Suntra Investment Bank Limited v Nicholas William Bentley–Buckle & another & 2 others (Suing in their Capacity as Executors of the Estate of Anthony William Bentley-Buckle–Deceased) (Civil Appeal 231 of 2020 & 322 of 2019 & E340 of 2021 (Consolidated)) [2025] KECA 1591 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1591 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 231 OF 2020 & 322 OF 2019 & E340 OF 2021 (CONSOLIDATED)

F TUIYOTT, JM NGUGI & GV ODUNGA, JJA

OCTOBER 3, 2025

BETWEEN

SUNTRA INVESTMENT BANK LIMITED .... APPELLANT

AND

NICHOLAS WILLIAM BENTLEY–BUCKLE & DEBORAH MARY BENTLEY–BUCKLE .... 1ST RESPONDENT

CUSTODY & REGISTRAR SERVICES LIMITED .... 2ND RESPONDENT

SUING IN THEIR CAPACITY AS EXECUTORS OF THE ESTATE OF ANTHONY WILLIAM BENTLEY-BUCKLE–DECEASED

AS CONSOLIDATED WITH

CIVIL APPEAL 322 OF 2019

BETWEEN

SUNTRA INVESTMENT BANK LIMITED .... APPELLANT

AND

NICHOLAS WILLIAM BENTLEY–BUCKLE & DEBORAH MARY BENTLEY–BUCKLE .... 1ST RESPONDENT

CUSTODY & REGISTRAR SERVICES LIMITED .... 2ND RESPONDENT

SUING IN THEIR CAPACITY AS EXECUTORS OF THE ESTATE OF ANTHONY WILLIAM BENTLEY-BUCKLE–DECEASED

AS CONSOLIDATED WITH

CIVIL APPEAL E340 OF 2021

BETWEEN

SUNTRA INVESTMENT BANK LIMITED .... APPELLANT

AND

NICHOLAS WILLIAM BENTLEY–BUCKLE & DEBORAH MARY BENTLEY–BUCKLE .... 1ST RESPONDENT

CUSTODY & REGISTRAR SERVICES LIMITED .... 2ND RESPONDENT

SUING IN THEIR CAPACITY AS EXECUTORS OF THE ESTATE OF ANTHONY WILLIAM BENTLEY-BUCKLE–DECEASED

(Appeals from the amended Judgment and Decree of the High Court of Kenya at Nairobi (Kasango, J.) dated 17th December 2019 in HCCC No. 480 of 2014)

JUDGMENT

A. Introduction and Background

1. This judgment concerns three consolidated appeals arising from the decision of the High Court (Kasango J.) in Milimani HCCC No. 480 of 2014. The learned Judge delivered the judgment on 30th May, 2019 and later issued an amended judgment on 17th December, 2019. Nicholas William Bentley–Buckle and Deborah Mary Bentley–Buckle, who sued in their capacity as executors of the estate of the late Anthony William Bentley–Buckle (deceased), were the plaintiffs before the High Court. The deceased had been a shareholder of 99,100 ordinary shares in East African Breweries Limited (EABL). Custody & Registrar Services Limited was sued as the 1st defendant while Suntra Investment Bank Limited was the second defendant.

2. Following those decisions, three separate appeals were lodged. Civil Appeal No. 322 of 2019 was filed by Suntra Investment Bank Limited after the judgment of 30th May, 2019. Civil Appeal No. 231 of 2020 was also filed by Suntra Investment Bank Limited, but this time it challenged the amended judgment of 17th December, 2019. Civil Appeal No. E340 of 2020 was filed by Custody & Registrar Services Limited against the same judgment. The three appeals were consolidated by an order of this Court, with Civil Appeal No. 231 of 2020 designated as the lead file.

3. For ease of reference in this judgment, we shall refer to Suntra Investment Bank Limited as “the appellant.” We shall refer to Nicholas William Bentley–Buckle and Deborah Mary Bentley–Buckle as “the 1st respondents.” Custody & Registrar Services Limited will be referred to as “the 2nd respondent.”

4. The appellant is a licensed stockbroker and investment bank which, at all material times, was appointed as a Central Depository Agent (CDA) under the Central Depository System of the Nairobi Securities Exchange. Its role included facilitating the immobilisation of physical share certificates into electronic form for purposes of trading at the Nairobi Securities Exchange. The 2nd respondent, on its part, was the shares registrar for EABL and, therefore, responsible for maintaining the share register and issuing share certificates.

5. The dispute before the High Court concerned the manner in which the deceased's 99,100 shares were fraudulently immobilised and sold by an impostor, leading to the permanent loss of those shares from the estate. The 1st respondents blamed both the appellant and the 2nd respondent for the loss.

6. For clarity, the *Central Depositories Act*, 2000 (Cap. 485C), section 2 defines an "immobilised security" as "a security which is evidenced by a certificate and is deposited with, and held by, a central depository." In practical terms, the immobilisation of shares is the process by which physical share certificates are deposited with the Central Depository and replaced by electronic records. Once immobilised, the Central Depository & Settlement Corporation (CDSC) maintains the corresponding accounts and issues periodic account statements to the beneficial owners.

7. In their Further Amended Plaint, the 1st respondents (who, as aforesaid, were the plaintiffs at the High Court) sought the following reliefs:

   a. Restitution of the 99,100 East Africa Breweries Limited ordinary shares fraudulently immobilized by the Defendants and subsequently sold.

   b. Payment of unpaid dividends of 99,100 East African Breweries Limited ordinary shares.

   c. Special damages for breach of contract being the current value of 99,100. East African Breweries Limited ordinary shares at Nairobi securities exchange.

   d. Special damages for breach of trust and/or fiduciary duty being the current value of 99,100 East African Breweries Limited ordinary shares at the Nairobi securities Exchange.

   e. General damages for breach of trust and fiduciary duty.

   f. Interest on (b), (c) and (d) above at court rates from the date of judgment until payment in full.

   g. Costs of this suit and interest thereon at court rates.

8. The appellant denied the allegations by the 1st respondents in a Statement of Amended Defence dated 4th October, 2017, and urged the court to dismiss the claims with costs.

