmi & another v Tarabana Company Limited & 5 others; Mbugua Ng'ang'a & Co. Advocates [Applicant] [Petition [Application]E033 of 2023][2024] KESC 9 [KLR] [12 April 2024] [Ruling]*, connotes conduct expected of a reasonable purchaser who has conducted a reasonable inquiry into the status of the estate or the land he seeks to purchase.
49. Similarly, if out of the judgment dated 20/1/2015, the subdivision in favor of DW2 had occurred, the easiest thing would have been to indicate in the agreement, the specific portion, acreage and parcel number out of the mother title which the appellant was being authorized to excavate the murrum from, backed by the specific documents from either, the Land Registrar, Surveyor, Land Control Board, minutes and mutation form. All these issues and facts were missing in the list of documents and or exhibits that the appellant tendered before the trial court through DW2 yet, the appellant wants the court to find and hold that the suit land did not form part of the estate of the deceased and hence, validate and enforce the agreement dated 23/2/2018.
50. A court of law cannot sanction an illegality. The agreement dated 23/2/2018 was not signed by the respondents. The agreement related to a subject matter belonging to a deceased person which had not been distributed to the beneficiaries. A beneficiary to the estate of a deceased person cannot arrogate himself the power that he does not possess to enter into any binding agreements to the estate. The signing of such an agreement by DW2 in favor of the appellant amounted to a nullity. A nullity in



law is a nullity. As held in *Macfoy v United African Co. Ltd* [1961] 3 All E.R. 1169, one cannot put something on nothing and expect it to remain there.

51. The appellant chose to deal with a non-legal representative of the estate of the deceased. The appellant took the easy path of ignoring the law. As a result, it trespassed on the land that was vested in the hands of the respondents as legal representatives and which had not been distributed in law by the court, by being defined as the specific portion for each beneficiary. Therefore, the appellant had no justification to intermeddle with the estate on 23/2/2018; thereafter, the appellant was a trespasser on the suit land. Despite a demand notice dated 23/5/2018, the appellant remained on the land and took no remedial action to mitigate the loss.
52. In my considered view, the respondents through their pleadings and evidence tendered discharged the onus to prove the ingredients of a tort of trespass.
53. The entry, excavation and carrying out of the quarrying activities at the site were specifically admitted by the appellant both in the statement of defense and through witness statements filed and adopted by DW1 - DW4. Admission of facts in law without more is enough for liability to be established against a party.
54. Coming to damages, trespass as a tort is actionable per se without proof that a party incurred specific loss and damages. See *Ndegwa v Kenya Power & Lighting Co. Ltd* [2013] eKLR. What the respondents pleaded and prayed for are general damages for loss and waste to the estate and for the illegal activities that the appellant undertook on the suit land without their approval, consent, or authority of the respondents. It is not disputed that the benefit if any, paid to DW2 by the appellant was not received on behalf of the estate.
55. The appellant did not even plead and or testify as to the quantity and expenses that it paid for the excavation to DW2. In *Simon Nyachae & Another v County Government of Mombasa* [2020] eKLR, the court awarded Kshs. 1,500,000/= as general damages for trespass to land. In *Neem Properties Ltd v Wells Fargo Ltd* [2022] eKLR, Kshs.1,000,000/= was awarded as general damages.
56. In *Kenya Power & Lighting Co. Ltd v Ringera & Others* [2022] KECA 104, the court awarded general damages for a continuing trespass at Kshs. 2,000,000/= and Kshs.4,000,000/= for the 1st and 2nd respondents. In *Philip Ayaya Aluchio v Crispus Ngayo* [2014] eKLR, the court observed that the measure of damages in trespass is the difference in the value of the plaintiffs' land immediately after the trespass on the costs of restoration, whichever is less. In *Duncan Nderitu Ndegwa v Kenya Power and Lighting Company & Another* [2013] eKLR, the court held that once trespass is proved, it is actionable per se and a court should award general damages without proof, based on the infringement of the plaintiff's right to use and enjoy the suit property.
57. In *KPLC v Ringera* [supra], the court observed that the amount of damages must be commensurate to the loss suffered. The trial court had based its award on valuation reports showing that the land had been rendered useless. The appellant just like in the instant case, had not filed a valuation report to controvert those relied upon by the respondents. The court held that failure to rebut the reports was not sufficient reason to award the figures without establishing if it was commensurate to the loss suffered, based on guiding principles on a calculation of appropriate damages for continuing trespass.
58. In this appeal, the appellant attacked the general damages awarded for lack of specific pleadings of mesne profits. In my view, the appellant is mistaken. General damages are what the respondents had pleaded and prayed for. Out of an abundance of caution, the respondents sought, prepared, availed and produced a valuation report through PW2. Expert evidence in law is not binding before a court per se and has to be considered alongside other evidence tendered.



