Kamiti v Equity Bank Limited & 6 others (Civil Appeal 662 of 2019)
[2025] KECA 1761 (KLR) (24 October 2025) (Judgment)

Neutral citation: [2025] KECA 1761 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 662 OF 2019

W KARANJA, SG KAIRU & LA ACHODE, JJA

OCTOBER 24, 2025

BETWEEN

SAMUEL GACHIE KAMITI ..... APPELLANT

AND

EQUITY BANK LIMITED ..... 1ST RESPONDENT

JAMES NJUGUNA MWANGI ..... 2ND RESPONDENT

MARY WANGARI WAMAE ..... 3RD RESPONDENT

KENNETH MBAABU MUCHIRI ..... 4TH RESPONDENT

GERALD GACHOKA WARUI ..... 5TH RESPONDENT

ANDREW MWANGI KIMANI ..... 6TH RESPONDENT

THE TRUSTEES OF THE EQUITY BANK EMPLOYEES SHARE OWNERSHIP PLAN (ESOP) ..... 7TH RESPONDENT

(Being an appeal from the judgment and order of the High Court of Kenya at Nairobi (Tuiyott J) dated 31st May 2018inNairobi HCCC. No. 543 of 2010)

JUDGMENT

1. This is the first appeal by Samuel Gachie Kamiti (the appellant) against part of the judgment and order of Tuiyott J. (as he then was), dated 31st May 2018 in Nairobi HCCC. No. 543 of 2010. Equity Bank Limited and 6 Others are the 1st to 7th respondents, and they filed a notice of cross-appeal against the judgment.

2. The backdrop of the appeal is as follows. The 1st respondent by a Deed of Settlement dated 29th August 2005, established an Employee Share Ownership Plan (herein after ESOP). The appellant as

an employee of the 1st respondent, from 12th January 2006, was eligible to purchase shares in the Equity Bank ESOP Scheme. He purchased ESOP shares which accumulated to Six Million, Five Hundred Fifty-Seven Thousand and Eighty (6,557,080) shares, at a cost of Kenya Shillings Twenty Four Million Three Hundred and Forty Thousand (Kshs. 24,340,000.00)

3. Thereafter, the appellant resigned on 2nd March 2010 and filed a suit through a plaint dated 10th August 2010 and amended on 1st February 2012, against the respondents. His case was that he was forced to resign on 2nd March 2010 from the 1st respondent as the General Manager of the Alternative Business Channels Department of the Bank, as the position was phased out of the 1st respondent's organizational structure and his job was rendered redundant. On the same day, he wrote to the Chairman of the Trustees of the Bank's ESOP, requesting for the redemption of his 6,557,080 ESOP shares and having them transferred into his name.

4. On 18th March 2010, the 3rd respondent wrote to him informing him that his contributions of Kshs. 24,330,000 had been refunded to him through a credit transfer into his account under the ESOP Trustee Deed. The appellant was dissatisfied with the settlement. He asserted that at the close of business on 2nd March 2010, the Nairobi Stock Exchange closing price for the bank's shares was kshs.15.75 per share and therefore, he was entitled to Kshs. 103, 274,010.60.

5. The 1st respondent replied that it dealt with the appellant's shares under the provisions of rule 6.6 of the Settlement Deed as amended by a Deed of Variation dated 11th November 2009. The rule provides that an employee who ceased to be an employee of the bank for whatever reason, before the vesting date of his shares, deemed to be the fifth anniversary of the allocation of the Units, was not permitted to, or deemed to have given a Redemption Notice. The employee would forfeit all such Units without any right to compensation.

6. The appellant asserted that the Deed of Variation, was not discussed with him or brought to his attention. It was added that the Deed of Variation received the sanction of the 1st respondent at the annual general meeting held on 26th March 2010, and the Capital Market Authority (CMA) only received the said Deed of Variation on 4th May 2010 for approval.