9. Similarly, the 2nd respondent also denied the allegations by the 1st respondents in a Further Amended Statement of Defence dated 11th September, 2017, and urged the court to dismiss the claims costs.

B. The Evidence and Judgment at the High Court

10. At the trial, the 1st respondents adduced evidence that the deceased, who had lived in Kenya in the 1970s before relocating to the United Kingdom in his later years, never disposed of his EABL shares during his lifetime.

11. The 1st respondent (Nicholas) testified that on the deceased's death they discovered the 1977 paper share certificates (Nos. 170423 and 168653) in the deceased's papers showing the address as P.O. Box 90102, Mombasa. The deceased had relocated to the UK in the late 1970s, was elderly and frail, and did not return to Kenya save for a brief 1980s visit. When the executors contacted the Registrar, they were told the shares had been immobilised and sold in 2007.

12. The 1st respondents produced the deceased's UK passport (Date of Birth (DOB) 13th August, 1921) and contrasted it with a Kenyan passport used to immobilise the shares (with DOB 10th October, 1947) and the surname "Bentley Buckle" without a hyphen. They contended the Kenyan passport was a forgery, the address used in the immobilisation papers was not the deceased's, and that neither the deceased nor his estate opened a CDS account or authorised any sale. They blamed the Registrar (the

2nd respondent) for misdirecting/dispatching the consolidated certificates to an amorphous Nairobi address "c/o EABL Shares Department" instead of to the deceased's Mombasa address (or without otherwise verifying the correct address). They also blamed the CDA (the appellant) for opening a CDS account and processing immobilisation on the strength of false information and a forged passport, while certifying verification on CDS–1 without even affixing a photograph.

13. The 1st respondents testified that the 2nd respondent had failed in its duty when it sent a consolidated share certificate for the deceased's EABL shares to a postal address that did not belong to him. This mistake allowed the impostor to gain possession of the certificate. They further testified that the impostor, armed with the wrongfully delivered certificate and forged identification documents, approached the appellant to open a Central Depository and Settlement (CDS) account. The appellant, without conducting proper verification, facilitated the immobilisation of the deceased's shares and enabled their subsequent sale. The 1st respondents maintained that these acts and omissions of both the appellant and the 2nd respondent amounted to negligence which caused the estate to suffer loss.

14. The 2nd respondent's witness, Ms. Kerry-Ann Makatiani, seemed to fortify the 1st respondents' testimonies when she testified as follows:

> "The person who immobilized the shares bears the same name as the deceased shareholder, namely, Anthony William Bentley–Buckle. The person who immobilized the shares used a forged passport of the deceased shareholder. There are several discrepancies between the deceased shareholder's passport forwarded to us by the 1st Plaintiff and the forged passport forwarded by the person who immobilized the shares as demonstrated below:

Item	Details of passport forwarded by 1st Plaintiff	Details of forged passport
Name	Anthony William Bentley-Buckle	Anthony William Bentley Buckle
Nationality	British Citizen	Kenyan citizen
Passport No.	03540911	A898013
Place of birth	Knockle	Nairobi
Date of Issue	20th May 1999	15th December 2004
Date of Expiry	20th May 2009	15th December 2009

15. Ms. Makatiani further explained that the share certificates originally in the custody of the 1st respondents were invalidated by EABL around 1998, when a notice was issued in the press requiring all shareholders to return their old certificates so that new consolidated certificates could be issued. She stated that the deceased's consolidated share certificate, together with other uncollected certificates, was posted to the address provided by the shareholder at the time of acquiring the shares. In the deceased's case, the certificate was sent to "C/O EABL Shares Department, P.O. Box 30161 Nairobi." She was, however, unable to confirm that this was the address given by the deceased. According to her testimony,

the person who fraudulently immobilised the deceased's shares must have accessed this consolidated certificate, which he later presented to the appellant to effect the immobilisation.

16. She went further to argue that the deceased bore some measure of responsibility for the loss. In her view, he was negligent in failing to collect his new consolidated share certificate despite the public announcement, in being generally indolent regarding the management of his shares and share certificate, and in failing to notify the 2nd respondent of the non-receipt or possible loss of his certificate. She firmly denied that the 2nd respondent colluded with the appellant in the fraudulent immobilisation that occurred on 30th April, 2007. Instead, she clarified that the 2nd respondent's role in the immobilisation process was limited to confirming that the records presented by the central depository agent matched those held by the registrar, verifying the authenticity of the share certificate being immobilised, and checking whether it was subject to any encumbrance. In this regard, she squarely blamed the appellant for failing to properly verify the identity of the individual who fraudulently immobilized the deceased's shares. She contended that it was the latter's failure to scrutinize and detect the forged passport and other documents that facilitated the fraudulent immobilisation and sale of the shares. The 2nd respondent insisted that its own role was limited to administrative custody of the certificates and that the loss could not have materialized had the appellant exercised due diligence.

17. The appellant's witness at the trial was Mr. Mark Kariuki Maina. He was an officer of the appellant and his testimony sought to explain the procedures followed by the appellant in the immobilisation of shares as well as to defend the appellant from allegations of negligence.

18. Mr. Maina conceded that the impostor who immobilised the deceased's 99,100 East African Breweries Limited shares presented himself to the appellant and completed the requisite CDS-1 form, accompanied by identification documents. He admitted that the impostor had tendered a passport, which was later shown to be forged, but explained that at the time, the appellant lacked the technical systems or capacity to authenticate the genuineness of passports and other identification documents. In his words, "in this case we could not confirm the I.D. because there were no systems." He further conceded that the CDS-1 form bore a declaration signed by the appellant certifying that the identification documents had been verified, but he maintained that this was done in line with the practices then prevailing in the industry, which relied largely on the face value of documents presented.

19. He explained that the appellant's role as a Central Depository Agent (CDA) was essentially ministerial: to open the CDS account once the forms were completed and to forward the immobilisation request to the 2nd respondent, the registrar. According to him, the appellant did not itself hold or control the share certificates but acted upon documents submitted by clients. He insisted that the primary responsibility for verifying the authenticity of share certificates and ensuring their proper custody lay with the 2nd respondent.