59. As held in *Kagina v Kagina & Others Civil Appeal 21 of 2017 [2021] KECA 242 eKLR*. A party attacking expert evidence has to lay the basis on the credibility, reliability, relevance, and believability of the same. In *Rhoda Kiilu v Jiangxi Water & Hydropower Construction [K] Ltd [supra]*, the court observed that once the defendant found out that it had dwelt with unknown owners of the land, it had a duty to either apologize, regularize and co-join the imposter to the suit for indemnity and or justify that it was either mistaken, misled or an innocent entrant to the land as held in *Bundi Makube [An infant suing by his next friend Thomas Bundi] v Joseph Onkoba Nyamuro [1983] KEHC 47 [KLR]* and *Westland's Triangle Properties Ltd v Westland's Sundries Limited & 2 others [2020] KEELC 2088 [KLR]* and in *John Kiragu Kimani v Rural Electrification Authority [2018] eKLR*, where the court held that the conduct, altitude and the manner that the defendant reacted to the complaint was indicative of a lack of concern on the ownership, loss and damage, hence aggravating the situation as held in *Kamau Mucuha v Ripples Ltd [1993] eKLR*.
60. As to the production of the valuation report, the appellant in this matter did not object to the same or produce a counter report. Indeed, this court takes judicial notice that under *Environmental Management and Co-ordination Act*, the appellant was duty bound to under an Environmental Impact Assessment report, before and after the excavation in line with Schedule 2 paragraph 6[9], as part of the precautionary principle. The appellant appears to have produced no such report to show that there was refilling of the site to return it to how it was before the excavation commenced. See *Carolyne Kerubo Omwoyo & Another v Abao Investments Ltd & Another [2019] eKLR*, and *Tim Busienei & 2 others v Director General, National Environment Management Authority [Nema] & another [Tribunal Appeal 10 of 2006] [2007] KENET 3 [KLR] [18 June 2007] [Ruling]*.
61. DW4 was not the site supervisor. He said nothing about the quantity, quality, costs and payments for the excavation materials. The project, according to the appellant's director was a government project which must have had tender documents, bills of quantities, and reports shared with the government agencies. It is expected therefore, that the appellant had in its custody relevant documents on the quantities excavated, the number of lorries that were used and the payment vouchers to DW2 for the materials excavated, to form a basis to attack the valuation report as inaccurate, exaggerated and lacking scientific basis.
62. The project and the quarry fell under Schedule 2 of Environmental Management Co-ordination Act requiring NEMA, explosives, noise vibration, and soil disturbances licenses from the relevant agencies. Equally, the appellant in law is expected to undertake restorative measures as part of the decommissioning process of the project site and to be issued with a NEMA license to that effect. PW1 and PW2 testified on how the site was left without rehabilitation hence becoming prone to soil erosion, being rendered useless, unproductive, and unusable in the future. All these are particulars of loss and damage falling under general damages.
63. Key to the loss is whether or not the appellant undertook its statutory duties to restore the environment by the process of refilling the quarry site to the satisfaction of the government and the owner of the land in line with Sections 108 and 109 of Environmental Management Co-ordination Act. See *Mjanaheri Farm Limited v China Road & Bridges Corporation & another [2015] eKLR*.
64. Leaving the site unrehabilitated and hence, unproductive flies against Article 70 of *the Constitution*. The valuation report captured the manner, extent and nature of the loss and damage. Contrary valuation reports, or scientific reports showing the mitigation and rehabilitation measures by the time of decommissioning the project and the quarry site were withheld by the appellant from the trial court. Quarrying activities require an Environmental Impact Assessment and a license.



65. The valuation report had attached a National Environment Management Authority improvement notice, referring to the quarry site of DW2 as an unlicensed site, yet quarrying had commenced. Photos appearing on page 5 of the valuation report show the status of the site after the appellant had left it without any refilling or rehabilitation measures being undertaken. The onus in law was on the appellant to cause an E.I.A. on the land before the commencement of quarrying and after as a basis of coming up with mitigation measures to undertake at the end of the project cycle to restore the environment in line with *Environmental Management and Co-ordination Act*.
66. Reports from National Environment Management Authority Public Health, and Kenya National Highways Authority, to show compliance with the land after quarrying, are all that the appellant should have shared with the trial court to sustain the defense that the respondents' complaint for the loss, waste and damage had no basis in law. Without such expert reports to counter the respondents' valuation report, I find grounds No. [1] and [7] of the Memorandum of Appeal lacking substance, basis and merits.
67. There can be no right without a remedy. The respondents as title holders of the land in issue had the right to use, enjoy, and seek compensation for the denial of those rights under Articles 40, 42, and 7 of *the Constitution* as read together with Section 3 of Environmental Management and Coordination Act.
68. Negative impacts arising out of the quarrying activities and the aftermath are what the respondents pleaded as loss, waste and damage. The appellant failed to contest the particulars of loss or damage through the production of alternative expert reports. PW2 gave his qualification licenses and credentials in the valuation report. In *Diana Muchiri v Lydia Wariara Njenga & Another* [2022] eKLR, the court cited Halsbury's Laws of England 4th Ed. Vol. 45 para 26 1503, that where there is oppressive, arbitrary and unconstitutional trespass by a party out to make a gain, by unlawful conduct, general damages may be increased.
69. In *Orbit Chemicals Industries v Prof. Ndeti* [2022] eKLR, the court upheld the trial court's reasoning based on Section 2 of Environmental Management and Coordination Act and Rio Declaration on the principle of polluter pays the costs of cleaning up any element that they cause to the environment. The court said that general damages are meant to compensate a claimant for the non-monetary aspects of the specific harm suffered.
70. Guided by the foregoing case law, I find no basis to disturb the award of Kshs. 5,700,000/= as general damages, more after the respondents raised the claim on time when the appellant ignored it. The upshot is I find the appeal lacking merits. It is dismissed with costs.
71. Orders accordingly.

JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 17TH DAY OF JUNE 2025.

In the presence of:

Court Assistant - Dennis

No appearance by the parties.

HON. C.K. NZILI

JUDGE, ELC KITALE.