7. Consequently, the appellant sought judgement against the respondents for:

    a. Payment of the accrued value of the appellant's shares at the Nairobi stock exchange on the 2nd March 2010 - Kshs. 103,274,010.00.; dividend payable to the appellant for the year 2009 – Kshs. 2,622,832.00; and damages for lost investment income which the appellant could have realized from the date of his resignation.

    b. In the alternative to (a), payment of damages for lost investment income which the appellant would have realized from alternative investments, between the 30th June 2006 until the date of trial and/ or the final determination of the suit, had the appellant not invested the sum of kshs.24,340,200/= in the Equity Bank Employees' Share Ownership Plan (ESOP)

    c. A declaration that the purported amendment of the Settlement Deed dated 29th August 2005 by introducing a vesting date with effect from the 11th November 2009 was illegal, null and void.

    d. A declaration that the appellant's shares were deemed to have been transferred into his name in the 1st respondent's register as per his request dated 2nd March 2010, and that any calculation of the accrued value of the appellant's share and/or the appellant's benefits should have been in accordance with the Settlement Deed dated 29th August 2005 and Rules as well as Regulations made under the Capital Markets Authority Act.

e. Special damages

f. Damages for breach of contract

g. Interest on (a) and (b) at the commercial rate of 20% per annum from the date of filing judgment until payment in full.

8. In rebuttal, the respondents filed a defence dated 3rd September 2010 and asserted that the Variation of the Deed was effected on 11th November, 2009 when the appellant was still in the employment of the 1st respondent and the provisions of the Variation are binding on him. It is their case that there was a meeting of the staff of the 1st respondent held in Nyeri at the time of the inception of ESOP, which agreed that the minimum period of service before vesting of units would be five years. They later sought and obtained approval from the Capital Markets Authority (CMA). According to them, the Deed of Settlement dated 29th August 2005, and its subsequent variation dated 11th November 2009, took effect on the respective dates of those Deeds and not at the Annual General Meeting of 20th March 2010.

9. During the hearing, the appellant presented three witnesses to support his case and the respondents called one witness.

10. The appellant testified as PW1 and rehashed the contents of his amended plaint. He stated that he was not aware that the Trustees could amend the Trust Deed from time to time and that the 1st respondent failed to credit into his account the value of his Units and instead credited Kshs. 24 million which was a mere refund. It was his testimony that the Trustees did not call him to inform him of the variation, and he was never provided with the Trust Deed despite his request via email to the company secretary. He reached out to CMA to confirm whether they approved the Deed of Variation, and they informed him that they received the variation on 4th May 2010 and that was long after he had resigned from the Bank.

11. John Kasuba Murage PW2, was employed by the 1st respondent on 19th March 2007 as a Finance Director. He invested Kshs. 2.7 million in 2007. When he left employment, he sought redemption of his ESOP shares. They were given a value of Kshs. 17.30 per share and he was paid a total of Kshs.13,148,000.00. He confirmed that he worked for less than five years but he was paid his shares at market value.

12. Leshire Okudo PW3, the Actuarial Scientist provided the court with a report on the appellant's educational background, financial appetite, and past investment experience. He testified that the appellant was "strongly invested" in real estate and sought to rebalance his portfolio by investing externally. He added that when the appellant got Kshs. 24million from the respondents, he invested part of it in Kenya Treasury Bonds but he was devastated that it was too small an amount for international investment. PW3 stated that the appellant was a medium risk investor and an active investor and that he lost investment opportunity was Kshs. 385,545,045.

13. The 3rd respondent, Mary Wangari Wamae, DW1, the Company Secretary of the 1st respondent testified that the Deed of Settlement dated 29th August 2005 was varied on 11th November 2009, although they did not file any minutes of a meeting or consultation between members of ESOP in respect of the variation. It was her testimony that the variation could only be made with the company's prior consent. That the company instructed Coulson Harney LLT Advocates to start the process of variation, and it did not require the resolution of the AGM as the Board gave the approval.

14. DW1 acknowledged the letter indicating that the Deed of Settlement dated 29th August 2005, and the Deed of Variation dated November 2009 were forwarded by the bank to the CMA on 12th May 2010. It was her evidence that the variation affected all subscribers at that time and anyone who resigned before

completing five years in employment was affected negatively. She pointed out that the case for PW2 was unique since he had retired on medical grounds.

15. Upon considering the matter before him, the learned trial Judge found in favour of the appellant against the respondents jointly and severally. He ordered for payment of Kshs. 78,934,010.00, being the difference between the value of his shares at the point of his resignation, Kshs.103,274,010.00 and the Kshs. 24,340,000.00 that he was paid. He was also awarded interest thereon at court's rate from the date of filing the suit until payment in full, together with the costs of the suit.