20. Nevertheless, under cross-examination, Mr. Maina conceded that the appellant had signed off on the CDS-1 form and confirmed verification of the documents, even though no meaningful verification had taken place. He admitted that there were gaps in the appellant's internal fraud detection mechanisms, acknowledging that the procedures then in place were inadequate to prevent the fraudulent immobilisation.

21. While he denied any deliberate wrongdoing on the part of the appellant, Mr. Maina sought to distance the appellant from full responsibility by pointing to the 2nd respondent's role in issuing and dispatching the consolidated share certificate to an incorrect address, which ultimately allowed the impostor to obtain it. In his view, the fraud was facilitated more by the 2nd respondent's errors in handling the share certificates than by any omission on the part of the appellant.

22. As reproduced above, in their Further Amended Plaint dated 25th July 2017, the 1st respondents sought several specific remedies. They prayed for restitution of the 99,100 East African Breweries Limited (EABL) ordinary shares fraudulently immobilised and sold by the defendants; for payment of unpaid dividends on those shares from the date of sale to the date of judgment; for special damages for breach of contract equivalent to the current value of the shares at the Nairobi Securities Exchange; for special damages for breach of trust and/or fiduciary duty, again quantified as the current market value of the shares; for general damages for breach of trust and fiduciary duty; and for interest and costs.

23. It is apparent from those prayers that the 1st respondents did not pray for general damages for negligence as a specific relief. Negligence was pleaded, and particulars were set out against both defendants in the body of the Further Amended Plaint. The issue of negligence was also framed in the list of issues and argued in the final submissions. However, the prayers themselves were confined to restitution of the shares, compensation in the form of unpaid dividends and market value of the shares under contract or trust theories, and general damages limited expressly to breach of trust and fiduciary duty.

24. When the learned Judge came to determine the matter, she held that the 1st respondents had failed to prove breach of trust or fiduciary duty, as there was no evidence of collusion between the appellant and the 2nd respondent, nor any basis to impose fiduciary obligations in the circumstances. For the same reason, the learned Judge dismissed the claims for general damages under that head. She also found that the claim for special damages was not specifically pleaded and strictly proved as required, and, therefore, could not be sustained. Likewise, the prayer for unpaid dividends was rejected because no evidence had been tendered to establish the sums claimed.

25. The learned Judge, however, found that negligence had been established against both the appellant and the 2nd respondent. The negligence lay in the appellant's failure to properly verify the identity of the person purporting to be the deceased before opening the CDS account and effecting immobilisation, and in the 2nd respondent's failure to send the consolidated share certificate to the deceased's correct address, thereby enabling the impostor to obtain and misuse it.

26. On the part of the appellant, the learned Judge underscored that the appellant had signed the CDS-1 form certifying that it had verified the information, yet later admitted that no systems were in place to authenticate the document presented. This failure to exercise even basic diligence enabled the impostor to open the account and proceed with the fraudulent immobilisation and sale of the shares. On the part of the 2nd respondent, the learned Judge found that the 2nd respondent dispatched the share certificate to an address which was neither that of the deceased nor one ever supplied by him, thereby allowing the certificate to fall into the hands of the impostor. The learned Judge also held that, in addition to sending the share certificate to an incorrect address, the 2nd respondent failed in its statutory and contractual responsibility to properly safeguard the records and to ensure that the immobilisation request matched genuine records. On this basis, the learned Judge ordered restitution of the 99,100 shares jointly and severally against the two defendants.

27. Having reached that conclusion, the learned Judge proceeded to award general damages of Kshs. 10 million, characterizing them as damages for the negligent acts and omissions of the appellant and the 2nd respondent. In her initial judgment of 30th May, 2019, the learned Judge had indicated the figure of Kshs. 4 million in the disposition section of the judgment. She subsequently amended the judgment on 17th December, 2019 to reflect the figure of Kshs. 10 million. This aspect of the judgment — both the propriety of the award of general damages, and the subsequent amendment under section 99 of the *Civil Procedure Act* — is at the heart of the present consolidated appeals.

C. Grounds of Appeal

28. Being dissatisfied with the judgment and decree of the learned Judge, the appellant and the 2nd respondent lodged three separate appeals, which have since been consolidated as aforesaid.

29. In Civil Appeal No. 322 of 2019, the appellant, Suntra Investment Bank Limited, set out the following grounds:

 1. That the learned Judge erred in law and fact in holding the appellant liable for negligence when the evidence on record did not support such a finding.
 2. That the learned Judge erred in failing to consider sufficiently or at all the appellant's pleadings, witness testimony, and submissions, thereby occasioning a miscarriage of justice.
 3. That the learned Judge erred in awarding general damages of Kshs. 10,000,000, which had not been specifically pleaded or proved.
 4. That the learned Judge erred in awarding interest on general damages from the date of filing suit rather than from the date of judgment.
 5. That the learned Judge erred in failing to find that the deceased shareholder, by his conduct, was guilty of contributory negligence which substantially facilitated the fraud.
 6. That the learned Judge erred in failing to dismiss the 1st respondents' suit in its entirety.

30. In Civil Appeal No. 231 of 2020, also filed by the appellant, Suntra Investment Bank Limited, against the amended judgment of 17th December 2019, the appellant raised the following grounds:

 1. That the learned Judge erred in law and fact in amending the judgment under section 99 of the *Civil Procedure Act* when the amendment was substantive, was not confined to a clerical or typographical slip, and was effected after a decree had already been perfected.
 2. That the learned Judge erred in amending the judgment after a notice of appeal and appeal had already been filed, thereby usurping the jurisdiction of this Court.
 3. That the learned Judge erred in enhancing the award of general damages from Kshs. 4,000,000 to Kshs. 10,000,000 without giving the parties an opportunity to be heard.
 4. That the learned Judge erred in awarding general damages of Kshs. 10,000,000 which had not been pleaded or proved.
 5. That the learned Judge erred in awarding interest on general damages from the date of filing suit rather than from the date of judgment.

31. In Civil Appeal No. E340 of 2020, the 2nd respondent, Custody & Registrar Services Limited, faulted the learned Judge on the following grounds:

 1. That the learned Judge erred in finding the appellant liable for negligence in the absence of sufficient evidence and in failing to consider the appellant's defence.
 2. That the learned Judge erred in failing to hold that it was Suntra Investment Bank Limited, and not the appellant, which bore the greater responsibility for the fraud.
 3. That the learned Judge erred in ordering restitution of the 99,100 EABL shares when such relief was not available against the appellant on the evidence.

4. That the learned Judge erred in awarding general damages of Kshs. 10,000,000 against the appellant when such damages had not been pleaded or proved.

5. That the learned Judge erred in awarding interest on general damages from the date of filing suit rather than from the date of judgment.

6. That the learned Judge erred in failing to find that the deceased shareholder was guilty of contributory negligence which disentitled the 1st respondents to some or all of the reliefs sought.

D. Submissions of the Parties

32. The appellant urged that the learned Judge fell into multiple errors of law and fact. On the merits, the appellant argued that the evidence did not support any finding of negligence against it. It described its role as a Central Depository Agent (CDA) as limited and largely ministerial: receiving a customer, issuing and witnessing completion of the CDS-1 account-opening form, receiving the CDS-2 immobilisation form with supporting documents, and forwarding the documents to the share registrar for verification and approval. According to the appellant, the *Central Depositories Act* and its subsidiary regulations place the verification of shareholding particulars, the authentication of the share certificate, and the matching of register details squarely on the share registrar — here, Custody & Registrar Services Limited (the 2nd respondent).

33. The appellant stressed that it forwarded the two original EABL share certificates and the passport copy presented by the walk-in customer to the 2nd respondent for verification; that the 2nd respondent confirmed the transaction as genuine and "balance-free", thereby paving the way for immobilisation; and that the appellant could not, as a matter of system design in 2007, conduct independent electronic validation of passports. It added that the CDSC system was then maintained by the share registrar, and a CDA had a "capture" and "view" interface only, not an authentication function.

34. The appellant further contended that the learned Judge did not sufficiently consider its pleadings, testimony, and submissions, and thereby reached conclusions unmoored from the evidentiary record. The appellant highlighted what it characterised as internal inconsistencies in the High Court judgment regarding damages: paragraph 63 stating Kshs. 4,000,000 per defendant and paragraph 65(b) decreeing Kshs. 10,000,000 per defendant with interest from filing. In the appellant's view, general damages for negligence were never sought in the plaint and, even if negligence was pleaded as a cause of action, the only general damages expressly prayed were for breach of trust and fiduciary duty — claims the learned Judge expressly rejected. Parties being bound by their pleadings, the court could not award an unpleaded head of damages.

35. The appellant also submitted that the learned Judge did not explain, by reference to evidence or comparable awards, how either the Kshs. 4 million or Kshs. 10 million figure was arrived at, rendering the award arbitrary. To support its argument on pleadings, Suntra relied on Galaxy Paints Co. Ltd v Falcon Guards Ltd [2000] eKLR, where the Court stressed that a court may only pronounce judgment on issues pleaded and proved.

36. The appellant mounted a distinct procedural challenge to the "amended judgment" of 17th December, 2019. It argued that once a decree had been drawn and a notice of appeal filed, the trial court was functus officio and lacked jurisdiction to "enhance" the award from Kshs. 4,000,000 to Kshs. 10,000,000 under the guise of section 99 of the *Civil Procedure Act*. The slip-rule jurisdiction, the appellant submitted, is narrow: it permits correction of obvious clerical slips that do not alter substance

or intention, not a substantive increase of damages after perfection of the decree and after appellate steps had commenced.

37. The appellant also complained that the amendment was effected without a proper inter-partes hearing on the quantum point, contrary to the principles of natural justice. On interest, the appellant argued that even if general damages were available, interest on unliquidated damages runs from the date of judgment, not the date of filing, and the decree awarding interest from filing was wrong in principle.

38. Finally, the appellant pressed contributory negligence: the deceased left Kenya in the late 1970s, did not update his address, did not respond to a public notice asking shareholders to collect consolidated certificates, and did not raise any caveat or query about non-receipt of dividends. In the appellant's view, these omissions facilitated the fraud and should have reduced or defeated recovery. On contributory negligence, the appellant invoked Statpack Industries v James Mbithi Munyao [2005] eKLR for the principle that a plaintiff must also exercise reasonable care for his interests.

39. Custody & Registrar Services Limited, the 2nd respondent, adopted a two-pronged position. On liability and restitution, it argued that the learned Judge failed to appreciate the division of statutory functions. The 2nd respondent said its role as EABL's share registrar during immobilisation was to confirm register particulars against the CDS-2 and share certificate; it did not interact with the putative shareholder, did not open the CDS account, and had no practical capacity in 2007 to authenticate foreign or Kenyan passports presented to a CDA. It maintained that the appellant, as the CDA dealing face-to-face with the impostor, bore the primary duty to verify identity, collect and affix the customer's colour photograph on the CDS-1, and satisfy know- your-customer requirements before initiating immobilisation.

40. The 2nd respondent also contended that addresses do change when shareholders migrate to the CDS environment and that an address discrepancy by itself could not be decisive. It submitted that the learned Judge overstated the significance of the hyphen in "Bentley- Buckle", pointing out that even the 1st respondents and their advocates sometimes wrote the name without a hyphen. On that footing, the 2nd respondent argued that it was unreasonable to treat the hyphenation point as negligence. On the sending of consolidated certificates in the 1998 exercise, the 2nd respondent explained that uncollected certificates were posted to addresses on file or to the EABL Shares Department as a holding measure. It denied any legal duty to trace a shareholder's foreign address via bankers and described the trial court's expectation in that regard as an unfair and extra-statutory burden.

41. On remedies, the 2nd respondent submitted that the learned Judge granted reliefs not sought. It emphasised that the plaint prayed for restitution, unpaid dividends, and special damages for breach of contract, breach of trust, and breach of fiduciary duty, plus general damages specifically for breach of trust and fiduciary duty. Because the learned Judge expressly found that breach of trust and breach of fiduciary duty were not proved, the 2nd respondent argued, there was no pleaded basis for an award of general damages. It added that restitution fully restored the estate to status quo ante; any further award of general damages, without pleaded or proven head of loss, became a duplicative windfall. It criticised the absence of a reasoned path to the Kshs. 10,000,000 figure and, in the alternative, invited the Court to hold that if damages were maintainable at all, comparable awards and principled quantification were required, neither of which, in its submission, featured in the judgment. To underline this, the 2nd respondent cited Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2 EA 212, where this Court emphasised that damages must flow from pleaded and proved facts.