16. Partially dissatisfied with the judgment, the appellant filed this appeal. In the Memorandum of Appeal dated 23rd December 2019 he assailed the learned trial Judge on twelve grounds which we have condensed as:

    i. Dismissing his claim for loss of investment income and holding that the lost investment income sought was not foreseeable.

    ii. Misdirecting himself and departing from the decision of Hardley vs Baxendale (1854) EWHC 9Exch 341 and proceeding to hold that the object of compensation is award of interest despite finding that the plaintiff suffered natural loss when he was deprived of the use of the remainder of what was due to him, thus occasioning miscarriage of justice.

    iii. Failing to find that the appellant was entitled to damages for breach of contract.

    iv. Failing to consider the appellant's evidence on forced resignation from the first respondent's employment, which amounted to breach of contract and entitled the appellant to an award of general damages.

    v. Failing to find that the appellant's shares were deemed to have been transferred to his name in the 1st respondent's share register as per the appellant's request of 2nd March 2010 and in the end failed to hold that any calculation of the appellant's shares and/or benefits should have been in accordance with the Settlement Deed dated 29th August 2005 and Rules as well as Regulations made under The Capital Market Act. Prior to the Deed of variation dated 29th November 2009.

    vi. Failing to find that the appellant was entitled to a claim for interest at a commercial rate of 20 % in the circumstances.

    vii. Failing to award the appellant dividends for the year 2009 and subsequent years until full settlement despite finding that the appellant still held shares in the ESOP until the said shares were redeemed and/or transferred into his name.

17. The respondents filed a Notice of Cross-Appeal dated 6th February 2020 based on seven grounds. A summary of the grounds is that the learned Judge:

    i. Failed to uphold the established principle of law that the court is bound by the pleadings of the parties,

    ii. Found erroneously that the Deed of Variation dated 11th November 2009 had not been approved by the Capital Markets Authority by 2nd March 2010,

    iii. Held erroneously that the 2nd to 6th respondents as trustees of the 7th respondent, failed to inform the appellant of the Deed of Variation and its contents before the date of his resignation.

18. The appellant filed written submissions dated 20th November 2023 through the firm of M/s Kipkenda & Company Advocates. His argument is that his claim for loss of income from investment

opportunities was foreseeable and was not remote. That by buying shares from the ESOP Scheme, he engaged in a commercial transaction with the 1st respondent, which in the ordinary course of business, applies commercial interest rates in its transactions and levies default interest rates on loans. Therefore, it was aware that if it defaulted in redeeming the appellant's shares on time, liability was likely to accrue. In addition, clause 5.1 of the Trust Deed and Schedules 7.1 and 7.3 of the Rules obligated the Trustees to pay the appellant the balance standing to his credit within thirty days after leaving employment at the bank. That under clause 16 of the Trust Deed, the Trustees were under a duty to ensure that the appellant maximized his investment opportunity.

19. The appellant asserted that he requested for redemption of his 6,557,080 ESOP shares by having them transferred into his name, in line with section 119(a) of part IX of the Capital Markets Authority Regulations 2001, Clause 5.1 of the ESOP Settlement Deed dated 29th August 2005, and paragraph 7 of the ESOP Rules dated 1st September 2005. However, the respondents refunded his investment amount of Kshs. 24,340,000.00, denying him the opportunity to invest the entire redemption amount at Nairobi Securities Exchange (NSE), or to engage in alternative investments. He posited that he led evidence in the High Court to demonstrate his investment history from the purchase of properties to purchase of shares and treasury bonds. Further, he demonstrated his investment history by investing Kshs. 20,000,000 in treasury bonds in March, 2010 out of the Kshs. 24,340,000 refunded by respondents.

20. The appellant also said he engaged PW3, who in his report dated 13th February 2013, projected the rates of return the appellant could have realized, after considering his past investment exposure and behavior. He projected a portfolio size of Kshs. 2,743,790,430 as at 31st December 2013, if the appellant had not chosen to invest with the Equity ESOP, and Kshs. 1,550,477,792 if he had been paid full value of his ESOP shares. He asserted that having pleaded both in his amended plaint and witness statement that he was constructively dismissed, the learned Judge ought to have addressed the issue. His prayer is for this Court to find that he was indeed entitled to damages for breach of employment contract.

21. The appellant referred the Court to page 782 of the Record of Appeal, Vol. 2, of the 1st respondent's Notice of Annual General Meeting and the Financial Statements of 2009 dated 17th February 2010. The final dividend for the year ending 31st December 2009 was indicated as Kshs. 0.40 per ordinary share of Kshs.0.50 each, subject to withholding tax where applicable. He urged that he is entitled to dividends amounting to Kshs. 2,633,832 and that since the respondents have been trading with his shares to date, it cannot be argued that he was not entitled to dividends for the year 2009 and subsequent years.