42. The 2nd respondent also challenged the amendment of the judgment. It argued that section 99 of the *Civil Procedure Act* cannot be used to effect substantive changes after a decree has been drawn and an appeal has been lodged; that the learned Judge was functus officio when she purported to "amend" the

judgment; and that the "clarification" from Kshs. 4 million to Kshs. 10 million was neither clerical nor obvious, and in any case could not be undertaken without giving the parties a hearing on quantum.

43. On interest, the 2nd respondent joined the appellant in submitting that interest on general damages — being unliquidated — runs from judgment, not from filing.

44. Lastly, like the appellant, the 2nd respondent pressed contributory negligence on the same grounds the appellant advanced, and in the event liability was upheld invited an apportionment, stating that the deceased's omissions substantially contributed to the loss. In support, the 2nd respondents relied on Kenyatta National Hospital v Gilbert Mutuma [2020] eKLR on the principle that a plaintiff's own negligence can mitigate or extinguish liability.

45. The 1st respondents, the executors of the deceased's estate, supported the learned Judge's core conclusions on liability and restitution and urged dismissal of all three appeals. They opened by situating the fraud in context: a spate of similar cases around 2007 involving elderly EABL shareholders, often non-resident, whose old paper certificates were converted and traded by impostors using forged identification. They pointed to the 2nd respondent's own letter of 29th May, 2012 acknowledging apparent discrepancies in the "Kenyan passport" used and reporting another fraud in the same year through the same broker; to the 2nd respondent's admission at trial that the impostor's documents were forged; and to the appellant's admissions about systemic weaknesses and the failure of its fraud-prevention processes.

46. The 1st respondents submitted that both the appellant and the 2nd respondent owed a duty of care — Suntra at the point of onboarding and witnessing the CDS-1, including verifying identity and obtaining a colour photograph as the form itself required; and Custody at the point of verifying names, addresses, the authenticity of the share certificate, and register particulars before authorising immobilisation.

47. On the facts, they argued, both actors were negligent. On the one hand, the appellant accepted photocopied identity without meaningful authentication, left the photo box on the CDS-1 blank, signed the bold certification on the form ("WE CERTIFY THAT THE NAME ID NO. AND SPECIMEN SIGNATURE...ARE ACCURATE..."), and processed the CDS-2 notwithstanding the glaring anomalies.

48. On the other hand, the 2nd respondent failed to detect obvious name and address discrepancies against its register, failed to demand explanation for the change from "Bentley-Buckle" to "Buckle", failed to match the long-recorded Mombasa address with the Nairobi address proffered for immobilisation, and, critically, had earlier sent the consolidated certificate to a "care of" internal address rather than to the shareholder's Mombasa address or any verified forwarding address, which enabled the impostor to get hold of the physical instrument in the first place. For the principle that both concurrent negligence and omissions can attract liability, the 1st respondents cited Barclays Bank of Kenya Ltd v Githua [2001] eKLR.

49. On the damages and amendment complaints, the 1st respondents took a different tack. They maintained that negligence was pleaded as a cause of action, was framed as an issue, and was argued in submissions; that the learned Judge was, therefore, entitled to award general damages for negligence. As to the inconsistency between paragraph 63 and paragraph 65(b) of the Judgment dated 19th May, 2019, they explained it as a clerical misstatement corrected through a properly invoked slip rule review. They emphasised that the 2nd respondent filed a motion for review dated 11th June, 2019 seeking clarification whether the general damages were Kshs. 4 million or Kshs. 10 million, that the application was heard inter-partes on 16th October, 2019, and that the learned Judge later issued an amended judgment on

17th December, 2019 clarifying that the intended figure was Kshs. 10 million. They conceded, however, that the 2nd respondent had withdrawn its application for clarification/review; and that the learned Judge proceeded to issue the "amended" judgment anyway.

50. In their submission, section 80 and section 99 of the *Civil Procedure Act* anchored the correction, and Order 45 rule 1(2) permits a review at the instance of a party who is not appealing notwithstanding the pendency of an appeal by another party. They further argued that once the amended judgment was issued, it superseded the original; in their view, any appeal targeting the original judgment was incompetent.

51. On interest, the 1st respondents relied on Premchand Raichand Ltd v Quarry Services of East Africa Ltd [1972] EA 162 to emphasise that interest awards lie in the discretion of the court.

52. They resisted the arguments on contributory negligence, stressing that the deceased's advanced age, frailty, residence in the United Kingdom for decades, and the absence of any legal duty on a shareholder to monitor Kenyan newspaper notices or to police the registrar's custody of certificates. They added that the wrong postal address used and the failure to verify identity were exclusively within the control of appellant and the 2nd respondent.

53. The 1st respondents filed detailed replies to both appellants, maintaining that the record contains multiple admissions from the appellant and the 2nd respondents establishing systemic failures at the precise points they each controlled; that the learned Judge's narrative finding of negligence against both defendants sits on firm evidential ground; that the remedy of restitution follows seamlessly from those findings and the equities; and that neither contributory negligence nor any inter-se apportionment excuses either appellant or the 2nd respondent where each omission was a necessary link in the causal chain that enabled the fraud. They defended the trial court's exercise of discretion on interest under section 26 of the *Civil Procedure Act* but, without prejudice, noted that the issue would be moot if this Court were to set aside the award of general damages.

E. Standard of Review and Issues for Determination on Appeal

54. This being a first appeal, our duty is well settled. We are obliged to reconsider the evidence on record, evaluate it ourselves and draw our own conclusions, while bearing in mind that we have neither seen nor heard the witnesses and must give due allowance for that. The guiding principle was articulated in Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123, where the predecessor to this Court stated:

> "An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

55. The same principle was reiterated in Jabane v Olenja [1986] KLR 661, where this Court emphasised that although an appellate court will not lightly differ with the findings of fact by the trial judge, it will interfere where the trial court is shown to have misapprehended the evidence, drawn erroneous inferences of fact, or applied the wrong principles in reaching its conclusion.