22. On the interest rate awarded, he submitted that the court did not appreciate that his engagement with the respondents was commercial in nature. Therefore, he ought to have been awarded a commercial interest rate of 20% per annum as supported by the 1st respondent's Equity Rate of Return for the year 2005 and 2006. In reliance on the case of Veleo (K) Ltd vs Barclays Bank of Kenya Ltd (2013) eKLR he implored us to find that he is entitled to interest at the commercial rate of 20% compounded.

23. In response to the Cross-Appeal, it was submitted that the learned Judge was right on the issue of validity of the Deed of Variation dated 11th November 2009. He submitted that according to Order 15 rule 2 of the Civil Procedure Rules, 2010, the issues to be framed cannot be confined to pleadings

alone but can be framed from allegations made during testimony or from the documents produced by either party. The appellant supported the learned Judge's finding that:

> "there was no evidence that the Deed of Variation was submitted to the Authority and approved before 2nd March 2010, the Terms therefore could not be effected as against Kamiti."

He asserted that this holding was supported by the 3rd respondent's testimony as captured in the judgment.

24. The appellant submitted that Section 57 (a) of the *Capital Markets Act* prohibits alterations, rescission, or addition to any trust deed, unless the consent of the unit holders has been obtained. He urged that his approval was not obtained before the purported amendment, and the respondents did not disclose to him that the amendment would result in a reduction or cutback in the accrued value of his shares and benefits.

25. The respondents filed their submissions dated 3rd November 2023 through the firm of M/s Triple O K Law LLP Advocates, and contended that the prayer for payment of dividends for subsequent years, until full settlement was not pleaded in the High court and cannot be introduced by way of appeal. It was their submission that the appellant is bound by his pleadings, and this Court is bound by the pleadings of the parties.

26. Regarding the dividends for the year 2009, the respondents submitted that a claim for unpaid dividends is a special damages claim. It must be specifically pleaded and strictly proved and the appellant failed to strictly prove his claim for Kshs 2,662,932.

27. The respondents argued that PW3 stated in his report that the appellant had sometime in 2009, wished to rebalance his portfolio by reducing his real estate and cash holding through acquisition of international equities, bonds and investments in forex trading. They pointed out that PW3's report was prepared after the appellant had received the refund. However, the report shows that upon receiving the refunded amount of Kshs. 24,340,000.00 that the appellant used to purchase ESOP units, he did not invest it in international equities, international bonds or forex trading.

28. The respondents asserted that the appellant's claim for lost investment income is a claim for consequential loss. To succeed, the appellant must satisfy the second limb of Hadley vs. Baxendale (1854) 9 Ex 341. In the decision, the Court identified the losses which a party can recover in the event of breach of contract to include losses which result from special circumstances and would only be recoverable if such losses were communicated to the defaulting party when the contract was formed. It was urged that the claim for loss of investment income was not foreseeable and the same was not communicated to the respondent when the contract was formed sometime in November 2006.

29. The respondents relied on the decision of this Court in Alba Petroleum Limited vs Total Marketing Kenya Limited (2019) eKLR to urge that the appellant failed to tender evidence to prove that he was entitled to interest at the commercial rate of 20% per annum, or at all. They submitted that the court properly exercised its discretion under Section 26 of the *Civil Procedure Act*.

30. In support of the Notice of Cross-Appeal, the respondents argued that the appellant contended without pleading, that the Deed of Variation dated 11th November 2009 had not been approved by CMA. It is their view that the trial court ought not to have decided the unpleaded issue, considering the nature of the issue and the evidence that would be required to determine it.

31. It was submitted that clause 19 of the Deed of Settlement dated 29th August 2005 provided on variation of the Deed of Settlement. Under clause 4.1.2 the Trustees could vary the terms and conditions attaching to redemption or surrender of units. The right to amend a Deed of Settlement of a Collective Investment Scheme is conferred upon the Trustees by the Capital Markets (Collective Investment Schemes) Regulations, 2001. Part IX of the Regulations at Rule 57 provides for amendment of the Trust Deed. It provides that parties to a Trust Deed may amend, alter or rescind any provision of the trust deed but no such amendment shall be valid unless the Authority is satisfied that it does not contain anything inconsistent with the provision of the *Capital Markets Act*.