56. Guided by these principles and having carefully re-examined and considered the entire record of proceedings before the High Court, the judgment of the learned Judge, the grounds of appeal, and the detailed submissions of counsel before us – both oral and written, and the law, and guided by the principles applicable on a first appeal, we are of the view that the following issues fall for our determination:

a. Negligence and Liability: Whether the learned Judge erred in finding that both the appellant (Suntra Investment Bank Limited) and the 2nd respondent (Custody & Registrar Services Limited) were negligent in the handling of the deceased's 99,100 East African Breweries Limited (EABL) shares; and whether the deceased was contributorily negligent.

b. Restitution of the Shares: Whether the order directing the appellant and the 2nd respondent to restitute the 99,100 EABL shares to the 1st respondents was justified on the evidence and the law.

c. Award of General Damages: Whether the learned Judge erred in awarding general damages (whether of Kshs. 10,000,000 or Kshs. 4,000,000) against the appellant and the 2nd respondent.

d. Amendment of the Judgment: Whether the learned Judge acted within the law in amending the judgment of 30th May, 2019 under section 99 of the *Civil Procedure Act*, so as to alter the award of general damages from Kshs. 4,000,000 to Kshs. 10,000,000.

e. Award of Interest from the Date of Filing: Whether the learned Judge erred in awarding interest on the general damages from the date of filing suit rather than from the date of judgment, and what the proper approach to the award of interest ought to have been.

f. Appropriate Reliefs: In light of the foregoing issues, what reliefs, if any, should this Court grant, and what orders should be made as to costs of the consolidated appeals?

F. Analysis and Determination

57. With the compass we indicated above, we turn to the issues framed.

a. Negligence and liability

58. On the question of restitution, the appellant and the 2nd respondent vigorously contended that the learned Judge erred in holding them jointly and severally liable to restore the 99,100 EABL shares. They argued that the fraud was the handiwork of an impostor who should bear sole responsibility, and that the deceased himself, by failing to collect his consolidated share certificate or update his contact details, contributed to the loss. They relied, inter alia, on their witnesses' testimonies to emphasize alleged contributory negligence and systemic challenges.

59. The 1st respondents, in contrast, maintained that both the appellant and the 2nd respondent admitted weaknesses in their verification processes and failed in their duty of care. They argued that without those lapses, the fraud could not have succeeded. They urged us not to disturb the learned Judge's finding that negligence was proved against both defendants.

60. We have considered these competing submissions. In our view, on a fair reading of the record, the learned Judge concluded that both 1st appellant (Suntra as CDA) and the 2nd respondent (Custody as EABL's share registrar) owed the deceased shareholder — and, after his passing, his estate — a duty to exercise reasonable care in processes that were inherently susceptible to fraud: dispatching new share certificates; opening a CDS account; immobilising paper certificates; and moving the shares into a

tradeable electronic form. The learned Judge then found that each breached its duty in ways that, together, enabled an impostor to immobilise and dispose of the 99,100 EABL shares.

61. We have independently reviewed the evidentiary foundations for those conclusions.

62. On the appellant's side, Mr. Mark Kariuki Maina explained the process the firm followed in 2007. A walk-in client presenting himself as the deceased had no existing CDS account. The appellant gave him a CDS- 1 form to open one; received the client's particulars and passport, and prepared the CDS-2 immobilisation request attaching the original EABL share certificates and a copy of the passport for the 2nd respondent's verification as registrar. The appellant's witness accepted that the firm signed the certification on the CDS1 "individual information card" to the effect that the ID particulars and specimen signature "are accurate and tally with information held by us." He also accepted that there was no photograph affixed to that card, and that the appellant "could not verify the ID because there were no systems" in place at the time to authenticate the passport. In cross-examination he maintained that the appellant relied on the registrar's verification and had "no reason to suspect" the passport was invalid.

63. On the 2nd respondent's side, Ms. Kerry-Ann Makatiani candidly acknowledged material discrepancies between the genuine UK passport subsequently supplied by the family and the Kenyan passport used by the impostor: the latter bore a different nationality, number, date and place of issue, and even an unhyphenated surname. She also explained EABL's 1998 consolidation exercise and testified that the consolidated certificate for the deceased, which replaced the 1977 paper certificates, was not collected and was posted instead to "c/o EABL Shares Department, P.O. Box 30161 Nairobi." Ms. Makatiani accepted that the consolidated certificate somehow found its way into the impostor's hands and was presented to the appellant for immobilisation. She further accepted that the 2nd respondent's role as registrar was to verify the shareholder's particulars against the register and to flag anomalies before approving immobilisation, but laid the primary blame on the appellant for front-end identity verification failures.

64. We agree with the learned Judge that each actor fell short of the standard of reasonable care. The appellant's "front door" checks were not merely ministerial as it claims. The CDA's own form required it to certify the accuracy of identification particulars and signature and to retain a colour photograph. Those are not venial box-ticking formalities. They are the first line of defence against identity theft. The absence of a photograph; the failure to keep or produce the CDS-2 copy it says it generated; and the admission that it had "no systems" to verify the passport, together with its blanket certification, support the conclusion that the appellant did not exercise reasonable care in opening the CDS account and initiating immobilisation. Its later reliance on the registrar's confirmation (2nd respondent) does not absolve it of its own gatekeeping duty.

65. Equally, the registrar's gate was not secure. The 2nd respondent did not produce the contemporaneous registry extracts against which it verified the impostor's details; yet the record shows red flags that reasonable diligence would have caught: the name inconsistency (the family name had long been styled "Bentley-Buckle" with a hyphen on the 1977 share certificates), the postal address mismatch, and the shift from a British to a Kenyan passport with wholly different biodata. The 2nd respondent also knew where the dividend stream on the account went and had historical records reflecting the deceased's Mombasa connection; yet it sent the consolidated certificate to a generic "c/o EABL Shares Department" address. That misstep is what allowed the original consolidated certificate to leave controlled custody and become the instrument of fraud. In these circumstances, the registrar's verification — meant to be the second line of defence — also fell short.

66. In these circumstances, causation is not a metaphysical puzzle: Without the 2nd respondent's negligent misdirection of the consolidated certificate (to the wrong postal address), the impostor could not have wrongfully obtained physical possession of the consolidated share certificate; without the appellant's lax front-end onboarding to the CDS account, the impostor could not have opened the account or lodged the immobilisation request; and without the 2nd respondent's relaxed back-end verification, the impostor could not have established title and cleared the immobilisation hurdle. The losses flowed from converging breaches by both the appellant and the 2nd respondent. Even if there were any residual doubt about apportionment where either of two negligent actors may be responsible for the indivisible loss, the burden- shifting rationale discussed by the Supreme Court of Canada in Cook v. Lewis (1951) SCR 830, which this Court has referenced with approval in several cases (see, for example, Fred Ben Okoth v. Equator Bottlers Ltd (2015) eKLR), underscores why joint responsibility is appropriate. In Fred Ben Okoth Case, this Court refers to Cook v. Lewis to explain the legal position that when there are two or more defendants who are each negligent, and it is impossible for the plaintiff to show which of them caused the damage, the burden shifts to the defendants to disprove causation.

67. We, therefore, affirm the learned Judge's conclusion that both the appellant and the 2nd respondent were negligent toward the estate and that liability was properly found against them. For those same reasons, we affirm the learned Judge's conclusion that the deceased was not contributorily negligent in the loss suffered.

b. Restitution of the shares

68. The order that the appellant and the 2nd respondent "equally restore" the 99,100 EABL shares to the estate within a set period was the learned Judge's tailored remedy to place the beneficiaries, as far as practicable, in the position they would have occupied but for the negligence. The record supports this relief. Restitution is a logical response where identifiable property has been wrongfully dissipated through a service provider's negligence, and the market permits reconstitution of the holding (whether by transfer from available custody or by procurement in the market at the wrongdoers' cost). The order is not punitive; it is restorative. Given our view on liability, we see no error in principle or in evidential footing. We affirm it.

69. We add that the order is joint and several, not merely "equal," in the sense that the estate is entitled to look to either wrongdoer for full performance, leaving issues of contribution between the wrongdoers to be pursued inter se. That is how the decree was framed, and we see no reason to dilute it.

c. Award of general damages

70. Before turning to our own analysis on the question of the award of general damages, it is necessary to recall, in brief, the positions taken by the appellant and the 2nd respondent. Both parties vigorously challenged the award of general damages made by the learned Judge.

71. The appellant argued that the 1st respondents had not pleaded a claim for general damages for negligence in their Further Amended Plaint, and that the learned Judge, therefore, erred in granting a relief that had not been specifically prayed for. It was stressed that parties are bound by their pleadings, and to award general damages in those circumstances was to depart from well-settled principles of law. To fortify this argument, the appellant relied on David Sironga Ole Tukai v Francis Arap Muge & 2 Others [2014] eKLR, where this Court held that a court cannot grant a remedy that has not been sought and is itself bound by the pleadings of the parties. The appellant further contended that the award was arbitrary, unsupported by evidence, and duplicative, given that the learned Judge had already ordered restitution of the 99,100 EABL shares.

72. The 2nd respondent associated itself with these arguments and further stressed that the award of Kshs. 10,000,000 lacked any legal or evidential foundation. It pointed out that the learned Judge did not explain how the figure was reached and that, in any event, restitution of the shares had already restored the estate of the deceased to the position it would have been but for the fraud. The 2nd respondent emphasised that the award offended the principle that damages are compensatory and must be rationally justified. To underscore this point, the 2nd respondent cited Stanley Maore v Geoffrey Mwenda [2002] eKLR and Morris Mugambi & Another v Isaiah Gitiru [2002] eKLR, where this Court stressed that comparable injuries should, as far as possible, be compensated by comparable awards, and that an appellate court will interfere with an award where it is inordinately high, low, or based on wrong principles.

73. Both the appellant and the 2nd respondent, therefore, urged us to set aside the award of general damages in its entirety.

74. We have considered these submissions with care. In our respectful view, a conclusion different from that we reached on restitution is compelled on general damages. The learned Judge awarded Kshs. 10,000,000 as "general damages," having earlier in the narrative indicated a figure of Kshs. 4,000,000. The difficulty is twofold.

75. First, the relief was not pleaded on the head in which it was granted. The 1st respondents pleaded and particularised negligence and sought, among other remedies, restitution; they also pleaded breach of trust and fiduciary duty and sought general damages in that specific juridical frame. They did not include a specific prayer for general damages. The learned Judge expressly rejected breach of trust and fiduciary duty. Having done so, the court could not transpose a general-damages award into the negligence claim when that head of relief was not prayed in that form. Parties are bound by their pleadings; courts adjudicate the case presented, not a different one. See David Sironga Ole Tukai v. Francis Arap Muge & 2 others [2014] eKLR; IEBC & another v. Stephen Mutinda Mule & 3 others [2014] eKLR. The point is as old as the system: a court will not grant a remedy that has not been applied for, nor determine matters not pleaded. The learned Judge's course contravened that principle: the 1st respondents did not include a prayer for general damages; they could not be awarded general damages.

76. Second, even if such a head were open, the quantum lacks any articulated basis. The judgment does not disclose the criteria by which either Kshs. 4,000,000 or Kshs. 10,000,000 was selected. The two inconsistent figures, unaccompanied by comparatives or reasons, render the award arbitrary. It is true that appellate restraint on interfering with quantum is well-settled, but it yields where the court below acted on a wrong principle or arrived at a wholly erroneous estimate. See Gitobu Imanyara & 2 others v. Attorney General [2016] eKLR; Stanley Maore v. Geoffrey Mwenda (CA No. 147 of 2002). The learned Judge offered no explanation whatsoever for either an award of Kshs. 4,000,000 or Kshs. 10,000,000 and cited no comparators or heads (e.g., loss of use, distress) to justify an additional monetary award in a case already addressed by a robust restitutionary remedy (which we have upheld above).