32. The respondents submitted that the appellant did not adduce evidence before the trial court to prove that the Deed of Variation dated 11th November 2009, was found by the Authority to have contravened the Act, or to be inconsistent with sound financial principles. They urged that the Deed of Settlement dated 29th August 2005, and its subsequent variation vide Deed of Variation dated 11th November 2009, took effect on their respective dates and was valid as between the parties.

33. The appeal came before us for hearing via the virtual platform on 12th March 2025. Mr. Odoyo learned counsel appeared for the appellant, while Mr. Kiche learned counsel held brief for Mr. Ohaga Senior Counsel for the respondents.

34. Mr. Odoyo relied on the appellant's submissions and supplementary submissions and added that there was no evidence that there was no approval for the dividends in the year 2009. Mr. Kiche also relied on the respondents' submissions. He submitted that the Board proposed dividends but the respondents produced evidence that it was not ratified at the AGM. He also urged that the appellant's expert witness said that if the appellant had not invested the money in the ESOP shares, he would have reaped a higher yield from international investment, yet he invested the money paid back to him in treasury bills at an interest of 11%, while the court awarded him interest of 12%.

35. This being the first appellate Court, our mandate was well stated in the much cited case of Selle & another v Associated Motorboat Co. Ltd.& others [1968] EA 123 as follows:

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of 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 demeanour of a witness is inconsistent with the evidence in the case generally."

36. We have anxiously considered the memorandum of appeal, the Cross-Appeal and the rival submissions before us and distilled the following issues for determination:

    i. Whether the appellant is entitled to payment of dividends for the year 2009 and subsequent years until full settlement;

    ii. Whether the learned Judge erred in considering the issue on Variation of Deed to the appellant that was not pleaded;

iii. Whether the appellant is entitled to damages for breach of contract/ lost investment income; and

iv. Whether the appellant is entitled to interest at the commercial rate of 20%

37. Before we delve into the issues set out above, we note that the appellant assailed the learned Judge for failing to consider that the 1st respondent forced him to resign. Thus, that the trial court should have considered the manner in which his employment contract was terminated.

38. Whether or not, the High court should have waded in to this issue, has been settled by the Supreme Court. In Republic v Karisa Chengo & 2 Others [2017] KESC 15 (KLR), the Apex Court pronounced that Judges of specialized courts cannot hear matters reserved for the High court and vice versa. This is because their appointments, oaths, and the intent of *the Constitution* confine them to their specific judicial domains even though they are of equal status. The Court put it this way:

> 78. The effect of the above local and comparative analysis is that a particular judge undertakes to perform stewardship of the particular office in respect of which he or she takes the oath, and not of a different office. The formal action-chain taken by relevant constitutional agencies, from advertisement, to appointment, and to oath - taking, is all linked, in each case, to a specific court. The judges do not take a general oath as superior court judges but as either High Court Judges, specialized court judges, Court of Appeal Judges, or Supreme Court Judges. If indeed *the Constitution* intended that Judges should swear oaths of allegiance to all superior Courts in general, then it would have expressly stated so; and if a common service- arrangement between the High Court and the specialized Courts existed, then it would be possible, by dint of sheer administrative directions, to designate Judges in the latter category, from time to time, to serve, say in the Family, Criminal, Commercial, or Civil Division, of the High Court.
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> 79. It follows from the above analysis that, although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from article 165(5) of *the Constitution*, which prohibits the High Court from exercising jurisdiction in respect of matters " reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the Courts contemplated in article 162(2)".
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> 80. In this case, it therefore also follows that Angote, J., appointed as a judge of the Environment and Land Court, and not of the High Court, had no jurisdiction to determine criminal appeals. Consequently, we concur with the Court of Appeal that Gazette Notice No. 13601 of October 4, 2013, by which the former Chief Justice empanelled him to sit and determine the criminal appeals in question, was unlawful and unconstitutional"

39. Flowing from the foregoing holding, the complaint concerning the employment contract ought to have been placed before the Employment and Labour Relations Court for determination. The High Court had no jurisdiction to consider it and the learned Judge was therefore, in order to decline to entertain it.

40. On to the first issue where the appellant urged that he is entitled to dividends for the year 2009 and subsequent years, since the respondents have continued trading with his shares to date, he referred this Court to the 1st respondent's Notice of Annual General Meeting, and the Financial Statements of

2009 dated 17th February 2010(at page 782 of the record) urging that the final dividend for the year ended 31st December 2009 was Kshs. 0.40 per ordinary share of kshs.0.50. The respondents contended that the prayer for dividends for subsequent years until full settlement was not pleaded neither had the claimed Kshs 2,662,932 for the year ending 31st December 2009 been strictly proved.

41. In the impugned judgment, the learned Judge rendered himself as follows:

> " 53. This court has combed through the evidence presented by the Plaintiff and is unable to find any evidence presented as to whether dividends declared for the year ended 31st December 2009 was at the rate 40 cents per share as he had sought. This claim was denied by the defendants and the onus was on Kamiti to prove every aspect of it. It is sad that the plaintiff is unable to obtain a favourable outcome on this limb because it seems just that he should have been paid a dividend for the year 2009 when he still held shares in the ESOP...."

42. It is a cardinal principle of civil law that he who alleges must prove. This obligation is rooted in Section 107(1) of the *Evidence Act*, which requires that a party asserting the existence of certain facts to gain a judgment, must prove that those facts exist. Specifically, Section 107(1) provides that;

> " Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
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> 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

43. In Mbuthia Macharia v Annah Mutua Ndwiga & another [2017] KECA 290 (KLR), the Court had this to say concerning the said section:

> " (15) Just like the learned trial Judge, we are not persuaded the appellant was able to prove the allegations of fraud regarding the transfer of suit premises to the 1st respondent. The Judge alluded to the provisions of section 107 of the *Evidence Act*, which deals with the burden of proof in any case and aptly stated that it lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden and we need not repeat....."

44. This principle of law is explained in Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14 as follows:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
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> The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential part of his case. There may therefore be separate burdens in a case with separate issues."(emphasis added)

45. The same principle was amplified in Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] KECA 423 (KLR) as follows:

> " Section 107 of the *Evidence Act* provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side."

46. In the instant appeal, the record indicates that the appellant pleaded the dividend for the year 2009. It also shows that he resigned on 2nd March 2010, that is, after the year of the pleaded dividend. The contestation is whether he proved that the dividend for the year ending 31st December 2009, was at the rate of 40 cents per share as pleaded. In his submission, the appellant referred to a Notice of Annual General Meeting (AGM), by the respondents, in his bundle of documents filed in court. On the agenda of the notice was the approval of dividend seen at paragraph 3 of the Notice as follows:

> " To approve a first and final dividend for the year ended 31st December 2009 of KES 0.40/= per ordinary share of KES 0.50/= each, subject to withholding tax, where applicable."

47. According to Black's Law Dictionary 9th Edition at page 565, a dividend is defined as:

> " A fund to be divided. The share allotted to each of several persons entitled to share in a division of profits or property. Thus, dividend may denote a fund set apart by a corporation out of its profits, to be apportioned among its shareholders, or the proportional amount falling to each. In bankruptcy or insolvency practice, a dividend is a proportional payment to the creditors out of the insolvent estate."

48. Simply put, a dividend is a reward paid to the shareholders for their investment in a company. As good practice, dividend is usually paid out of the company's net profits. It can be a specific monetary amount like a cash or stock dividend, or a general concept of a share allotted to each person entitled to a division of profits. When a company declares a dividend, it sets a record date when a person must be on the company's books as a shareholder in order to be eligible to receive the dividend.

49. The appellant submitted that he was entitled to dividends for the year 2009 and for the subsequent years until full settlement, for the reason that the company has continued to trade with his shares to date. We however, note that he pleaded for the dividend only for the year 2009. Additionally, he did not prove that the AGM was actually held, or that the dividend was eventually declared and paid.

50. Therefore, we have no basis to hold that he was entitled to be paid Kshs. 2,662,932.00 as dividend for the year 2009. We also decline to award dividend for the subsequent years since it was not pleaded, and in any case, the appellant was no longer on the company's books as a shareholder, in order to be eligible to receive the dividend, his shares having been remitted back to him when he resigned.

51. In the Cross-Appeal, the respondent faulted the learned Judge for finding that the variation of the Settlement Deed was not applicable to the appellant, yet this was not pleaded. The appellant on the

other hand supported the findings of the learned Judge. The learned Judge in finding that this issue was for his determination held that:

> 20. Part of Kamiti's case is that the Deed of Variation is invalid as against him and it had not received the approval of the Authority by the time he left the scheme. Although this was not expressly pleaded, it turned out to be an issue in the course of hearing in
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> which both the plaintiff and defence witnesses testified. Indeed, when Kamiti's lawyers made submissions on it, the defence were happy to respond without protesting that the issue was not pleaded (see pages 12, 13 and 14 of the defence submissions). Following the proposition in Odd Jobs vs. Mubia (1970) EA 476 this Court is bound to determine the issue.

52. This Court in G.K. Macharia & another v Lucy N. Mungai [1995] KECA 165 (KLR) quoted with authority the pronouncement of Duffus P, in Odd Jobs vs Mubia [1970] EA 476 as follows:

> " It is therefore the duty of the court to frame such issues as may be necessary for determining the matters in controversy between the parties. Apart from these provisions, the Court has wide powers of amendment and should exercise these powers in order to be able to arrive at a correct decision in the case and to finally determine the controversy between the parties. In this respect, a trial court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates and on which a decision is necessary in order to determine the dispute between the parties."

53. Also, in Mithamo & another v Mithamo [2024] KECA 1864 (KLR) this Court in determining whether the superior court was right in deliberating on the issue of trust that was not pleaded, held that:

> 35. It is trite that where a party seeks to anchor a claim on trust, the issue should be pleaded and particulars of trust given. Where this is not done, the opposite party has the right to move the court under the Civil Procedure Rules to have the pleadings struck off. Should the application for striking out of pleadings not be made, and it is followed by the issue of trust being addressed in evidence at the hearing and in submissions, it is assumed that the party has opted to forgo his right to challenge the pleadings, and acquiesced to the issue being determined by the court.
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> 36. Given the fact that the issue of trust was raised by both the parties and that during the hearing witnesses adduced evidence that touched on the issue of trust and that in the written submissions the issue was extensively addressed by both parties, it is clear that the issue was left for the determination of the court.
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> 37. Though unpleaded, the issue of trust therefore had to be determined, and must therefore be construed as having been left to the ELC for determination, and the ELC did not therefore err in determining this unpleaded issue."

54. We note that as much as the issue on invalidity of the Deed of Variation on the appellant was not pleaded, it was central to determining the value of the shares that the appellant was entitled to. The appellant pleaded that his shares value was Kshs. 103, 274, 010.00 at the time of his resignation. Further, the respondents' witness gave evidence in response to the validity of the Deed of Variation, and the respondent equally submitted on it. They did not object to its being raised during the proceedings on the ground that it was not pleaded. Consequently, we are not persuaded that there is need to depart from the holding in G.K. Macharia & another and Mithamo & another supra. Therefore, we find that the learned Judge did not err in determining it.

55. Regarding the question on whether the Deed of Variation was invalid with respect to the appellant, the learned Judge considered it at paragraph 24 to 26 of the judgment. When, or whether the Deed of Variation received the sanction of the Authority was contested. The 3rd defendant testified that the variation of the Deed of Settlement was approved by the CMA, on 3rd June 2009. According to the appellant however, the letter from CMA referred to at para. 23 of the impugned judgment, suggests that the Authority received the Deed of Variation and approved it on 10th May 2010.

56. The learned Judge considered this issue and concluded as follows:

> 25. Yet there is no evidence to support the assertion that the Deed of Variation was one of the Documents reviewed and approved by the Authority on 3rd June 2009. (the letter is reproduced in paragraph 19 of this Decision). The letter of 3rd June 2009 is fairly clear that the Authority considered "the application and reviewed the Trust Deed and Rules submitted therewith". The letter does not mention the Deed of Variation. Of some significance is that the date of the letter of the Authority is 3rd June 2009. Yet the Deed of Variation was dated 11th November 2009. How then it can be asked, was it communicating the approval of a Deed of Variation dated 11th November 2009 which would be 3 months later? This was not explained by the Defence, or their witnesses.

57. As to when exactly the Deed of Variation was sent to the Authority for approval and when it received the approval was not proved with any degree of certainty by either side. If the defence had any evidence to the contrary of what the appellant stated, that information reposed in their Trustees who allegedly sent the Deed for approval. They had the duty to avail it to the court. This they failed to do.

58. The plaintiff on the other hand produced evidence that the Deed was received on 12th May, 2010. The import of this is that the Deed of Variation had not been approved by the time the appellant was seeking to exercise his right on 2nd March 2010 to have the units transferred to himself, in an act of Redemption. It was therefore, invalid in his case. However, we reiterate that the appellant did not plead dividends for the subsequent years.

59. The next issue for consideration is whether the appellant is entitled to compensation for breach of contract/lost investment income. The general principle is that the damages awardable for breach of contract are compensatory in nature as stated in Halsbury's Laws of England Fourth Edition Reissue Vol 12(1) thus:

> " 941...The normal function of damages for breach of contract is compensatory. Damages are awarded, not to punish the party in breach, or to confer a windfall on the innocent party, but to compensate the innocent party and repair his actual loss. Compensation is normally achieved by placing the innocent party in the same position, so far as money can do, as if the contract had been performed. Only in exceptional circumstances do courts depart from this policy and award some greater or lesser sum. Ordinarily there is just one measure of damages in contract, which is the loss truly suffered by the promisee."

60. Thus, the claim for lost investment income for breach of contract is a claim for consequential loss. In Parabola Investment Limited & Ors vs Browallia Cal Limited & Ors (2011) QB 477 at 486, the England and Wales Court of Appeal, (Civil Division), identified the different ways in which consequential loss may be established as follows:

> " Some claims for consequential loss are capable of being established with precision (for example, expenses incurred prior to the date of trial). Other forms of consequential loss are

not capable of similarly precise calculation because they involve the attempted measurement of things which would or might have happened (or might not have happened) but for the defendant's wrongful conduct, as distinct from things which have happened. In such a situation the law does not require a claimant to perform the impossible, nor does it apply the balance of probability test to the measurement of the loss."

61. Further, the Court in Hadley v Baxendale supra held that:

> " Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

62. The appellant herein pleaded damages for breach of contract. He urged that the report by PW3 the expert witness, proved that if he had not invested with ESOP and chosen the international investments platform as at 31st December 2013, his shares value would have grown to Kshs. 2,743,790,430. Alternatively, that the value of his shares in full, would have given him Kshs. 1,550,477,792. In his view, he had proved his claim for loss of investment income. In rebuttal the respondent urged that the claim for loss of investment income was not foreseeable, nor was it communicated to the respondent when the contract was formed sometime in November 2006.

63. This Court explained the manner in which expert evidence should be treated in Ndolo v. Ndolo [2008] 1 KLR (GF) 742 as follows:

> " [B]ut as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say -"because this is the evidence of an expert, I believe it." That, we think, is the proper direction which a court dealing with the opinion of an expert or experts must give itself and the assessors when it is necessary to direct the assessors on such evidence. Of course, where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a court is satisfied on good and cogent grounds(s) that the opinion though it be that of an expert, is not soundly based, then a court is not only entitled but would be under a duty, to reject it".

64. We note that the expert witness did not lay a basis for the figures he provided. In our considered view, the projection of the investment income that in his opinion, the appellant would have made, can neither be considered foreseeable, nor was it communicated to the respondent when the contract was drawn in November 2006. This projection cannot be fairly considered to arise naturally by the parties herein. Therefore, this ground fails.

65. Lastly, the learned Judge awarded the appellant interest at court rate from the time of filing suit, which the appellant asserts ought to have been a commercial interest rate of 20% per annum, as supported by the 1st respondent's Equity Rate of Return for the year 2005 and 2006. The respondent on the other hand contended that the appellant did not prove that he should have been awarded 20% interest.

66. In the impugned judgement the learned Judge held that:

> "…. Yet even if I was to agree that a commercial rate was deserved and not the Court rates, no evidence was led in proof that the commercial rate was indeed 20% per annum. The law is that interest on special damages is awardable from the date of filing suit until payment. The amount due to the plaintiff is in the nature of special damages. In the absence of proof of the commercial rates, this court will award interest at Court rates."

67. Section 26 (1) of the *Civil Procedure Act* gives the courts the discretion to award interest in pecuniary judgments. This discretionary power must be exercised cautiously, judicially and in the interest of justice. The section states:

> " Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."

68. On the discretion of the court, we are guided by the decision in Mbogo & Another vs. Shah [1968] EA 98 where the Court held that:

> " The Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis justice."

We see nothing on record to convince us that the learned Judge misdirected himself, or that he exercised his discretion injudiciously or capriciously. We therefore, decline to interfere with his finding.

69. In the premise, both the appeal and the Cross-Appeal are found to lack merit and are dismissed.

Given that neither the appeal nor the cross appeal have succeeded, we order that each party shall bear their own cost of this appeal.

It is so ordered.

DATED AND DELIVERED IN NAIROBI THIS 24TH DAY OF OCTOBER, 2025

W. KARANJA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, C.Arb, FCIArb

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

Signed

Deputy Registrar