77. There is a further, structural concern. The core wrong here resulted in the dispossession of a fungible asset: EABL shares. Restitution of the very holding is, in principle, the adequate remedy. Overlaying an additional lump-sum "general damages" award risks double recovery and leaving the plaintiffs in a better place than they would have been had the tort not been committed. The special-damages claim for the then market value was rightly rejected for want of particularization and proof, and the unpaid-dividend claim failed for the same reason — both correct outcomes in our view. It would be incongruous to smuggle back a monetary substitute in the guise of "general damages" without either pleading or proof.

78. For all those reasons, we conclude that it was an error for the learned Judge to award general damages and we set aside that award.

d. Amendment of the judgment

79. We turn to the learned Judge's later "amendment" of the judgment under section 99 of the *Civil Procedure Act*, which changed the award of general damages from Kshs. 4,000,000 to Kshs. 10,000,000.

80. The appellant and the 2nd respondent submitted that the learned Judge erred in purporting to "correct" her judgment under section 99 of the *Civil Procedure Act* after the decree had been perfected and an appeal lodged. They argued that the so-called "correction" went far beyond a clerical error and amounted to a substantive change of the award, which could only be done after hearing the parties or through appellate intervention. They characterized the amendment as unprocedural and void.

81. The 1st respondents countered that the amendment was a permissible correction of a slip under section 99 of the *Civil Procedure Act*, intended to clarify the true award of the trial court. They argued that no prejudice was caused, as the intention of the learned Judge was always to award Kshs. 10,000,000 and not Kshs. 4,000,000.

82. The "slip rule" embodied in section 99 of the *Civil Procedure Act* empowers a court to correct clerical or arithmetical mistakes or errors arising from accidental slip or omission. The jurisprudence is clear that such corrections must be obvious, non-controversial, and must not change the substance or intention of the judgment. See the Supreme Court's decision in Fredrick Otieno Outa v. Jared Odoyo Okello & 3 others [2017] eKLR emphasizing that the slip rule does not confer a power to sit on appeal over one's own judgment or to extensively review it so as to substantially alter it. The broader finality principle and the doctrine of functus officio — articulated in Raila Odinga & another v. IEBC & 2 others [2013] eKLR counsel restraint once a decree is perfected and appellate jurisdiction has been engaged.

83. Changing a money award from Kshs. 4,000,000 to Kshs. 10,000,000 is not a clerical tweak. It is a substantive alteration with real consequences, more than doubling the damages awarded. Even if one could divine from paragraph 65 of the original judgment that the figure contemplated there was Kshs. 10,000,000, the route taken — section 99 of the *Civil Procedure Act*, post-decree and post- notice of appeal — was, in the circumstances of this case, not available. Such a change, if open at all, lay in review upon proper terms or in the appellate process. The slip-rule path was, with respect, a procedural cul-de-sac. The learned Judge, therefore, fell into error in invoking section 99 of the *Civil Procedure Act* in the manner done, and the "amended" figure cannot stand. However, given our setting aside of general damages altogether, the point is moot. For the avoidance of doubt, nonetheless, we hold that the "amendment" of the judgment was unprocedural and of no effect.

e. Interest

84. The learned Judge awarded interest on the general-damages sum "from the date of filing suit." The appellant and the 2nd respondent contended that the learned Judge erred in awarding interest on general damages from the date of filing the suit, rather than from the date of judgment. They submitted that this was contrary to settled law and, in any event, compounded the prejudice from the erroneous award of damages.

85. The 1st respondents argued in reply that the learned Judge was within her discretion to order interest from the date of filing suit, and that in any event, once general damages were found payable, interest properly followed.

86. In our view, the question of interest is largely moot given our finding on general damages. Nevertheless, it bears emphasis that the approach taken by the learned Judge would not have been correct even if general damages were otherwise maintainable. Interest on unliquidated damages ordinarily runs from the date of judgment because the right to the sum crystallizes only upon assessment. See Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1970] EA 469, applied in Oriwo (Kenya) Ltd v. Paul Kabeu & 2 others [2014] eKLR. As we have set aside the general-damages award, the question of interest is moot anyway. We, nevertheless, state the principle for completeness.

G. Disposition on the issues and Final Orders

87. In sum, we affirm the learned Judge's findings of negligence and the restorative order requiring the appellant and the 2nd respondent to restitute the 99,100 EABL shares to the estate of the deceased. We set aside the award of general damages, both because it was not sought in that head and because no articulated justification for it was provided and was inconsistent with the restorative relief given. We also hold that the purported amendment of the judgment under section 99 of the *Civil Procedure Act* was unprocedural and, in any event, of no effect. Finally, the interest ruling on general damages, if it had stood, would have required correction to run from the date of judgment and not from filing but the issue is moot in light of our disposition.

88. In the result, and for the reasons set out above, these consolidated appeals succeed in part. We accordingly make the following orders:

    i. The findings of the learned Judge holding the appellant, Suntra Investment Bank Limited, and the 2nd respondent, Custody & Registrar Services Limited, jointly and severally, liable in negligence for the unlawful immobilisation and sale of 99,100 East African Breweries Limited shares belonging to the estate of the deceased are hereby affirmed.

    ii. The order for restitution of the 99,100 shares to the 1st respondents is affirmed. The same shall be completed within 90 days of this judgment. For avoidance of doubt, each party shall do all acts and procure all consents necessary within their respective systems to effect full restoration in the CDSC/EABL register.

    iii. The award of Kshs. 10,000,000 as general damages (having initially been indicated as Kshs. 4,000,000) is hereby set aside in its entirety.

    iv. For completeness, we also hold that the amendment of the judgment by the learned Judge on 17th December 2019, purporting to correct the figure of Kshs. 4,000,000 to Kshs. 10,000,000 under section 99 of the *Civil Procedure Act*, was unprocedural and a reversible error.

    v. The award of interest on the general damages from the date of filing the suit, rather than from the date of judgment, was erroneous. This point is, however, moot in light of our reversal of the award of general damages.

    vi. To that extent only, the appeals by the appellant and by the 2nd respondent succeed. In all other respects, the appeals are dismissed.

    vii. Each party shall bear its own costs of the appeals, considering that the 1st respondents have succeeded in upholding the restitution of shares, while the appellant and the 2nd respondent have succeeded in overturning the award of general damages.

    Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2025.

F. TUIYOTT

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

F. V. ODUNGA

....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR