



**West Kenya Sugar Company Limited v Agriculture & Food Authority & another (Civil Appeal E973 & E981 of 2023 (Consolidated)) [2025] KECA 527 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KECA 527 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL E973 & E981 OF 2023 (CONSOLIDATED)  
AO MUCHELULE, GV ODUNGA & F TUIYOTI, JJA  
MARCH 21, 2025**

**BETWEEN**

**WEST KENYA SUGAR COMPANY LIMITED ..... APPELLANT**

**AND**

**AGRICULTURE & FOOD AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**BUTALI SUGAR MILLS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgement and Decree of the High Court at Nairobi (A. Mabeya, J.) dated 1st day of September 2023 in High Court (Commercial and Tax Division) Civil Case No. 168 of 2007)*

**JUDGMENT**

1. This judgement is in respect of two consolidated appeals being Nairobi Civil Appeal Nos. E973 of 2023 and E981 of 2023. The two appeals arose from the judgement delivered by the High Court Nairobi in High Court (Commercial and Tax Division) Civil Case No. 168 of 2007. On 16<sup>th</sup> October 2024 we, by consent of the all the parties, consolidated the two appeals and directed that the appellant in E973 of 2023, West Kenya Sugar Company E981 of 2023, Agriculture & Food Authority, be the 1<sup>st</sup> respondent/cross appellant and that Butali Sugar Mills Limited, a respondent in both appeals, be the 2<sup>nd</sup> respondent.
2. This is one of the many cases arising from what has been christened “the sugar wars” in this country. The main protagonists in this appeal, West Sugar Company Limited, the appellant herein, and Butali Sugar Mills Limited, the 2<sup>nd</sup> respondent herein have had more than their fair share of the litigation zone quarter in this country. The 1<sup>st</sup> respondent, Agriculture and Food Authority, formerly Kenya Sugar Board, (the Board) has been more than happy to referee the duels siding with one or the other at different times.



3. The genesis of this dispute was a Judicial Review application filed by the appellant, being Nairobi High Court Civil Miscellaneous Application No. 1127 of 2005 – R v Kenya Sugar Board ex parte West Kenya Sugar Company Ltd and Ministry of Agriculture and Butali Sugar Mills Limited (hereafter, the Judicial Review application). In the said application, the appellant sought to quash the decision made by the 1<sup>st</sup> respondent made on or about the 13<sup>th</sup> April 2005 to register the 2<sup>nd</sup> respondent to operate a Sugar Mill. It also sought an order of certiorari to remove into the High Court and quash the Certificate of Registration dated the 13<sup>th</sup> April 2005 issued by 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent. Further, the appellant sought to prohibit the 1<sup>st</sup> respondent from entertaining or granting a fresh application from the 2<sup>nd</sup> respondent to construct or operate a Sugar Mill within the West Kenya Zone.
4. The application was based on the fact that on 23<sup>rd</sup> September 2004, the Chief Executive Officer of the 1<sup>st</sup> respondent had issued an undertaking to the appellant that no other miller would be registered to operate a sugar mill within 24 km radial distance of the appellant’s mill. The said letter stated, inter alia, that:

“Please be assured that no other white sugar mill will be allowed to be installed and operate within the border landmarks of West Kenya Sugar Company Limited zone as outlined in our letter ref. KSB/C/WKS/VOL. 1 of July 2004, a copy of which is attached herewith for ease of reference. You are therefore advised and assured that your facility will enjoy the benefits of economics of scale through the expansion to utilise a higher proportion of the zone, as proposed.

You are hereby authorised to proceed with the implementation of the proposed expansion project as planned.

Your Sincerely

A.O. Otieno

Chef Executive Officer”

5. This letter, although not expressly stated, seemed to have been in response to the appellant’s letter to the 1<sup>st</sup> respondent, titled “The planned Expansion of West Kenya Sugar Company by the addition of a 1,500 TCD expandable to 2,500 TCD Plant” dated 11<sup>th</sup> September 2004 in which the appellant informed the 1<sup>st</sup> respondent that “for the viability of the project it is of utmost importance to have a secure zone within which cane development, infrastructure development and related planning can occur without interference”.
6. In a Board Paper prepared by the Chief Executive Officer of the 1<sup>st</sup> respondent who authored the letter dated 23<sup>rd</sup> September 2004, reference was made to an earlier communication by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent dated 10<sup>th</sup> June 2004 in which the 2<sup>nd</sup> respondent was informed that:

“We thank you for expressing an interest to invest in the sugar industry. Having reviewed and evaluated your proposal, we hereby wish to inform that the proposed location of your facility between Malava and Butali markets in Kakamega District lies within a radius of 10km of an existing sugar mill that is currently implementing a capacity expansion program that is likely to be adversely affected should you be allowed to proceed as planned. We therefore request that you identify an alternative site, preferably outside a 30 km radius of any other existing mill.”



7. In the Board Paper it was concluded that:

“It should be noted that this project proposal had been earlier submitted and presented to the Board as Miwa Sugar Company by the same investor and the Board passed a resolution to advise the investor to relocate the project to an alternative site due to its close proximity to the existing West Kenya Sugar Company.”

8. There was also on record a letter dated 3<sup>rd</sup> March 2005 from the then Assistant Minister for Justice and Constitutional Affairs, Hon Robinson Njeru Githae, requesting the Minister for Agriculture, Hon Kipruto Kirwa, to:

“...issue a letter to West Kenya Sugar Company Limited and also to the Kenya Sugar Board confirming that unless and until the law is amended, no sugar company in Kenya should be licensed within a radius of 40kms from each other.”

9. All these actions seemed to have been directed at the 2<sup>nd</sup> respondent's intention to set up a sugar mill within the area that the appellant perceived had been zoned to it. The decision by the 1<sup>st</sup> respondent not to register the 2<sup>nd</sup> respondent led to appeals to the Ministry of Agriculture and a plethora of cases between the appellant and the 2<sup>nd</sup> respondent. One such appeal resulted into the document from the Ministry of Agriculture entitled “Comments on Application for Registration and Licencing of Butali Sugar Mills” concluding that “the potential can adequately cater for the two sugar companies and even leave more potential for further expansion” and urging the 1<sup>st</sup> respondent to “reconsider their decision to defer registration of the Mill”. There is also a letter dated 24<sup>th</sup> March 2005 from the Ministry of Agriculture to the Ag. Chief Executive of the 1<sup>st</sup> respondent conveying the decision of the Inter Ministerial Technical Committee which was of the view that the appeal by the 2<sup>nd</sup> respondent had merit and recommending the need for the 1<sup>st</sup> respondent to revisit the 2<sup>nd</sup> respondent's application for registration.

10. These communications culminated into the decision by the 1<sup>st</sup> respondent on 12<sup>th</sup> April 2005 to approve the registration of the 2<sup>nd</sup> respondent as communicated by the 1<sup>st</sup> respondent to the Permanent Secretary Ministry of Agriculture vide the letter dated 13<sup>th</sup> April 2005. The 2<sup>nd</sup> respondent was eventually issued with Registration Certificate No. KSB-MREG-0009 to “enable you to continue with the implementation of the project” on LR No. Kakamega/Malava/303. It was however indicated in the letter dated 13<sup>th</sup> April 2005 transmitting the certificate of registration that the operating licence would be issued when the 2<sup>nd</sup> respondent was ready to start milling.

11. Aggrieved with the foregoing development, the appellant instituted the said Judicial Review application where it sought leave to institute the aforesaid judicial review proceedings. Also sought was that the leave, should it be granted, operate as a stay of proceedings in question decision pending the hearing and determination of the substantive application for judicial review. The said application, as we have stated, was hinged on the letter dated 23<sup>rd</sup> September 2004 emanating from the Chief Executive Officer of the then Kenya Sugar Board, the predecessor to the 1<sup>st</sup> respondent, in which seemingly an undertaking had been given to the effect that no other sugar mill would be registered to operate a sugar mill within 24km radial distance of its mill.

12. Upon considering the said application, the learned Judge, on 27<sup>th</sup> July 2005, found that, based on the allegations that the decision to register the 2<sup>nd</sup> respondent was a result of intervention by the Ministry of Agriculture, which had no mandate to register the 2<sup>nd</sup> respondent and acting ultra vires by revising the decision it had made and against the legitimate expectation of the appellant, the appellant had



established a prima facie case. The learned Judge further found that since the 2<sup>nd</sup> respondent had not started any construction or operation and in light of the offer to give undertaking, it was prudent to preserve the status quo. The learned Judge, accordingly, issued the following orders:

- a. Leave to apply for an order of certiorari to remove into the High Court of Kenya and quash the decision made by the respondent herein, the Kenya Sugar Board made on or about the 13<sup>th</sup> April 2005 to register Butali Sugar Mills Ltd to operate a Sugar Mill in accordance with Part III, section 14 of the Sugar Act, 2001.
  - b. Leave to apply for an order of certiorari to remove into the High Court of Kenya and quash the Certificate of Registration dated the 13<sup>th</sup> April 2005 by the Kenya Sugar Board to Butali Sugar Mills Limited.
  - c. Leave to apply for an order of prohibition, prohibiting the respondent herein, the Kenya Sugar Board from entertaining or granting a fresh application from Butali Sugar Mills Limited to construct or operate a Sugar Mill within the West Kenya Zone.
  - d. That leave granted do operate as a stay of proceedings in question provided the application for Judicial Review is prescribed within 21 days and served within 8 days and on further condition that the applicant's undertaking as to damages is filed with the Court on or before the close of the day on Monday, 1<sup>st</sup> August 2005.
  - e. That if both conditions are not met, the order that leave does operate as a stay shall automatically lapse.
  - f. That the costs to abide the outcome of the Judicial Review application.
13. Pursuant to the leave granted, the appellant filed an undertaking as well as the substantive application. The undertaking, which was dated 1<sup>st</sup> August 2005, was couched in the following terms:

“We, west kenya sugar company limited, the applicant herein refer to the order made by the Honourable Mr Justice Nyamu in the above matter on 27<sup>th</sup> July 2005 granting a stay in terms of prayer No. 3 in the applicant's application by way of Chamber Summons dated 27<sup>th</sup> July 2005 and hereby give our undertaking to abide by any order that the Court may make for the payment of damages that may have been sustained by reason of the said stay upon it being shown or demonstrated that the said order of stay ought not to have been made in the first place.”

14. The 1<sup>st</sup> and 2<sup>nd</sup> respondents were aggrieved by the grant of these orders and sought to have them set aside but before the applications could be finally disposed of, on 27<sup>th</sup> July 2006, the appellant entered into a consent and/or compromise with the 1<sup>st</sup> respondent to withdraw the Judicial Review application. The proceedings for the withdrawal are recorded as follows:

27.07.2006

Coram: Nyamu, J Njoroge – court clerk

Nyaoga/Amoko for the applicant

Mr Hayanga, Gakoi Ngige, Miss Hayanga for respondent

Miss Mwaniki for the 1<sup>st</sup> interested party Oraro/Ochieng for the 2<sup>nd</sup> interested party Mr Nyaoga:



We wish to withdraw the application as we have reached a settlement with the respondent as well as the 1<sup>st</sup> interested party with no order as to costs.

Mr Hayanga: We have no objection to the withdrawal Miss Mwaniki: I wish to confirm the position as per the applicant

Mr Oraro/Ochieng

I wish to state that the stay granted in the matter was against a licence issued to the 2<sup>nd</sup> interested party. Consequently the 2<sup>nd</sup> interested party has suffered damages as a result of that stay. The 2<sup>nd</sup> interested party is not party to consent to withdraw nor has it consented to any agreement. It is the option of the parties to withdraw its application but consequential relief – withdrawing with costs to us- without prejudice to the right of the 2<sup>nd</sup> interested party to take action to recover damages.

Mr Nyaoga:

1. The 2<sup>nd</sup> interested party was registered as a Miller and has never been issued with licence to operate – stay was not against a licence.
2. We sued the respondent and we are only seeking orders against the respondent. The 2<sup>nd</sup> interested party is not entitled to any costs as substantive parties have withdrawal (sic) the suit.

Ruling

As all the parties have agreed to have the matter withdrawn by the applicants except (sic) a reserve by the 2<sup>nd</sup> interested party's claim to costs and damages, I order that the application dated 5.8.2005 be and is hereby withdrawn. On the issue of costs I see no reason why they should not follow the event since the 2<sup>nd</sup> interested party was an affected party in terms of the relevant Order (53) and costs are awarded to it.

On the issue of damages, this claim is at the moment outside the purview of judicial review and I will leave it to the wisdom of the counsel for the 2<sup>nd</sup> interested party.

It is ordered.

J G Nyamu Judge.

15. Subsequently, the 2<sup>nd</sup> respondent, vide a plaint dated 30<sup>th</sup> March 2007, filed Nairobi High Court (Commercial and Tax Division) Civil Case No. 168 of 2007 – Butali Sugar Mills Limited v West Kenya Sugar Company Ltd & Kenya Sugar Board, in which it claimed against the appellant and 1<sup>st</sup> respondent, jointly and severally, Kshs.590,630,441.00 plus interest thereon at 18% pa from 1<sup>st</sup> August 2006 until payment in full as well as the costs of the suit. This claim, according to the 2<sup>nd</sup> respondent, was for loss incurred as a consequence of alleged unlawful interference of its business by the appellant and 1<sup>st</sup> respondent.
16. In its plaint, the 2<sup>nd</sup> respondent traced the history of the litigation as set out above and averred that the order issued in the Judicial Review application stayed its operations, transactions and business in connection with its objects and undertakings as a registered miller and that the actions of the appellant and 1<sup>st</sup> respondent amounted to unlawful interference with its business and investment and set out the particulars thereof. According to the 2<sup>nd</sup> respondent, by reason of that order, the 2<sup>nd</sup> respondent's



investment was delayed, negated and scuttled whereby it suffered loss and damage particularized at Kshs. 590,630,441.00 which it claimed against the appellant and 1<sup>st</sup> respondent.

17. The appellant opposed the suit vide the Re-Amended Defence dated 3<sup>rd</sup> December 2018. It contended: that the registration of the 2<sup>nd</sup> respondent was contrary to an established policy of the Ministry of Agriculture, the former Kenya Sugar Authority and the 1<sup>st</sup> respondent, not to allow the establishment of any new sugar factory within the recognized sugar zone of a radius of 40km of an existing sugar factory; that further, the registration was contrary to the 1<sup>st</sup> respondent's four previous decisions of refusal to grant the 2<sup>nd</sup> respondent a licence to operate a white sugar mill within the appellant's zone and the assurance by the 1<sup>st</sup> respondent not to allow any other sugar mill within the appellant's sugar zone whereby the appellant could proceed to expand its milling capacity at a cost of Kshs. 1.2 billion by an additional capacity of 1500 tonnes crushed per day "(TCD)" to 2500 TCD; that it was against the existing agreements between the appellant and area out growers and the appellant's legitimate expectation that its expansion programme would be honoured; that it had operated a sugar factory at South Kabras, Kakamega County since 1979 and that under the Crop Production and Livestock Act, Cap 321, no licence could be granted to set up a factory within 25 km from an existing factory; that the Sugar Act, 2001 did not compromise the vested rights of the existing sugar factories; and that vide a letter dated 11<sup>th</sup> October 2000, the Ministry of Agriculture demarcated to the appellant its sugar zone as specified therein.
18. While admitting that it lodged the Judicial Review application, the appellant contended that the same was meant to protect and further its own business interests and averred that the Judicial Review application was compromised vide an agreement dated 21<sup>st</sup> July 2006 by which the 2<sup>nd</sup> respondent was to relocate its factory from its site and be subsequently de-registered.
19. On the alleged unlawful interference of the 2<sup>nd</sup> respondent's business, the appellant denied the allegation and alleged that the Court lacked jurisdiction to determine most of the particulars pleaded in support thereof. It therefore denied the claim of Kshs. 590,630,441.00 and contended that the 2<sup>nd</sup> respondent had no cause of action as the Court of Appeal had declared that its license to operate its sugar mill was null and void.
20. In addition, the appellant issued a Notice of Claim against the 1<sup>st</sup> respondent dated 2<sup>nd</sup> March 2012 in which it alleged: that the 1<sup>st</sup> respondent made various representations and assurances, that it would not allow any other white sugar mill to operate within the zone allocated to it; that as a result of the said representations and assurances the appellant made investments of Kshs. 3.5 billion; that the 1<sup>st</sup> respondent, however, reneged on those representations and licensed the 2<sup>nd</sup> respondent which led to the filing of the Judicial Review application; and in the premises, that the 1<sup>st</sup> respondent should reimburse the appellant any award of damages that may be made against it in this suit.
21. In its defence dated 18<sup>th</sup> June 2007, the 1<sup>st</sup> respondent admitted entering into a consent with the appellant to have the Judicial Review application withdrawn and contended that the 2<sup>nd</sup> respondent could not question the efficacy thereof as it did not object to that consent at the time. It denied that the agreement of 21<sup>st</sup> July 2006 was meant to scuttle the business of the 2<sup>nd</sup> respondent or that there was any unlawful interference with the 2<sup>nd</sup> respondent's business. It contended that the particulars of unlawful interference raised issues of public law which the Court lacked jurisdiction to adjudicate upon and that the case, as framed, was an alleged infringement of the 2<sup>nd</sup> respondent's rights under public law and should have been litigated under Judicial Review and not by way of a suit. In conclusion, the 1<sup>st</sup> respondent contended that the Court lacked jurisdiction by virtue of section 31 of the Sugar Act, and denied that the 2<sup>nd</sup> respondent had suffered any loss.



22. As regards the appellant's claim against it, the 1<sup>st</sup> respondent admitted making representations and assurances but stated that they were subject to review and rescission. It denied that the appellant had invested Kshs. 3.5 billion on reliance on the said representations and contended that the appellant was solely liable for any damages arising out of the stay orders of 27<sup>th</sup> July 2005 as it had given an undertaking as to those damages. According to the 1<sup>st</sup> respondent, since the 2<sup>nd</sup> respondent was not party to the agreement of 21<sup>st</sup> July 2006, any breach of the undertaking given therein could not occasion any damages upon the 2<sup>nd</sup> respondent.
23. The 2<sup>nd</sup> respondent replied to the appellant's defence vide an Amended Reply to Defence dated 11<sup>th</sup> February 2019 in which it denied that its registration was unlawful and contended: that the issue of exclusive sugar zones had been determined and was res judicata; that the 1<sup>st</sup> respondent had no power to give the undertaking in the letter dated 23<sup>rd</sup> September 2004 to the appellant; and that the Court of Appeal had not declared its license a nullity as alleged by the appellant.
24. At the trial, the 2<sup>nd</sup> respondent called 2 witnesses while the appellant and the 1<sup>st</sup> respondent called one witness each.
25. Atul Shah (PW1), the Managing Director of PKF Consulting Ltd, adopted his witness statements and told the Court how his company was engaged by the 2<sup>nd</sup> respondent to consider and compute the 2<sup>nd</sup> respondent's claims. He explained the steps his company undertook before preparing the reports which he produced as PExh 1 and 2 respectively. It was his evidence that the claims were for loss of profits at Kshs. 135,975,479.00 escalation in costs at Kshs. 171,547,689.00, increase in construction costs at Kshs. 39,748,900.00, preliminary expenses at Kshs. 48,088,751.00, additional interest due to increase in LIBOR at Kshs. 15,204,240.00, loss of profits due to increase in the sale value of sugar at Kshs. 145,312,906.00 and interest accrued due to additional borrowing at Kshs. 34,752,476.00. In his opinion, the total claim was Kshs. 590,630,441.00.
26. In cross-examination, he stated that he was involved in the conceptualization for setting up the business plan for the 2<sup>nd</sup> respondent's sugar Mill as well as the carrying out of the feasibility study and that he had previously given transactional advice to, among others, Mumias Sugar, Transmara Sugar, Zanzibar Sugar, Kibos Sugar as well as in Uganda and Ghana. It was his evidence that the crop study showed that there was sufficient cane and land available to sustain the 2<sup>nd</sup> respondent's factory. He explained that he relied on both the feasibility study report of September 2004 and the crop report in preparing the report. To him, the initial planning was that it would have taken 12 months to construct the factory and in June 2004 a consultant was appointed who gave a time frame of 72 weeks for commissioning of the factory which would have been in June 2006. It was his evidence that when the factory was finally built in 2010, it took up to 16 months. He explained that the 2<sup>nd</sup> respondent could not begin operations until January 2007. He insisted that what he computed were actual expenses.
27. On the claim of interest, PW1 observed that as at the time the order was lifted, the rate of LIBOR had escalated from 3.5% to 10.11% and insisted that there was enough land for cane farming but that the stay order disrupted the project.
28. Jayantilal Patel (PW2), the Managing Director of the 2<sup>nd</sup> respondent, relied on his witness statements of 23<sup>rd</sup> November 2015 and 11<sup>th</sup> February 2019 and produced the 2<sup>nd</sup> respondent's documents as PExh 1 to 6. It was his evidence: that he had been in the sugar industry for 50 years and Butali Sugar factory was to be established on LR Kakamega/Malava/303 in July 2005; that the stay order paralysed the intended establishment of the Sugar Mill and as a result, the 2<sup>nd</sup> respondent suffered loss of Kshs. 590,630,441.00 as had been particularized by PW1; that the 2<sup>nd</sup> respondent applied for the EIA report on 22<sup>nd</sup> September 2004 and the same was granted on 11<sup>th</sup> July 2005 thereby paving the way for the



- works to start; that between 11<sup>th</sup> July 2005 and the date the order was served no contract of supply was entered into; that the 2<sup>nd</sup> respondent abstained from making any further investment after the order of stay was issued; and that the infrastructure works began in 2007 but because of other interferences, the works were completed in 2010 and the Mill commissioned in 2012 at the total cost of US\$4.9M.
29. When cross-examined by learned counsel for the 1<sup>st</sup> respondent, PW2 stated: that the appellant had objected to the registration of the 2<sup>nd</sup> respondent; that ever since being established, the 2<sup>nd</sup> respondent had co-existed with the appellant and had expanded to 3000 TCD while the appellant was at 6000 TCD; and that, the zoning was meant to assist the farmers in the transportation of the cane to the sugar factories.
  30. Jaswant Singh Rai (D1W1), the director of the appellant, was the sole witness for the appellant. He relied on his statements made on 9<sup>th</sup> November 2017 and 9<sup>th</sup> March 2020, and produced D1Exh1, 2 and 3 respectively. He told the Court: that each Sugar Miller has an own zone as per the letter dated 11<sup>th</sup> October 2000 by the Ministry of Agriculture; that the appellant made extensive sugar development on its zone by engaging farmers; that the 2<sup>nd</sup> respondent wanted to establish a sugar mill within the appellant's exclusive zone; that the appellant objected to the 2<sup>nd</sup> respondent's registration vide the Judicial Review application but the same was later withdrawn on agreement with the Ministry of Agriculture; that the 2<sup>nd</sup> respondent was never properly licensed; that the subject order did not refer to the 2<sup>nd</sup> respondent or stoppage of construction; and that the 1<sup>st</sup> respondent had agreed to the relocation of the 2<sup>nd</sup> respondent and the appellant was to pay the costs thereof; and that since the cost of the project was Kshs. 550M, the present claim of Kshs. 590,630,441.00 was unjustified.
  31. D1W1 denied that there was any excess cane in the region and asserted: that the 2<sup>nd</sup> respondent had not developed any cane and it intended to rely 100% on the appellant's cane development; and that in the event there was any liability, the same ought to be shouldered by the 1<sup>st</sup> respondent.
  32. In cross examination, D1W1 admitted that at the time he purchased the appellant from its former owners, there was provision for liability in respect of this suit but was unable to recall how much was the provision. He insisted that the appellant was entitled to challenge the decision of the 1<sup>st</sup> respondent vide the Judicial Review application and denied any disruption of the 2<sup>nd</sup> respondent's business as a result of the stay order. He admitted that although the particulars of the 2<sup>nd</sup> respondent's claim were served in 2007, none had been rebutted.
  33. Jude Chesire (D2W1), the 1<sup>st</sup> respondent's legal officer, testified on behalf of the 1<sup>st</sup> respondent and relied on his statements dated 24<sup>th</sup> October 2014 and 4<sup>th</sup> March 2019. He also produce D2Exh1 and 2 in support of his evidence and told the Court that there is no sugar license attached to any exclusive zone. According to him, the 2<sup>nd</sup> respondent was properly licensed and that the 1<sup>st</sup> respondent had no role in the filing of the Judicial Review application. He denied that the 1<sup>st</sup> respondent was liable to indemnify the appellant.
  34. In cross-examination, he admitted that the 2<sup>nd</sup> respondent complied with all the entire requirements for registration and confirmed that there was available adequate cane and land for cane development in the subject area. It was his evidence that upon being registered, the 2<sup>nd</sup> respondent was entitled to start the factory but the same was disrupted by the stay order. He explained that the appellant's grievance that it was expanding its production from 1000 TCD to 2500 TCD was baseless considering the circumstances on the ground. He denied that there was sugar zoning and blamed the Chief Executive Officer and Board of the 1<sup>st</sup> respondent for some of the decisions that had led to the appellant claiming inexistent rights. He admitted that the decision of the 1<sup>st</sup> respondent could be challenged through a



Judicial Review application but asserted that the Board had not sanctioned the assurances given to the appellant by its Chief Executive Officer.

35. After considering the case as presented before him, the learned Judge identified the issues for determination as: whether the Court had jurisdiction to determine the suit; whether the Court had jurisdiction to enforce the undertaking as to damages given in the Judicial Review application; whether there was unlawful interference with the 2<sup>nd</sup> respondent's business by the defendants in the case, jointly and severally; whether the 2<sup>nd</sup> respondent suffered any loss and damage as a result of such interference and if so, the quantum thereof; whether the appellant was entitled to be indemnified by the 1<sup>st</sup> respondent; and what orders as to costs should be made.
36. In his judgement, the learned Judge found: that the Judge in the Judicial Review application had the jurisdiction to impose the condition he did hence the undertaking was validly given; that the contention that only the Judge adjudicating the Judicial Review application on merit could determine if the stay order ought not to have been made in the first place was misplaced; that the submission that the appellant was protected by section 6 of the *Judicature Act* had no basis; that on the basis of the many cases filed by the parties, and in particular, NRB JR Appln No. 426 of 2014 - Republic v AFFA & 3 Others Ex parte West Kenya Sugar Company [2015] eKLR, and the fact that the parties to that application compromised the same without letting the Court pronounce itself thereon on merit, meant that the same may not have been necessary in the first instance; that the appellant had the opportunity to use the provisions of section 31 of the Sugar Act for appropriate remedy but chose not to; that although the appellant had a constitutional right to choose what it thought to be the most appropriate remedy to it, including the Judicial Review application, it must also be prepared to shoulder the obligation and the consequences that arise from its choice; and that accordingly, the Court had jurisdiction to look at the efficacy of that undertaking.
37. The learned Judge further held: that based on Halsburys Laws of England, 4th Edn Vol 24 Pare 983, Newcome v Coulson [1878] 7 CHD 764 and Church Road Development Ltd v Barclays Bank of Kenya Ltd & 2 Others [2006] eKLR, by terminating the Judicial Review application, the appellant was not absolved from having the enforceability of its undertaking being considered and that the Court had the jurisdiction to enforce the undertaking given by the appellant on 1<sup>st</sup> August 2005; that from the evidence on record, the 2<sup>nd</sup> respondent was able to show that as at July 2005 it was ready, able and willing to commence the construction of the factory; that the Judicial Review application was directed at preventing the 2<sup>nd</sup> respondent from opening or operating any sugar mill since it sought the cancellation of the 2<sup>nd</sup> respondent's Certificate of Registration which would have enabled the 2<sup>nd</sup> respondent to complete the elaborate plans and preparations that it had undertaken; that the stay of proceedings meant that the effect and efficacy of the 2<sup>nd</sup> respondent's Certificate of Registration had been stayed; that the order of stay had the effect of staying any further steps on the part of the 2<sup>nd</sup> respondent to realize the establishment and commissioning of a Sugar Mill; that the cumulative effect of the evidence of the reports by J.P Mukherji & Associates, West Kenya Agro-Developers Ltd and PKF Consulting Ltd, was that the 2<sup>nd</sup> respondent's sugar mill should have been ready by June 2006 and that there was enough cane to satisfy the 2<sup>nd</sup> respondent's projected milling of 500 TCD at commencement; that due to the order of 27<sup>th</sup> July 2005, the construction and commissioning of the mill was thrown into disarray; and that there were other intervening events which led to the same being realized in 2011 which were outside the purview of the case.
38. On the issue whether the order of 27<sup>th</sup> July 2005 was warranted, the learned Judge found: that the basis of the appellant's argument was that there were exclusive Sugar Zones for the respective Sugar Millers yet there was no evidence to show that there existed such a policy; that if there was such policy, the same



was protectionist and unlawful; that the assurances and representations relied on by the 2<sup>nd</sup> respondent were unlawful and had no basis in law; that the fears of lack of cane to support both factories were also proved to be misplaced; and that there was unlawful interference with the 2<sup>nd</sup> respondent's business between July 2005 and July 2006.

39. On the issue of damages, the learned Judge found: that the evidence on record was that as a result of the unlawful interference of the 2<sup>nd</sup> respondent's business, the 2<sup>nd</sup> respondent could not commence the construction and commissioning of the sugar mill by June 2006 as had been projected; that with the delay in the construction and commissioning of the Sugar Mill meant that there was lost opportunity; that the evidence of the 2<sup>nd</sup> respondent that it suffered loss and damage, which was quantified at Kshs. 590,630,441.00, was not displaced and or controverted; that the 2<sup>nd</sup> respondent could not put the actual cost as that would have meant making a claim on what happened in 2011 which was way beyond the interference period (2005- 2006); and that as a result of the unlawful interference of the 2<sup>nd</sup> respondent's business, the latter suffered loss and damage.
40. As for proof of special damages, the learned Judge found that, as regards the claim for loss of profits for delay of Kshs. 135,975,479.00, based on the unshaken evidence of PW1, this claim was proved; that as regards the claim for escalation in costs of machinery in the sum of Kshs. 171,547,689.00, based on the evidence of PW1, as detailed at pages 184 to 302 of PExh 2, this claim was proved to the required standard; that regarding the claim for increase on construction costs in the sum of Kshs. 39,748,900.00, since there was evidence that the 2<sup>nd</sup> respondent was ready to commence construction in July 2005 and PW1's evidence that due to remobilization of contractors, increases in labour, steel and cement prices in Kenya, there was increased construction costs as at October 2006 when mobilizing to start afresh, it was proved that there was increased construction costs; that however, the item on provision of project mobilization and cancellation claim was not explained hence the only amount of loss allowable was Kshs. 36,696,100.00; that with respect to the claim for additional interest due to increase in LIBOR in the sum of Kshs. 15,204,240.00, there was evidence that the project financing was partially equity funds through financing and from the evidence of PW1 which was not displaced, between July 2005 and October 2006, there was change in LIBOR interest rates; that however since there was another claim on interest, this claim was repetitive and was declined; that regarding the claim for preliminary expenses of Kshs. 48,088,751.00, the expenses allowable were those of 2005 which was Kshs. 7,480,875.00 and 7 months in 2006, which was Kshs. 10,786,563/70 hence the allowable amount was Kshs. 18,267,438/70; that regarding the claim for loss of profits due to sugar price change, COMESA period protection of Kshs. 145,312,906.00, based on the evidence that the factory would have been ready by June 2006 and the feasibility and crop study were clear on the availability of the cane, this claim was proved to the required standard and was accordingly awarded; and that on the claim for interest accrued due to additional borrowing of Kshs. 34,752,476.00 there was to be increased capital expenditure and construction cost already been determined to total Kshs. 211,296,589.00, hence the claim was proved and therefore allowed.
41. Accordingly, the Court held: that the 2<sup>nd</sup> respondent was able to prove its claim on a balance of probability, that due to interference with its business and the delay in constructing and commissioning of its factory; that the delay led to lost opportunity and an increase in the cost of the project; and that as a result, it suffered the following losses:-
  - a. loss of profits for delay – Kshs. 135,975,479.00
  - b. Escalation in costs of machinery – Kshs. 171,547,689.00
  - c. Increase in construction costs – Kshs 36,696,100.00



- d. Additional interest due to increase in libor – Nil
  - e. Preliminary expenses – Kshs. 18,267,438/70
  - f. Loss of profits due to sugar change COMESA period protection – Kshs. 145,312,906.00
  - g. Interest due to additional borrowing – Kshs. 34,752,476.00
- Total - Kshs. 507,799,612.00
42. We have, however, noted an arithmetic error in the above calculation. The total ought to be Kshs 542,552,088.70 instead of Kshs 507,799,612.00. It is clear that the figure in respect of(g) was not factored in by the learned Judge when calculating the final amount.
43. Regarding the issue whether the appellant was entitled to be indemnified by the 1<sup>st</sup> respondent, the learned Judge found that although the claim by the 2<sup>nd</sup> respondent arose out of the undertaking given by the appellant on 1<sup>st</sup> August 2005, there was an admission in the defence of the 1<sup>st</sup> respondent that it did make representations and assurances to the appellant as alleged; that the letter dated 23<sup>rd</sup> September by the CEO of the 1<sup>st</sup> respondent, gave the assurance that the appellants “sugar zone” was secure and no other miller would be licensed to operate therein; that it cannot lie in the mouth of the 1<sup>st</sup> respondent that it can make representations and assurances subject to rescission; that the general rule is that, where a party makes a representation which it knows to be untrue and the party to whom the same is made acts on it to its detriment, the party making the misrepresentation is liable to the innocent party for damages; that in the present case, although the 1<sup>st</sup> respondent sought to disassociate itself from the letter of 23<sup>rd</sup> September 2004 by its CEO, it cannot avoid the consequences of the wrongful acts of its officers; that in so far as the 1<sup>st</sup> respondent made representations and assurances to the appellant, which made the latter belligerently assert that there were sugar zones for which it was exclusively entitled to a portion, which was not the case both in law and fact, the 1<sup>st</sup> respondent could not escape the consequences; that the 1<sup>st</sup> respondent had to shoulder some blame for its own acts which led the appellant to the disastrous misadventure though not 100%; that since the appellant over stretched its reliance and asserted rights that never existed either in law and/or fact, it would shoulder 70% of the claim; that the appellant was therefore entitled to be indemnified by the 1<sup>st</sup> respondent to the extent of 30% of the loss and damage suffered by the 2<sup>nd</sup> respondent.
44. Consequently, the learned Judge entered judgement for the 2<sup>nd</sup> respondent against the appellant for Kshs. 507,799,612.00 out of which the appellant was entitled to indemnity against the 1<sup>st</sup> respondent to the tune of 30% on the damages. The said sum was ordered to attract interest at the rate of 12% per annum from the date of the suit until payment in full and the 2<sup>nd</sup> respondent was awarded the costs of the suit.
45. Aggrieved by this decision the appellant challenged the same on a whopping 20 grounds that:
1. The Trial Court erred in holding that the Plaintiff was able to prove its claim, on a balance of probability, that due to the interference with its business, there was delay in constructing and commissioning its factory which led to lost opportunity and an increase in the costs of the project.
  2. The Learned trial judge erred in finding that the commission of the Plaintiff’s factory would have been in June, 2006.
  3. The Learned trial judge erred in finding that the Plaintiff had suffered the losses specified in paragraph 102 of the Judgment.



4. Having found that the 2<sup>nd</sup> respondent made representations in its letter dated 23<sup>rd</sup> September, 2004 which were relied upon by the appellant, the Learned Judge erred in failing to hold it 100% liable.
5. The Learned trial judge erred in finding that the sum of Kshs. 507,799,612 should attract interest at the rate of 12% per annum from the date of the suit until payment in full.
6. The Learned trial judge erred in finding that the appellant is solely liable for the 1<sup>st</sup> respondent's (Plaintiff's) loss notwithstanding the fact that the 1st respondent's cause of action was founded on alleged unlawful interference by the joint actions and/or omissions of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
7. Whereas at paragraph 108 of the impugned judgment, the Learned Judge found, inter alia, that the 2nd respondent through its letter dated 23rd September, 2004 made representations and assurances that the appellant subsequently relied upon, the learned Judge erred in finding that the appellant was 70% responsible for the alleged consequences of the same whilst the 2<sup>nd</sup> respondent was found to be only 30% responsible for its own representations and assurances.
8. The Judgment dated 1<sup>st</sup> September, 2023 was entered against the appellant on the basis of assertions and its reliance on alleged unlawful assurances and representations of the 2nd respondent contained in the letter dated 23<sup>rd</sup> September, 2004 which the 1st respondent did not plead nor seek to have declared unlawful.
9. The Judgment dated 1<sup>st</sup> September, 2023 is replete with substantial errors borne of glossy and inadequate of salient facts, mischaracterization of pleadings and testimony on record and express misstatements of law that cumulatively worked to the detriment of the appellant.
10. The Learned trial Judge disregarded relevant constitutional provisions in the Judgment dated 1<sup>st</sup> September, 2023 thereby rendering the same unconstitutional in the following respects:-
  - i. The appellant has been penalized to pay damages on account of its reliance upon the representations and assurances of the industry regulator-the 2<sup>nd</sup> respondent-that it was legally bound to seek and comply with.
  - ii. The appellant challenged the 2<sup>nd</sup> respondent's decision to issue the Certificate of Registration dated 13<sup>th</sup> April, 205 pursuant to its legal rights under Section 8 and 9 of the *Law Reform Act*, Cap 26, Order 53 of the Civil Procedure Rules and Section 70 and 77 of the retired Constitution.
  - iii. The finding by the Learned Judge that he had jurisdiction to determine whether or not the appellant was justified to file Judicial Review Case No. 1127 of 2005 constitutes a manifest violation of the appellant's right to protection of law and the right to fair trial enshrined in Articles 27 and 50 of *the Constitution* respectively.
11. The Judgment dated 1<sup>st</sup> September, 2023 amounts to an ex post facto judicial determination given that it has deemed as illegal and illegitimate decisions and actions of the appellant that were not unlawful in 2005 when it filed Nairobi High Court Judicial Review Case No. 1127 of 2005 Republic vs Kenya Sugar Board and Others Ex-Parte West Kenya Sugar Company Limited.
12. Within the meaning and context of Articles 20,27,50,159 and 160 of *the Constitution* and the prevailing transitional challenges in the Sugar Sector, the Judgment delivered on 1<sup>st</sup> September,



2023 constitutes a complete negation of Justice and brings into disrepute the administration of justice in Kenya in the following respects:-

- i. The appellant's liability is founded on the letter of the 2<sup>nd</sup> Defendant dated 23<sup>rd</sup> September, 2004 whose validity was not challenged or pleaded in the Plaint dated 20<sup>th</sup> March, 2007
  - ii. The Judicial Review case was compromised pursuant to the Agreement dated 21<sup>st</sup> July, 2006 which basically conceded the appellant's case about the illegality of issuing a Certificate of Registration dated 13<sup>th</sup> April, 2005 to the 1<sup>st</sup> respondent.
  - iii. The 1<sup>st</sup> respondent did not challenge the withdrawal of the Judicial Review case.
  - iv. The Judicial Review Court did not make a finding that either the appellant was not justified to file the said case or that the order of stay was issued unlawfully or wrongfully.
  - v. In view of the above, besides the Court of Appeal, no other court had jurisdiction to re- open the judicial review case in order to determine whether or not the appellant was justified to file it.
13. The impugned judgment has been entered against the appellant on the basis that it was wrong relying on the assurances and representations of the 2<sup>nd</sup> respondent to file Nairobi High Court Judicial Review Case No. 1127 of 2005 Republic vs Kenya Sugar Board and Others Ex-Parte West Kenya Sugar Company Limited.
  14. Whereas the 1<sup>st</sup> respondent in its pleadings directed the primary blame of interference with its business on the 2<sup>nd</sup> respondent and prayed for judgment to be entered jointly and severally against both Defendants, the Trial Court without any explanation-has entered judgment against the appellant only.
  15. The learned trial judge erred in law and in fact in finding the appellant responsible for 70% liability despite finding that the 2<sup>nd</sup> respondent unlawfully gave assurances and representations to the appellant in its letter dated 23<sup>rd</sup> September, 2004.
  16. The Learned Judge erred in his findings on existence of sugar zones given that the unchallenged evidence before the Trial Court shows that Sugar Zones existed and in fact the 1<sup>st</sup> respondent was issued with a Certificate of Registration and ultimately the operating license on the basis that there was sufficient sugar zone in the appellant's sugar zone to be shared through the splitting of the same into two.
  17. The Learned Judge erred in declining to admit the appellant's 2<sup>nd</sup> Supplementary List of Documents (containing the Sugar Board Cane Census Report of 2009/10-2010/11) and the Witness Statement of the appellant made by Sohan Kumar Sharma on 23<sup>rd</sup> May, 2022.
  18. The Learned Judge erred in failing to consider the evidence and submissions of the appellant in determining the matters in dispute and issues in contention.
  19. By stripping the appellant of its rights to protection of law and delegitimizing its right to access the High Court for legal redress, the Judgment dated and delivered on 1<sup>st</sup> September, 2023 constitutes a gross miscarriage of justice and unconstitutional exercise of judicial power.
  20. The Judgment dated and delivered on 1<sup>st</sup> September, 2023 amounts to an unjust enrichment of the 1<sup>st</sup> respondent.



46. The appellant prayed that the Judgment and Decree dated 1<sup>st</sup> September, 2023 be set aside and that the costs of this appeal and of the suit be awarded to it.
47. Similarly, the 1<sup>st</sup> respondent was dissatisfied with part of the judgement that found it liable to indemnify the appellant and filed Civil Appeal No. E981 of 2023 on the grounds that:
1. The Trial Court erred in its findings that an admission of culpability arose in the appellant's Defence to the 1<sup>st</sup> respondent's Statement of Claim dated 16<sup>th</sup> March, 2012 specifically with respect to the authorship of the dubbed "Letter of assurance" dated 23<sup>rd</sup> September, 2004.
  2. The Trial Court erred in finding that the appellant was liable for individual actions committed ultra vires and in abuse of office perpetuated by the 2<sup>nd</sup> respondent's former Chief Executive Officer in the letter dated 23<sup>rd</sup> September, 2004 through which unsanctioned assurances were made without the knowledge or authority of the appellant's Board.
  3. The Trial Court erred in failing to consider and make a finding that no legality could be accorded to the letter dated 23<sup>rd</sup> September, 2004 as it not only purported to confer the 2<sup>nd</sup> respondent a benefit that is contrary to the Sugar Act, 2021 but also countermanded the statutory mandate of the appellant under Section 14, 15 and 16 of the Act.
  4. The Trial Court erred in failing to consider and make a finding that the letter dated 23<sup>rd</sup> September, 2004 was not only illegal but equally wholly unenforceable in favour of the 2<sup>nd</sup> respondent on account of the fact the same was procured on specific terms at the request by the 2<sup>nd</sup> respondent to give comfort to its bankers in respect of its request for financing.
  5. The Trial Court erred in failing to consider and make a finding that the 1<sup>st</sup> respondent having actively participated in the procurement of an illegality through the letter dated 23<sup>rd</sup> September, 2004 is prohibited from benefiting from such illegality and cannot seek to enforce the said letter for any form of relief.
  6. The Trial Court erred in fact and in law by enforcing the illegal and unsanctioned representations in the letter dated 23<sup>rd</sup> September, 2004 in favour of the 2<sup>nd</sup> respondent despite making a clear determination that the Claim by the 2<sup>nd</sup> respondent solely arose out of the Undertaking given to it by the 1<sup>st</sup> respondent.
  7. The Trial Court erred in finding that the 2<sup>nd</sup> respondent was entitled to be indemnified by the appellant to the extent of thirty percent (30%) of the loss and damage suffered by the 1<sup>st</sup> respondent.
48. The 1<sup>st</sup> respondent prayed that part of the judgment and Decree that found it culpable to indemnify the appellant to the extent of 30% of the loss and damage suffered by the 1<sup>st</sup> respondent herein, be set aside and that the costs of this appeal and the suit be awarded to it.
49. When the appeal was called out for hearing on the Court's GoTo virtual platform on 16<sup>th</sup> October 2024, learned counsel, Mr Kibe Mungai, appeared with learned counsel, Ms Lagat, for the appellant, learned counsel, Mr Julius Kemboi, appeared with learned counsel, Ms Okina, for the 1<sup>st</sup> respondent/cross appellant and learned counsel, Mr James Ochieng Oduol, appeared with learned counsel, Mr Miller Bwire, for the 2<sup>nd</sup> respondent. Learned counsel informed us that they had filed their submissions which they relied on and briefly highlighted. The appellant's submissions, filed by the firm of Kinoti, Kibe & Co Advocates were dated 27<sup>th</sup> March 2024. The 1<sup>st</sup> respondent's submissions dated 5<sup>th</sup>



June 2024 were filed by Kemboy Law Advocates. The 2<sup>nd</sup> respondent's submissions were filed by TripleOKLaw Advocates LLP were dated 31<sup>st</sup> May 2024.

50. We have considered the submissions made on behalf of the parties as well as the record as placed before us. From the grounds of appeal and the submissions made before us, the following issues fall for determination:

1. Whether the appellant was justified in filing the judicial review application.
2. Whether it is necessary for the Court to make a finding that the stay ought not to have been sought before the undertaking can be enforced and whether the learned Judge erred in finding that that the stay order ought not to have been made.
3. Whether the High Court was the proper forum to issue a relief in respect of an undertaking given in judicial review proceedings.
4. Whether the 2<sup>nd</sup> respondent was the correct party to seek compensation in proceedings where the respondent was the 1<sup>st</sup> respondent.
5. Whether the High Court can give relief that is not expressly provided for under section 8 of the Law Reform Act or Order 53 of the Civil Procedure Rules such as special damages.
6. Whether the appellant was protected by section 6 of the Judicature Act.
7. Whether the 2<sup>nd</sup> respondent's claim was proved.
8. Whether the award of interest from date of filing suit till date of payment was proper.
9. Whether the Court erred in apportioning liability between the appellant and the 1<sup>st</sup> respondent at 70:30.

51. Before we delve into the merits of the submissions put to us, we restate this Court's mandate on a first appeal as set out in rule 31(1)(a) of the rules of this Court which is to reappraise the evidence and draw our own conclusions. In determining this first appeal from the decision of the trial court, we are alive to our mandate as espoused in the case of Ng'ati Farmers' Co- operative Society Ltd v Ledidi & 15 Others [2009] KLR 331 that:

“An appeal to this Court from a trial by the High Court is by way of re-trial 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 witness and should make due allowance in that 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.”

52. Similar view was expressed in Abok James Odera T/A A.J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, where this Court held that:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine



whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

53. This mandate was reiterated in the case of *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212 as follows:

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

54. While we appreciate that we may, in appropriate cases, reverse or affirm the findings of the trial court in *Peters v Sunday Post Limited* [1958] EA 424, the predecessor of this Court, stated that:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.”

55. In determining the issues in this appeal, we do not intend to sequentially follow the manner in which they are set out above. Rather, we shall go by the sequence in which the submissions were made.

56. In support of its appeal, the appellant submitted: that the 2<sup>nd</sup> respondent’s claim was founded on a registration and licensing process that ultimately was declared unlawful by this Court; that pursuant to sections 8 and 9 of the *Law Reform Act*, Cap.26 and Order 53 of the Civil Procedure Rules, the appellant had a right to file the Judicial Review application to challenge the decision of the 1<sup>st</sup> respondent in exercise of the appellant’s right under sections 70 and 77 of the retired Constitution that enshrined the right to protection of the law and fair trial; and that the trial court erred in finding that the appellant was not justified to file the Judicial Review application.

57. In its submissions, the appellant relied on the decision in the case of *Chatur Radio Service v Pronogram Limited* [1994] eKLR which held: that the undertaking is given in by a plaintiff in civil proceedings to protect a defendant who may suffer by the wrongful issuance of the injunction; that upon hearing on merits, the trial Judge must find that the injunction ought not to have been granted before the undertaking can be enforced; and that the defendant is entitled to an inquiry as to the damages if the plaintiff ultimately fails on the merits.

58. It was the appellant’s case: that since the undertaking relied upon in the 2<sup>nd</sup> respondent’s suit was given in judicial review proceedings, several jurisdictional issues arise from the claim; that the High Court cannot give a relief that is not expressly provided for under section 8 of the *Law Reform Act* or Order 53 of the Civil Procedure Rules; that since the orders that were sought in the Judicial Review application could not be issued against the 2<sup>nd</sup> respondent, it was untenable for the trial court to find that the order of stay interfered with its business; that only the Judge adjudicating the Judicial Review application on merits could have jurisdiction to determine whether the order of stay was issued wrongfully and further, the party to be protected would be the 1<sup>st</sup> respondent against whom the judicial review orders were sought; that the trial court had no jurisdiction to determine whether or not the subject undertaking was wrongfully issued as that would amount to sitting on appeal in respect of the concluded judicial review proceedings.



59. In response, it was submitted on behalf of the 2<sup>nd</sup> respondent: that the suit before the High Court was for enforcement of an undertaking as to damages issued to the Court since the 2<sup>nd</sup> respondent sought special damages for losses suffered as a consequence of the stay order issued in the Judicial Review application, for which losses the appellant issued an undertaking as to Damages, to the Court; that on the authority of the case of *Chatur Radio Service v Pronogram Limited* [1994] eKLR, this Court adopting the holding of Turner, LJ in *Newby v Harrison* [1861] 3 De GF & J 287, restated the law, that a party who gives an undertaking of this nature puts himself under the power of the Court, not merely in the suit but absolutely; that the undertaking issued to a court cannot be resiled/renege; that such an undertaking issued to court can be enforced not necessarily by the Court in which it is filed, but by any court having jurisdiction to try a disputation incidental to the issues touching on the undertaking; that since special damages have to be succinctly pleaded and strictly proved, the High Court (Commercial Division), being the Court of original jurisdiction, had the proper jurisdiction to enforce the undertaking, in light of the observation by Nyamu J (as he then was) that damages for losses arising from the undertaking were outside the purview of Judicial Review; that on the authority of *Church Road Development Co. Ltd v Barclays Bank of Kenya Ltd & 2 others* [2006] eKLR, *Newcomen v Coulson* (1878) 7 Chd 764 and *Halsbury's Laws of England*, 4th Edition, Vol. 24 paragraph 983, despite the withdrawal of Judicial Review application in which the undertaking was issued, the party giving the undertaking was not excused from making good its undertaking; that the withdrawal of a suit in which an undertaking was issued places a plaintiff in the stead of a party that has lost the suit and the undertaking could only be discharged if the Court in the Judicial Review application determined that the appellant's suit had merit; that by withdrawing the suit, the appellant denied the Court the opportunity to make such determination, thus the liability under the undertaking crystallized/accrued; that it matters not that the appellant had a right to file the Judicial Review application, or whether the appellant had merits for filing the said suit thus the undertaking having been ordered and filed, could only be discharged if the appellant was declared successful in Judicial Review application; that on the authority of the case of *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* [2010] eKLR since there is no Notice of Appeal or appeal filed against the order of the High Court in the said application, this Court has no jurisdiction to sit on appeal on the order; that the Order of Nyamu J. (as he then was) having been issued by a court of concurrent jurisdiction, the High Court (Mabeya J.) had no jurisdiction to sit in appeal thereof and could only enforce it; and that the appellant having freely and voluntarily consented to the execution of the undertaking as to damages and having obtained the advantage thereunder of curtailing the construction of the 2<sup>nd</sup> respondent's plant for a period of 1 year, appellant was bound by the terms and obligation of the undertaking and cannot be heard to avoid liability.
60. From these submissions, the issues that arise are whether, the High Court was the proper forum to deal with the enforcement of the undertaking given in judicial review proceedings and whether the undertaking had matured in order to give rise to a claim for damages under it.
61. According to the appellant the claim for damages could only have been made before the judicial review court that granted the conditional stay. This submission seems to contradict the appellant's own submissions that the High Court granted a relief that could not be granted in judicial review proceedings. The conditional stay order was clear that the leave granted was to operate as a stay of proceedings in question provided, inter alia, that the applicant's undertaking as to damages was filed with the Court on or before the close of the day on Monday, 1<sup>st</sup> August 2005. Our understanding of the said order was that the appellant was required to undertake to pay any damages in the event that the stay sought and granted ought not to have been granted as a condition for the grant of the stay order. That being the case, and as the appellant rightly appreciated, the law as existed then, did not provide for the relief of damages in judicial review proceedings. A court, it has been held has the power to ensure



that its order is implemented. In our view, the only way in which the conditional stay order could be implemented was by filing a suit for damages and therefore the High Court was the right forum in which the claim for damages could be determined. The filing of the suit for the enforcement of the undertaking before the High Court as opposed to the Judicial Review Court cannot be faulted.

62. Tied to the above issue is the question as to whether only the Judge adjudicating the Judicial Review application on merits had jurisdiction to determine whether the order of stay was issued wrongfully. With respect to the appellant, this position cannot be correct. Once the judicial review application was withdrawn, the proceedings therein came to an end and the Judge, in those proceedings, became *functus officio* and could not thereafter interrogate whether the stay was properly granted. If the parties wanted that question to be determined by the learned Judge, they ought to have sought for the same before the withdrawal of the Judicial Review application. Once the same was withdrawn, it was upon the Court determining damages to make a finding as to whether, in the circumstances of the case, the stay was properly sought by the appellant and granted. This must be so because it is only in the subsequent proceedings that the circumstances under which the withdrawal was made could be brought to the attention of the Court. We find nothing wrong with the High Court being called upon to determine whether or not the stay ought to have been sought by the appellant. In this case, as rightly submitted by the 2<sup>nd</sup> respondent, the direction by Nyamu, J (as he then was) that the issue of damages was “at the moment outside the purview of judicial review” was not challenged. We therefore find no merit in the contention by the appellant that the High Court had no jurisdiction to determine whether or not the order of stay was properly sought and made.
63. We must however make it clear that the Court determining the issue subsequently cannot, where the judicial proceedings were not determined on merits, purport to enter into an investigation as to whether the judicial review proceedings were merited. The Court’s jurisdiction is limited to making a finding as to whether, in the circumstances of the case, the applicant was justified in seeking the order of stay.
64. The appellant contended that the 2<sup>nd</sup> respondent was not entitled to enforce the undertaking since the party which was meant to be protected by the undertaking was 1<sup>st</sup> respondent against whom the judicial review orders were sought. Judicial review proceedings, it ought to be reiterated, are totally different from any other ordinary civil proceedings since the orders therein are sought in the name of the Republic (See *Farmers Bus Service & Others v The Transport Licensing Appeal Tribunal [1959] EA 779*). In this case the application was made by *The Republic v Kenya Sugar Board exp West Kenya Sugar Company Limited and The Ministry of Agriculture & Butali Sugar Mills Limited*.
65. The undertaking is however given to the Court and not to a specific party. The rationale for giving undertakings as to damages was explained by the Royal Court of Jersey in the case of *Morelli v Morelli [2021] JRC 221* where it was held that:

“The starting point is to recognise that a plaintiff obtaining an injunction prior to judgment by which the assets in the hands of the defendant are restrained so as to provide comfort for the plaintiff that, if successful at trial, the judgment can be duly enforced, obtains relief against the defendant before the validity of the claim has been established. That being so, there will be cases where the plaintiff does not succeed at trial: and thus, with the benefit of hindsight, was clearly not entitled to the relief which he obtained. It is because obtaining that relief might cause the defendant loss that the plaintiff is required to give an undertaking in damages”



66. Nevertheless, it cannot be gainsaid that more often than not, in such proceedings, it is not the nominal respondent that stands to suffer by the grant of stay or the final orders but a party interested in the proceedings. In this case, leave was granted to “operate as a stay of proceedings in question”.
67. In order to determine what amounted to “proceedings in question” one must consider the prevailing circumstances. In this case, the 2<sup>nd</sup> respondent had already been issued with a Certificate of Registration and what was pending was the issuance of the operation licence. It follows that the proceedings in question could only refer to steps leading to issuance of the operations licence. It was that licence that would have enabled the 2<sup>nd</sup> respondent to commence the milling business. By the grant of the stay, it was the 2<sup>nd</sup> respondent who was adversely affected since the questioned proceedings which were stayed related to the steps leading to the grant of the Operations Licence. In our view, where a Judicial Review Court issues a conditional stay, in enforcing the undertaking given thereunder, it is not necessarily the nominal respondent that must commence the proceedings. Any person, who was, reasonably in the contemplation of the court and the applicant, likely to be adversely affected by the order has the right to commence proceedings for the enforcement of the undertaking. There is no doubt that the 2<sup>nd</sup> respondent was in such a position. We find that the 2<sup>nd</sup> respondent had the necessary *locus standi* to institute the said proceedings and agree with the learned Judge that:

“The stay of proceedings in order No. 4 of the order of 27/7/2005 meant that the effect and efficacy of the plaintiff’s Certificate of Registration had been stayed.”

68. The appellant’s argument is that since the order of stay was directed at the nominal respondent, the 1<sup>st</sup> respondent herein, there was no order directed at the 2<sup>nd</sup> respondent restraining it from proceeding with its plans. While on the face of it, the order only stayed the proceedings leading to the issuance of the licence and did not stop any construction, in determining the damages arising from such an order, it is our view that the Court ought to look at the matter holistically. The construction that the 2<sup>nd</sup> respondent intended to undertake were depended on the issuance of the Operations Licence. With the suspension of the proceedings leading to the issuance of that licence, it was only prudent that any intended construction be suspended. It is the Operation Licence that would have given the 2<sup>nd</sup> respondent the greenlight to start milling. By obtaining an order staying proceedings, the appellant in effect obtained orders freezing further actions by the 2<sup>nd</sup> respondent since without obtaining the Operation Licence, any step taken by the 2<sup>nd</sup> respondent would have been stillborn. Kevin Costello: *Costs Principles and Environmental Judicial Review*, Irish Jurist, 2000, New Series, Vol. 35 (2000), pp. 121-148 notes that:

“Where the respondent is a licensing body the applicant may seek a stay suspending the effect of the decision to authorise the activity. Under established principles an undertaking in damages may have to be given to the respondent. This is unlikely, since the respondent, being simply an adjudicative institution, is unlikely to suffer any economic loss through having its order suspended. Under the new principle, an undertaking may also have to be given to the organisation seeking the licence in order to compensate it for any economic loss suffered in the postponement of its activity.”

69. In our view, in determining to what extent the undertaking applies, a narrow approach should not be adopted. Rather, the Court should adopt a holistic view in order to determine which party stood to be affected by the stay order.
70. The next issue for determination in respect of the submissions above, is whether the undertaking given by the appellant had matured in order for it to be enforced. According to the 2<sup>nd</sup> respondent, the



withdrawal of the Judicial Review application, without it being heard and determined on its merits was sufficient for the purposes of the enforcement of the undertaking and no further inquiry was required to be made by the High Court as regards the appellant's liability. It was submitted that there was jurisdiction under Order 53 Rule (3) of the Civil Procedure Rules for the judge in Judicial Review application to impose a condition for leave to operate as stay; that the liability of the appellant under the undertaking as to damages crystallised/accrued upon withdrawal of the application thus its merits ended and were not live for determination in a suit for enforcement of the undertaking; that the subsequent proceedings were purely for determination of the question of quantum of damages, not on whether the issuer of the undertaking was liable; that irrespective of the finding on the verity by the appellant to file the Judicial Review application, the appellant was already liable for provable losses under the undertaking.

71. The appellant, on the other hand, contends that, based on *Chatur Radio Service v Pronogram Limited* (supra), it was necessary for the Court to make a finding that the stay was improperly sought.
72. We appreciate that cases based on enforcement of undertaking in damages are few and far apart. Accordingly, the procedure for enforcement of undertaking as to damages in this country, unlike in some commonwealth jurisdictions, is rather grey. According to *Morelli v Morelli* (supra), following the English procedure, enforcement of the undertaking is a two-step process: first the applicant must seek leave, which, if granted, will then be followed by a hearing to assess the recoverable damages. The learned Judge in that case expressed himself as hereunder:

“As far as I am aware, this is the first occasion on which the Royal Court has been asked to order an inquiry into damages pursuant to the undertakings given by a plaintiff in obtaining injunctions ex parte in an Order of Justice. It is certainly the case that I have not been provided by either party with examples of cases in Jersey where this has happened before. There are also no rules of court which have been made to date in this respect. It is right, therefore, that I set out what I conceive to be the law and procedure which I should follow. In doing so, I have had close regard to a number of English cases, as will be apparent from the citations below. I am satisfied that this is the appropriate course: the practice directions which we have adopted in Jersey for obtaining ex parte injunctions have been taken from comparable practice directions and cases in England and Wales. I accept that the first step in the process is for the defendant in these circumstances to apply to the court to exercise its discretion to order an inquiry into damages and give such consequential directions as may be appropriate.”

73. Baker and Partners in an article: *Enforcing the Undertaking in Damages-New Developments in Jersey* opine that:

“The court's involvement is required because an undertaking in damages, while often regarded as ‘the price’ for obtaining an ex parte injunction, does not operate as a contract between the plaintiff and defendant but is a promise given to the court. Only with the court's leave can it be enforced. Because the court may be required to rule on factual issues (including the enforcing party's conduct), both the leave hearing and the damages hearing should be constituted by a judge and jurors.”

74. The position mirrors that in *Morelli v Morelli* (supra) where the case of *SCF Tankers Limited* (formerly known as *Fiona Trust and Holding Corporation*) and *Others v Yuri Privalov and Others* [2017] EWCA Civ 187 was cited and in which it was stated by Beatson, LJ. that:



- "40. It is well established that the purpose of the cross-undertaking in damages and liability under it is to protect a party who is subjected to such an injunction preventing him from doing something but who subsequently prevails at the trial of the action from loss caused by the injunction; see *Hoffman-La Roche and Coy Secretary of State for Trade and Industry* [1975] 2 AC 295 at 361, per Lord Diplock. The court has discretion whether or not to enforce a cross undertaking in damages." [Underlining ours].
75. In order to determine this issue, it is important to ascertain the substance of the order. According to the order, as issued by the Court, the stay was on "condition that the applicant's undertaking as to damages is filed with the Court on or before the close of the day on Monday, 1<sup>st</sup> August 2005". In compliance with the said order, the appellant, on 1<sup>st</sup> August, 2005 did file an "undertaking to abide by any order that the Court may make for the payment of damages that may have been sustained by reason of the said stay upon it being shown or demonstrated that the said order of stay ought not to have been made in the first place." Neither the Court nor the parties took issue with the manner in which the undertaking was given. It must therefore be taken to have been properly given otherwise there would be nothing to enforce.
76. That being the position, it is clear from the undertaking that the appellant's liability was conditional "upon it being shown or demonstrated that the said order of stay ought not to have been made in the first place." From the order, the appellant's liability with respect to the undertaking would only accrue upon it being shown or demonstrated that the order ought not to have been made in the first place. The burden was therefore upon the person intending to enforce the undertaking to show or demonstrate that the stay order ought not to have been sought and given. The position adopted by the 2<sup>nd</sup> respondent that "the withdrawal of a suit in which an undertaking was issued places a plaintiff in the stead of a party that has lost the suit and the undertaking could only be discharged if the Court in the Judicial Review application determined that the appellant's suit had merit" cannot therefore be entirely correct. Mere withdrawal of the application did not necessarily mean that the stay ought not to have been granted or that the appellant lost the case. This is the perspective of I.C.F. Spry in *Specific Performance, Injunction, Rectification and Equitable Damages*, 8<sup>th</sup> ed. (United Kingdom: Sweet & Maxwell, 2010), who notes in relation to enforcement, at 655 that:
- "In order that the Court may conclude that the defendant should be compensated pursuant to an undertaking earlier given by the plaintiff, it is generally necessary that he should be able to show that the interlocutory or interim injunction in question has been wrongly obtained, wrongly, that is, in the sense that if the matters in issue had been able to be fully investigated at the interlocutory application it would have appeared that the plaintiff was not entitled to relief and accordingly no injunction would have been granted or, alternatively, that an injunction would have been granted on materially narrower terms."
77. Suits are withdrawn for many reasons including the change in the circumstances and or by the happening of an event that makes it unnecessary to continue with the suit. What the Court enforcing the undertaking ought to determine is whether in the circumstances giving rise to the withdrawal, the applicant unequivocally got the relief it set ought to obtain in the application. The Court of Appeal for British Columbia in the case of *Ralph's Auto Supply (B.C.) Ltd. v Ken Ransford Holdings Ltd* 2020 BCCA 120 which was an appeal from an order of the Supreme Court of British Columbia cited



A.A.S. Zuckerman's: The Undertaking in Damages – Substantive and Procedural Dimensions (1994), 53 Cambridge L.J. 546 at 567 where it is stated that:

“A question may arise whether a judgment which is given not on the merits but for some other reason constitutes final judgement for the purpose of enforcing the undertaking. Where the defendant's claim under the undertaking rests on the assertion that the interlocutory injunction interfered with his rights, it might be said that in the absence of a judgment recognizing his claim he should not be awarded damages unless he can prove his right to do the unrestrained act. It seems however, more reasonable to hold that the defendant should be entitled to damages whenever the action in respect of which the interim injunction was given comes to an end without vindicating the plaintiff's claim. The reason for preferring this last view has to do with the stance that applicants for interim relief take. A plaintiff who applies for an interlocutory injunction justifies his attempt to interfere with the defendant's freedom by arguing that the restraint is essential for protecting those of the plaintiff's rights which he undertakes to prosecute and established by final judgement.

The interim injunction is therefore a crutch for supporting the plaintiff's rights pending litigation.” [Emphasis added].

78. In other words, the success of the proceedings depends, not just on the act terminating the proceedings, but also the reasons for their termination. Spry (supra) at p. 654 states that:

“If the plaintiff discontinues his proceedings before they reach a final hearing it may be appropriate that he be required to compensate the defendant pursuant to any previous undertaking that he has given, but this is not necessarily the case, and the reasons for discontinuance as well as any relevant supervening events and other relevant considerations, are taken into account by the Court in determining what is most just in all the circumstances.”

79. We disagree with the 2<sup>nd</sup> respondent's position that “by withdrawing the suit, the appellant denied the Court the opportunity to make such a determination” on whether or not the stay ought to have been made. While that statement may be true on some occasions, it is not the position in all cases. The 2<sup>nd</sup> respondent's position that “the liability under the undertaking crystallized/accrued” and “it matters not that the appellant had a right to file the Judicial Review application, or whether the appellant had merits for filing the said suit thus the undertaking having been ordered and filed, could only be discharged if the appellant was declared successful in Judicial Review application” is clearly incorrect. The appellant's liability was not “absolute” as the 2<sup>nd</sup> respondent submits, but was conditional upon a finding that the stay ought not to have been made.

80. The position was explained by Muli, JA in *Chatur Radio Service v Pronogram Limited* (supra) where he expressed himself as hereunder:

“The respondent's application was for a temporary injunction which the Court granted. The respondent's suit for, inter alia, infringement of the copyright was dismissed for want of prosecution. The respondent had given an undertaking to abide by an order the Court might make as to damages in case the Court was of the opinion that the appellant sustained damages by reason of the Anton Pillar injunction which the respondent ought to pay. The learned trial judge found that the Anton Pillar injunction was improperly granted and the appellant has suffered damages. He should have proceeded to assess damages or compensation which would be justifiable to meet the appellant's injury.”



81. The learned Judge in the above matter set out steps to be followed before damages can be awarded in a suit for enforcement of an undertaking. First, it must be ascertained that there was in fact an undertaking to pay damages in the event that it is found that an order of injunction, or as in this case, a stay, ought not to have been made. Once that is ascertained, the Court, whether in the same suit (where, for example, an undertaking is given in civil proceedings) or in a separate suit (where the undertaking is given in judicial review proceedings such as in this case) then proceeds to determine whether or not the order of stay or injunction ought not to have been made. It is only upon making the finding that the order ought not to have been made that an inquiry as to the quantum of damages is entered into.
82. We appreciate that we do not, as yet, have in place a rule of law or practice as to the procedure for enforcement of undertakings in damages arising from judicial review proceedings. That, however, does not mean that we cannot borrow from other jurisdictions with similar legal systems, in order to develop our own procedure. Whereas some jurisdictions have a two stage process, the first stage being leave stage where the court determines whether or not to enforce the undertaking and the second stage is where damages are assessed, we believe that the same result may be realised by undertaking both processes at the same time. In other words, the court may hear the parties both on the enforcement of undertaking in damages and the actual award of damages in the same proceedings as was done by the learned Judge without necessarily breaking or splitting the two stages.
83. In order therefore to find the appellant liable, it was necessary that a finding be made that the order of stay ought not to have been made. Since in his ruling allowing the application for withdrawal, Nyamu, J (as he then was) did not make any finding that the stay ought not to have been made in the first place, it was incumbent upon the 2<sup>nd</sup> respondent who was claiming damages, on the strength of the undertaking, to therefore satisfy the Court that, in the circumstances, the order for stay ought not to have been sought. We reiterate that the mere fact of the withdrawal of an application based on a compromise arrived at between the appellant and the 1<sup>st</sup> respondent did not necessarily mean that the order for stay was improperly sought.
84. Even as we consider this aspect, we observe that in the scheme Order 53 of the Civil Procedure Rules on applications for judicial review, a party may seek leave without also pleading for stay or may seek both leave and stay. Indeed, under Order 53 Rule (1)(4) the question of leave and whether grant of leave shall operate as stay may be heard and determined separately. Under Rule (3), where leave denotes stay, then the judge may impose terms as to costs and as to giving of security. Terms such as an undertaking as to damages is intended to undergird, not the grant of leave, but where leave is accompanied with stay.
85. We appreciate the fact that leave is never granted as a matter of course. It is a necessary stage during which the court, on the material available, considers, without going into the matter in depth, that there is an arguable case hence its purpose to filter and weed out hopeless cases at the earliest possible time. Its purpose is firstly, to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly, to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. See Waki, J (as he then was) in *Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others* Mombasa HCMCA No. 384 of 1996 and this Court's decision in *Meixner & Another v Attorney General* [2005] 2 KLR 189.
86. It may then be argued that the fact that leave has been granted, it follows that the case was not frivolous hence an undertaking in damages for a stay that may accompany the leave ought not to be enforced since the grant of leave presupposes that the case was not frivolous. In our view, it does not necessarily follow that where leave and stay are granted, an undertaking in damages may not be enforced. Leave, particularly where it is granted ex parte, as was the case in the proceedings in *Miscellaneous Civil*



Application No. 1127 of 2005, is often based on the version of the applicant alone. At that stage, the court may well be satisfied that the case is not frivolous. However, upon later hearing the version of the other parties, the court may discover that the facts, as presented, were incorrect or twisted and that had the correct position been presented the court would not have granted leave. To hold that once leave is granted, it must follow that the application was not frivolous, would defeat the very objective of requiring that undertakings in damages to be given for a stay granted.

87. Therefore, when the court is called upon to enforce the undertaking as to damages, it takes into account, not only the facts as they were at the time of the grant of leave but also the occurrences during the course of the proceedings or, where there is termination, circumstances leading to the termination of the proceedings. The conduct of the parties during the proceedings therefore becomes a factor to be taken into account in determining whether or not leave and the stay were deserved. As appreciated in *Gee on Commercial Injunctions*, 7th Ed at paragraph 11-043:

“There is a discretion to refuse to enforce the undertaking and each case must be decided on its own facts. This will be done on the basis of all the material available to the court at the time of exercising the discretion, including matters post dating the granting of the order, and including in the case of a search order the results of the execution of the order if the defendant has provoked the bringing of the proceedings or brought them on himself, it may be “inequitable” to enforce the undertaking. The judge is entitled to take into account all the circumstances relevant to whether it is fair and just to refuse an inquiry... Whether an injunction was “wrongly granted” does not depend on whether the judge made a mistake in granting it. It involves looking at all the facts at the time of the hearing seeking an inquiry with the benefit of knowledge of all those facts and applicable law, and hindsight (*Smithkline Beecham PLC v Apotex Europe Limited* [2005] EWHC 1655 [2006] 1 WLR 872)”

88. At para 11-044 it is stated that:

“...If there has been a compromise agreement in respect of the continuance of the injunction, it is a matter of interpretation of that agreement whether the parties have agreed that no claim is to be made to enforce the cross undertaking. Where the agreement is silent on this it is a question of inferring whether the parties intended that the respondent abandoned the right to make such a claim...”

89. That brings us to the crux of the matter: Did the 2<sup>nd</sup> respondent show that the stay order ought not to have been made in the Judicial Review application? As we have stated above, in determining this issue we must not only consider the circumstances prevailing at the time of the grant of leave and stay but also the subsequent events that led to the termination of the proceedings. According to the 2<sup>nd</sup> respondent, considering the decided matters between the parties herein, the appellant ought to have known that the issue of zoning was a non-issue and therefore ought not to have commenced the judicial review application. As stated at the beginning of this judgement, the parties herein have had more than their share of litigation in this country. It is also true that the courts in this country have eventually found that zoning was not justified. Our attention was however not drawn to any decided case pre-2005 when these proceedings were initiated before the Judicial Review court. We agree that had there been prior decisions in which the issue of zoning had been decided before the appellant went to court in 2005, the appellant would have had an uphill task convincing the trial court that it was blameless in persisting in the course it took. The question, however, is what is the effect of decisions in related matters subsequent to the grant of stay? Should such decisions be the basis upon which the finding of propriety of an order of stay, granted before the said decisions were made, is to be gauged? In our view, it would be inappropriate to judge the merits of the stay on the basis of court decisions



which had not been made at the time the stay was sought and granted. In those circumstances, unless the appellant was omniscient, it could only make a decision based on the circumstances prevailing at that time since it would not have known what the courts were going to decide in future regarding the issue of zoning in order for it to refrain from basing its claim on the issue.

90. Elsewhere in this judgement, we have set out the history of the dispute between the parties. From that history, it is clear that the 1<sup>st</sup> respondent's Chief Executive Officer whether rightly or wrongly assured the appellant that "no other white sugar mill will be allowed to be installed and operate within the border landmarks of West Kenya Sugar Company Limited zone". There is evidence that the 2<sup>nd</sup> respondent's previous applications for registration were declined by the 1<sup>st</sup> respondent on the ground that "the proposed location of your facility between Malava and Butali markets in Kakamega District lies within a radius of 10km of an existing sugar mill that is currently implementing a capacity expansion program that is likely to be adversely affected should you be allowed to proceed as planned". The 2<sup>nd</sup> respondent was therefore requested to "identify an alternative site, preferably outside a 30 km radius of any other existing mill".
91. The 1<sup>st</sup> respondent has contended that these assurances were given by a person who had no authority to do so. It is however clear that the letters were authored by the Chief Executive Officer of the 1<sup>st</sup> respondent who was the officer tasked with communicating the decisions of the Board. There is no evidence that the appellant was aware of the want of authority on the part of the said officer. Apart from the said assurances, the position taken by the Ministry of Justice and Constitutional Affairs was that an assurance be given

"to West Kenya Sugar Company Limited and also to the Kenya Sugar Board confirming that unless and until the law is amended, no sugar company in Kenya should be licensed within a radius of 40kms from each other."

92. Based on the foregoing, can it be said that the appellant's view that its zone was protected was without any basis? The learned Judge in determining this issue found that:

"Was the order of 27/7/2005 warranted? I do not think so. The basis of the plaintiff's argument was that there were exclusive Sugar Zones for the respective Sugar Millers. There was no evidence to show that there existed such a policy. If there was, the same was protectionist and unlawful. D2W1 was categorical that there was no such policy or law. That the assurances and representations relied on by the plaintiff were unlawful and had no basis in law. The fears of lack of cane to support both factories were also proved to be misplaced."

93. The learned Judge seemed to have then taken the view that although the appellant had assurances from the 1<sup>st</sup> respondent, the appellant ought not to have relied on the same since such assurances were unlawful. This finding was not supported by the evidence on record. According to the evidence of DW1, the decision that the zoning was not lawful was made in 2010. If that position was correct, then it would mean that as at the time the stay order was granted, the legality of the zoning had not yet been determined with finality. It is also our view that the learned Judge subjected the appellant to an unreasonably high standard. If the law was that as regards legitimate expectations, one can only commence legal proceedings when absolutely satisfied that its expectations are lawful, that would unnecessarily and unreasonably curtail the right to access justice. It is only at the hearing of the case, if based on legitimate expectation, that the Court can find that the expectation was not legitimate on the ground of invalidity. The parties cannot be expected to make a conclusive determination on the lawfulness or otherwise of their expectation prior to coming to court. What a party seeking leave to commence judicial review application is required to do is to establish a prima facie case as opposed



to prove the case. Once the court is satisfied that a prima facie case has been made the applicant is, subject to what comes to light once the respondent files its response, entitled to leave. As for stay, what the applicant ought to establish is that unless the proceedings in question are stayed, the success of the application may well be merely academic. Nevertheless, we reiterate that a party who moves the court on an ex parte application assumes the risk that the other parties who come on board later may persuade the court that leave and stay ought not to have been granted in which case the same might be set aside or the applicant may be compelled to satisfy the undertaking as to damages, if one was given.

94. In our view, it was upon the 2<sup>nd</sup> respondent to prove that the stay ought not to have been sought and made. Once prima facie evidence was adduced to the effect, the burden shifted to the appellant to show that, based on the circumstances as they existed at the time of his application and subsequently in the course of the proceedings, it was reasonable for it to apprehend that its interests were under a threat of being infringed if what was sought to be stayed proceeded. He need not show that he was certain that its case would succeed. The decision whether or not the apprehension was reasonable must be taken with regard to the circumstances existing at the time when the stay was sought and not necessarily on the ultimate outcome of the judicial review proceedings. However, the conduct of the proceedings may also be indicative of whether the leave and stay were sought bona fide.
95. Looking at the matter merely from the perspective of the circumstances prevailing prior to the grant of leave and stay, and from the learned Judge's own finding regarding the conduct of the 1<sup>st</sup> respondent, we find no fault with the appellant's decision to move the Judicial Review court.
96. The next issue, and which the court must also consider is whether the subsequent conduct of the appellant was indicative of a party who knew or ought to have known that its case was based on false start or is evidently reckless as to its merit. In this case the subsequent conduct revolves around the agreement entered into between the appellant and the 1<sup>st</sup> respondent on 21<sup>st</sup> July 2006.
97. In his statement dated 9<sup>th</sup> November 2017 which was adopted at the hearing, PW1, averred that the overall effect of filing Miscellaneous Civil Application No. 1127 of 2005 and obtaining the order of stay, the agreement of 21<sup>st</sup> July 2006, and the consent and/or compromise to withdraw the said Judicial Review proceedings of 27<sup>th</sup> July 2006 were interference with and scuttled the 2<sup>nd</sup> respondent's business yet the 2<sup>nd</sup> respondent was not a party to the consent order to compromise the Judicial Review proceedings.
98. The issues drawn by the 2<sup>nd</sup> defendant were inter alia: whether the agreement of 21<sup>st</sup> July 2006 between the appellant and the 1<sup>st</sup> respondent and subsequent withdrawal of the judicial review proceedings obviated the 2<sup>nd</sup> respondent's application to set aside leave given to the appellant to file the judicial review proceedings; whether the judicial review proceedings were withdrawn by the appellant on terms and conditions of the agreement of 21<sup>st</sup> July 2006; whether the agreement of 21<sup>st</sup> July 2006 and the terms thereof regarding the 2<sup>nd</sup> respondent was unlawful; whether the agreement of 21<sup>st</sup> July 2006 was entered into with the intention to scuttle and negate the 2<sup>nd</sup> respondent's business; whether the agreement of 21<sup>st</sup> July 2006 had the effect of scuttling, delaying and negating the 2<sup>nd</sup> respondent's business; whether the agreement of 21<sup>st</sup> July 2006 in which the 1<sup>st</sup> respondent covenanted not to licence the 2<sup>nd</sup> respondent to operate a sugar mill at Kakamega/Malava/303 and subsequent withdrawal of the judicial review proceedings were done with knowledge of colossal commitments made by the 2<sup>nd</sup> respondent in the venture and the attendant losses should the business be stayed or scuttled; whether the 2<sup>nd</sup> respondent was consulted in the making of the agreement of 21<sup>st</sup> July 2006; whether the 2<sup>nd</sup> respondent was aware of the terms of the agreement on 27<sup>th</sup> July 2006 when the consent was recorded; whether the agreement of 21<sup>st</sup> July 2006 and withdrawal of judicial review proceedings denied the court the opportunity to decide on issues in judicial review proceedings; whether by the 1<sup>st</sup> respondent's



commitment in the agreement of 21<sup>st</sup> July 2006 and further correspondence from the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent, the 2<sup>nd</sup> respondent's licencing processes were stayed and consequently the 2<sup>nd</sup> respondent could not proceed with installation and construction of the sugar plant; whether as a consequence of the order of stay obtained by the appellant, the agreement of 21<sup>st</sup> July 2006, consent of 27<sup>th</sup> July 2006 and further activities of the appellant and the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent suffered the loss particularised in the plaint.

99. On its part, the appellant identified, as one of the issues for determination: whether it was within the appellant's rights in law to seek and obtain the interim orders sought in the Judicial Review application number 1127 of 2005 and later to enter into the agreement dated 21<sup>st</sup> July 2006 and the consent recorded on the 27<sup>th</sup> July 2006 to safeguard and protect its legitimate business interests.
100. In his judgement the learned acknowledged that in the plaint:

“The plaintiff alleged that the actions of the defendants amounted to unlawful interference of its business and investment and set out the particulars thereof. That by reason of the defendants' actions, the plaintiff's investment was delayed negated and scuttled whereby it suffered loss and damage particularized at Kshs. 590,630,441/= which the plaintiff claimed against the defendants.”

101. On the other hand, the learned Judge pointed out that the appellant in its defence:

“admitted entering into a consent with the 1st defendant to have the JR application withdrawn and contended that the plaintiff could not question the efficacy thereof as it did not object to that consent at the time. It denied that the agreement of 21/7/2006 was meant to scuttle the business of the plaintiff or that there was any unlawful interference with the plaintiff's business.”

102. In his judgement, the learned Judge identified the following issues:

“The issues for determination are; whether this court has jurisdiction to determine this suit, whether this Court has jurisdiction to enforce the undertaking as to damages given in HC. Misc. C.A. No. 1127 of 2005 Republic vs Kenya Sugar Board Exparte West Kenya Sugar Company Ltd; Whether there was unlawful interference with the plaintiff's business by the defendants, jointly and severally, whether the plaintiff suffered any loss and damage as a result of such interference and if so, the quantum thereof; Whether the 1st defendant is entitled to be indemnified by the 2nd defendant, what orders as to costs?”

103. He then found that:

“Firstly, by the act of the 1<sup>st</sup> defendant itself, the substantive Notice of Motion did not see the light of the day. It compromised the Motion and denied the court the opportunity of pronouncing itself on the same. Secondly, the fact that the 1<sup>st</sup> defendant sought another route which it thought was beneficial to it rather than the court pronouncing on its grievances meant that, there was an alternative and adequate route or remedy that should have been used in the first place instead of having rushed to court to obtain the stay order.”

104. He further held that:

“The fact that the parties to that application compromised the same without letting the court pronounce itself on merit, meant that the same may not have been necessary in the first



instance. It is also not lost of this Court that the applicant had the opportunity to use the provisions of section 31 of the Sugar Act for appropriate remedy but chose not to.”

105. After considering the evidence, the learned Judge concluded that:

“Accordingly, I make a finding that there was unlawful interference with the plaintiff’s business. The relevant period in this suit is between July, 2005 and July, 2006.”

106. It is clear from the foregoing that the agreement of 21<sup>st</sup> July 2006 and its effect on the judicial review proceedings was central to the determination of the suit. The learned Judge considered that agreement and found that it was an alternative route that could have been resorted to by the 1<sup>st</sup> appellant instead of instituting the judicial review proceedings.

107. Although there is no specific ground of appeal directly attacking this finding we have fleshed out the following grounds as alluding to that finding:

1. The Trial Court erred in holding that the Plaintiff was able to prove its claim, on a balance of probability, that due to the interference with its business, there was delay in constructing and commissioning its factory which led to lost opportunity and an increase in the costs of the project.

12. Within the meaning and context of Articles 20,27,50,159 and 160 of *the Constitution* and the prevailing transitional challenges in the Sugar Sector, the Judgment delivered on 1<sup>st</sup> September, 2023 constitutes a complete negation of Justice and brings into disrepute the administration of justice in Kenya in the following respects:-

.....

(ii) The Judicial Review case was compromised pursuant to the Agreement dated 21<sup>st</sup> July, 2006 which basically conceded the appellant’s case about the illegality of issuing a Certificate of Registration dated 13<sup>th</sup> April, 2005 to the 1<sup>st</sup> respondent.

108. We must reiterate that the mere fact that an applicant enters into a consent with the substantive respondent in judicial review proceedings which compromises those proceedings in favour of the applicant ought not to be construed as an indication that the proceedings ought not to have been instituted. Indeed, there will be instances where such out of court resolution of disputes ought to be lauded. However, the circumstances of the compromise may be considered in determining whether it was necessary to take the steps that were taken by the applicant and where the bona fides of the steps leading to the withdrawal or the compromise are questioned, judicial review reliefs being discretionary reliefs, parties are expected throughout the proceedings to fully disclose any material that may have come to their knowledge or might have influenced their actions during the process of litigation so that the court may, in arriving at its discretionary decision, whether or not to enforce the undertaking to damages, make an informed decision. Parties who therefore do not make full disclosure to the court may, in cases where they have given undertaking to damages, and where their conduct evince some form of compunction, be held liable if a third party who was in their contemplation, likely to suffer damages as a result of the ex parte orders they obtained from the court, does suffer damage as result thereof. We agree with Willcock, J, with whose opinion the other two Justices concurred, in Ralph’s Auto Supply (B.C.) Ltd. v Ken Ransford Holdings Ltd (supra) that:

“Where a dispute resulting in the granting of an interlocutory injunction is resolved or becomes inconsequential before trial, the plaintiff will be left with two options:



discontinuing the action or doing nothing and awaiting its dismissal for want of prosecution. Discontinuing the action exposes the plaintiff to potential liability to pay damages arising from the issuance of the injunction, upon consideration of the criteria described by Silverman J. in *Peter Kiewit*. If inactivity does not expose the plaintiff to the same potential liability, plaintiffs may be discouraged from discontinuing actions that have become inconsequential... Because the undertaking is intended to afford protection against losses incurred for an injunction which restrained the defendant from doing that which he had a right to do, however, there should not be a presumption the undertaking may be enforced when the action is dismissed without an assessment of the merits... In my view, the weight of the authorities and logic support the view taken by Silverman J. in *Peter Kiewit* that a discontinuance should not be regarded as an admission the injunction was wrongly sought. I would say the same of inactivity leading to the dismissal of an action...I would not accede to the view that a strong presumption (or indeed any presumption) in favour of enforcing the undertaking arises where an action is dismissed for want of prosecution. Inactivity, like the filing of a notice of discontinuance, may be no reflection of the merits of the claim. Neither is equivalent to a dismissal of the claim on the merits. While the conduct leading to the dismissal may be a reflection of a plaintiff's lack of confidence in the right it asserts, it may also, as in the case at bar, reflect diminished significance of the subject matter of the dispute... For that reason, I would say as a general rule, that when an action is dismissed for want of prosecution, equity demands that the surrounding circumstances of the obtaining of the interlocutory injunction and of the dismissal, must be considered before there can be any decision with respect to whether or not the undertaking should be enforced. In my view, the chambers judge erred in concluding there is a general presumption undertakings are to be enforced in the absence of any assessment of the merits of the claim or the plaintiff's conduct.”

109. What the court was saying was that mere dismissal or discontinuance of an action does not lead to the presumption that the undertaking given during the interlocutory proceedings must be enforced. Rather, the decision whether or not it will be enforced depends of the assessment of the merits of the claim taking into account, “the surrounding circumstances of the obtaining of the interlocutory injunction and of the dismissal” or as in this case, discontinuance. Whereas in the above case the Court was dealing with enforcement of an undertaking following the dismissal of the suit for want of prosecution, we hold that the principles apply with equal force to discontinuance or withdrawal of suits.
110. In this case, there is no evidence that the 2<sup>nd</sup> respondent was a party to the negotiations that culminated into the agreement of 21<sup>st</sup> July 2006. In that agreement, the appellant, gratuitously as it were, made some unsolicited concessions. The terms of the agreement were that:
- i. That the minimum radial distance of 24km, allocated in proportion to the mill capacities be implemented between Butali and West Kenya Sugar Companies.
  - ii. That Butali Sugar Mills relocates from the present site to any other site that satisfies condition (i) above.
  - iii. That West Kenya Sugar Company compensates Butali Sugar Mills the resultant relocation costs subject to independent professional valuation of the land, civil and building works constructed so far at the current Butali factory site.
  - iv. That West Kenya Sugar Company withdraws the related court cases and agrees to an out of court settlement based on the principles of item (i), (ii) & (iii) above.



111. Without any explanation from the appellant or the 1<sup>st</sup> respondent, we are unable to understand the circumstances under which the appellant, who was agitating for what it believed were its rights, would readily accede to meet the expenses of relocating the 2<sup>nd</sup> respondent, apparently including the value of the 2<sup>nd</sup> respondent's

“land, civil and building works constructed so far at the current Butali factory site” without any prompting from the 2<sup>nd</sup> respondent unless the appellant appreciated that to an extent, however limited, it was liable to meet some expenses of the 2<sup>nd</sup> respondent arising from the compromise of the judicial review proceedings. Since the circumstances under which that liability was acceded by the appellant was especially within the knowledge of the appellant and the 1<sup>st</sup> respondent, the duty to disclose them same lay squarely on the two parties. See section 112 of the *Evidence Act*.

112. And we must add that the compromise cannot be construed to mean that the appellant had gotten what it sought in the judicial review proceedings and was therefore victorious. We say so because the compromise was not unconditional but at the pain of the appellant meeting the costs of the “relocation costs subject to independent professional valuation of the land, civil and building works constructed so far at the current Butali factory site.”

113. It is, therefore, from the conduct of the appellant giving rise to the compromise of the proceedings and their non-disclosure of material facts, rather than from the mere act of withdrawal of the proceedings, that we find, on a balance of probabilities, that the order for stay was not justifiably sought and granted. The act of the appellants entering into a consent to compromise the proceedings on terms that were not brought to the attention of the 2<sup>nd</sup> respondent at the time of the discontinuance of the proceedings, yet in the same vein extending some measure of indulgence or grace to the 2<sup>nd</sup> respondent by way of meeting the 2<sup>nd</sup> respondent's said costs, leads us to the conclusion that the appellant realised, albeit late in the day, that its case may not have been well-founded or could have been dealt with differently. It was however a case of attempting to close the stable after the horse had bolted.

114. We are also unimpressed with the fact that the 1<sup>st</sup> respondent who, like the 2<sup>nd</sup> respondent, sought to have the leave and stay obtained by the appellant set aside would, under unexplained circumstances, turn round and enter into a settlement with the appellant in which the 2<sup>nd</sup> respondent's interests would be compromised. In that settlement, the 1<sup>st</sup> respondent seems to have artfully shoved the liability to the appellant by having the appellant assume the responsibility of meeting the 2<sup>nd</sup> respondent's said costs of relocation. Whether this concession was unwittingly made by the appellant is not clear to us. What is clear, however, is that the appellant, without any provocation, demand or coercion by the 2<sup>nd</sup> respondent agreed to shoulder the liability that ordinarily would not have been shouldered by a party who went to court to protect its bona fide rights.

115. As was held in *Morelli v Morelli* (supra), in determining whether or not an undertaking in damages is to be enforced, the court exercises discretion. Discretion simply means the faculty of deciding or determining in accordance with circumstances and what seems just, fair, right, equitable and reasonable in those circumstances. See *Kiriisa v Attorney-General and Another* [1990-1994] EA 258.

116. In deciding the appeal, we are guided by the decision of the Supreme Court authority of *Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 Others* (2019) eKLR in which it was reiterated that:

“in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was



as determined in the New Zealand Supreme Court case of *Kacem v. Bashir* (2010) NZSC 112; (2011) 2 IVZLR 1 (Kacem) where it was held:

‘In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter:

- (1) error of law or principle;
- (2) taking account of irrelevant considerations;
- (3) failing to take account of a relevant consideration; or
- (4) the decision is plainly wrong.’”

117. With respect to findings of fact by the trial court, this Court’s position as stated by Hancox, JA (as he then was), in *Mohammed Mahmoud Jabane v Highstone Butty Tongoi Olenja* [1986] KLR 661; [1986-1989] EA 183 is that:

“The appellate Court only interferes with the trial Court’s findings of fact if it is shown that he took into account facts or factors which he should have not taken into account, or that he failed to take into account matters of which he should have taken into account, that he misapprehended the effect of the evidence or that he demonstrably acted on wrong principles in reaching the findings he did.”

118. Having considered the material placed before us, we find that the criteria for interfering both with the learned Judge’s exercise of the discretion and the findings of fact has not been met. While we differ with the learned Judge’s finding as regards the appellant’s propriety of initiating the judicial review proceedings on the basis of decided cases, we find that the appellant, based on the circumstances leading to the agreement of 21<sup>st</sup> July 2006, ought not to have sought for stay in the manner it did and by so doing assumed the risk and responsibility of meeting any losses that the 2<sup>nd</sup> respondent would incur as a result of the stay order.

119. We now proceed to deal with the other issues raised in the appeal.

120. According to the appellant, if section 6 of the *Judicature Act* shielded Nyamu, J (as he then was) from liability in issuing the impugned order of stay, it would be absurd if the provision does not equally protect the appellant who was a beneficiary of the said order of stay unless expressly found to have wrongfully obtained the order of stay. The 2<sup>nd</sup> respondent’s position was that the argument that the appellant is also protected under section 6 of the *Judicature Act* is grossly untenable since the said provision is for protection of liability for Judges, Magistrates and judicial officers, not litigants such as the appellant.

121. Section 6 of the *Judicature Act* provides that:

“No judge or magistrate, and no other person acting judicially, shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of; and no officer of a court or other person bound to execute the lawful warrants, orders or other process of a judge or such person shall be liable to be sued in any court for the execution of a warrant, order or



process which he would have been bound to execute if within the jurisdiction of the person issuing it.”

122. The appellant was clearly not a judge or magistrate nor was it acting judicially. It could not therefore seek to rely on the above provision to escape liability.
123. On the particulars of interference of the business pleaded by the 2<sup>nd</sup> respondent, the appellant submitted that the order of stay could not in fact and in law interfere with the 2<sup>nd</sup> respondent’s business; that the judgment was entered on the basis of assertions of the alleged unlawful assurances and representations of the 1<sup>st</sup> respondent contained in the letter dated 23<sup>rd</sup> September 2004 which the 2<sup>nd</sup> respondent did not plead nor seek to have declared unlawful; that the letter was not the handiwork of the 1<sup>st</sup> respondent’s CEO, Rosemary Mkok, but the Board itself thus the appellant was erroneously found liable on account of gross misrepresentation of facts based on documents that were before the Court; that the trial court erred in finding that the 2<sup>nd</sup> respondent proved its case of unlawful interference with its business by the appellant noting that when the orders of 27<sup>th</sup> July 2005 were issued, the 2<sup>nd</sup> respondent had not signed the envisaged contracts with suppliers, financiers and contractors or even obtained the building approvals required under section 30 of the Physical Planning Act, Cap. 286 and had not yet procured and executed a construction with any of the firms interested in the job; that the 2<sup>nd</sup> respondent did not exhibit the approved drawings/plans or any contract signed with Ms. Zenith Steel Fabrications by the projected date of commencement of sugar project namely 1<sup>st</sup> July 2005; that the 2<sup>nd</sup> respondent’s witness admitted that the 2<sup>nd</sup> respondent had not complied with the statutory request to engage in cane development within its allocated zone thus it was difficult to understand how the 2<sup>nd</sup> respondent could have suffered losses relating to the business of milling sugarcane; and that the trial court, in upholding the 2<sup>nd</sup> respondent’s claim based on the differences between quotations and invoices before and after the subject order were obtained and compared, erred.
124. On the other hand, it was submitted on behalf of the 2<sup>nd</sup> respondent: that based on the evidence on record, the 2<sup>nd</sup> respondent was financially ready to commence the sugar milling in June 2006 had it not have been stopped by an order of stay; that the appellant did not file any expert report(s) to contradict/rebut these authoritative expert reports produced by the 2<sup>nd</sup> respondent yet on the authority of the case of Dick Omondi Ndiewo t/a Ditech Engineering Service v Cell Care Electronics [2015] eKLR expert evidence can only be challenged by the evidence of another expert.
125. In the 2<sup>nd</sup> respondent’s submissions, the suit in the High Court was filed in March 2007 while the cause of action accrued on 27<sup>th</sup> July 2006, thus at the time of suit, the losses had already been suffered but the 2<sup>nd</sup> respondent had not constructed the plant to be able to evidence the actual payments made; that whilst it suffered further losses due to the interferences with its business by the appellant and the 1<sup>st</sup> respondent until 2010, the losses claimed before court were limited to 2005 and 2006 and the spiral effect thereof, due to the stay order issued in the Judicial Review application.
126. The issues that arise for determination in these submissions are whether the order of stay had the effect of interfering with the 2<sup>nd</sup> respondent’s business; whether the letter dated 23<sup>rd</sup> September 2004 is deemed to have been the decision of the 1<sup>st</sup> respondent; whether the 2<sup>nd</sup> respondent proved its case of unlawful interference with its business by the appellant; and whether the 2<sup>nd</sup> respondent proved that it sustained the losses and the damages as pleaded.
127. We have already dealt with the effect of the order of stay on the 2<sup>nd</sup> respondent’s intended actions as well as the effect of the letter dated 23<sup>rd</sup> September 2004. It is true that by the time the stay order was issued, the 2<sup>nd</sup> respondent had been issued with Certificate of Registration and what was pending was the issuance of the Operation Licence. The distinction between the two, from the evidence on record,



is that the former is issued to the miller to set up the Sugar factory while the latter is given subsequent to the registration, and allows the miller to start crushing sugar cane in the factory. According to the evidence, upon issued with the Certificate of Registration, the 2<sup>nd</sup> respondent embarked on the steps that were required in order for it to be licenced. The steps taken by the 2<sup>nd</sup> respondent were narrated by both PW1 and PW2 and there was no serious challenge to the evidence of PW1, an expert in the sugar industry.

128. The only issue that falls for determination is the award of damages. As has been stated herein above, an undertaking in damages is given to the court and not to the party although a party suffering injuring as a result therefore is at liberty to move the court for compensation. We associate ourselves with the persuasive decision of *Morelli v Morelli* (supra) that:

“...the undertaking is not given to the defendant. It is given to the court. It follows that there is no contract between the plaintiff and the defendant which the defendant might later claim has been breached by obtaining the orders in question. It is the court which is in the driving seat as to whether the undertaking given by the plaintiff should be enforced.”

129. What then is the principle that guides the court in awarding damages when enforcing undertaking in damages given in judicial review proceedings? According to the above cited case:

“41. If the court decides to enforce a cross- undertaking, the decision of the High Court of Australia in *Air Express Limited v Ansett Transport Industries (Operations) Proprietary Limited* (1979) 146 CLR 249 has been influential in relation to the approach to causation and the burden of proof. Mason J, stated at 325 that it is for the parties seeking to enforce the undertaking to show that the damage he has sustained would not have been sustained but for the injunction. Although Mason J dissented as to the result, on the burden of proof there was no division of view: see Gibbs and Steven JJ at 313 and 320. The approach in the Ansett case has been followed by a number of decisions in this jurisdiction. They include the decision of this court in *Energy Venture Partners Limited v Malabu Oil and Gas Limited* 120141 EWCA Civ 1295, [2015] 1 WLR 2309, a case concerned with whether a cross undertaking as to damages should be fortified. Referring to the judgment of Gibbs J, in the Ansett case as to what was required to enforce the undertaking itself, Tomlinson LJ stated at 541 that:

‘as to causation, it is sufficient for the court to be satisfied that the making of the order or injunction was a cause without which the relevant loss would not have been suffered.’

The person who seeks to do must show that the loss would not have been suffered "but for" the order; that is on the facts of this case, that the freezing order and the security undertakings were an effective cause of the Standard Maritime parties' loss.

The Ansett case had also been relied on 16 years earlier by Saville J in *Financiera Avenida v Shibleaq* Transcript 21 October 1988. The decision is unreported but extracts from Saville J's judgment are set out by Waller J in the *Tharros Shipping* case. After stating that it is for the party seeking to enforce the



undertaking to show that the damage that he has sustained would not have been sustained but for the injunction, Saville J added:

"This approach does not mean that a party seeking to enforcement taking must deal with every conceivable or theoretical cause of the damage claimed, however, unlikely this may be. Once a party has established a prima facie case that the damage was exclusively caused by the relevant order, then in the absence of other material to displace that prima facie case, the court can, and generally would, draw the inference that the damage would not have been sustained but for the Order. In other words, the court seeks to approach and deal with this question of causation in a common- sense way".

In this court, Lloyd LJ with whom Stocker LJ and Sir George Waller agreed, stated that he saw no fault or flaw in Saville J's judge approach or in his conclusion on causation."

130. In awarding damages, the court must keep in mind that the award is in respect of an undertaking given to the court and not to the parties. In our view, the principles that guide award of damages for breach of contract may not necessarily apply to enforcement of undertaking in damages. However, in *Morelli v Morelli* (supra), the learned Judge, while appreciating that the claim brought on an undertaking in damages is not generally a contractual claim, noted that it is well established that the measure of damages is assessed by having regard to the rule in *Hadley v Baxendale* [1854] 9 Ex 341 where Alderson B said:

"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."

131. Whereas the rule in *Baxendale Case* may assist in determining the award, it is our considered view that in enforcing undertaking in damages, the court, in determining the award in a claim for damages for breach of undertaking, is not enjoined to adopt the principles for award of damages resulting from breach of contract or tort where the damages are awarded based on a wrong done to a party. That, in my view, is what informs the giving of the undertaking to the court as opposed to the parties.
132. Our view is that in matters of enforcement of undertaking as opposed to damages for breach of contract what ought to guide the court is whether the damages claimed may reasonably be supposed to have been in the contemplation of the applicant at the time the applicant applied for and obtained stay.
133. In this case, it is important to reiterate that the order of stay was issued on 27<sup>th</sup> July 2005 and was lifted on 27<sup>th</sup> July 2006. The loss claimed by the 2<sup>nd</sup> respondent is therefore in respect of the inability to commence its operations during the said period. In order to be entitled to the claim, it was incumbent upon the 2<sup>nd</sup> respondent to place satisfactory material before the trial court showing that that had it not have been for the stay, the 2<sup>nd</sup> respondent was certain that the preparations necessary for its operation would have been completed within the stipulated 18 months in order for it to start operations. In other words, the 2<sup>nd</sup> respondent ought to have shown that absence the stay order, its operations would have started by the eighteenth month.



134. In his evidence, PW1, Atul Shah stated:

“I was engaged in 2004 in feasibility study. I was engaged in the preparation of the feasibility study- Finance and Financial viability process. I see page 1 of PEX1. It is a certificate of Registration. Its purpose is to allow Butali to engage in building up the factory for production. It includes cane development mobilizing and contracting farmers, register them and field support. Plaintiff season for cane in Kakamega is between March and April of any given year or can start in February. Short rains is between Sept and October. Plaintiff will be in August, September. Certs of registration came on 13/4/2005. When the planting season for 2005 had passed. The registration of farmers started earlier. The process of starting the factory would start after the registration. It is my client to show evidence of operations of the factory...The reasons beyond Jan 2007 led to multiple interferences and disturbances led to delay...Upon issuance of licence the factory should have been operational by Dec 2006. In the initial planning it would have taken 12 months to construct the factory...There were multiple contractors involved in this project...Milling would have commenced in June 2006. All processes of construction, erection and commissioning would have been completed by June, 2006. These were the projections during feasibility study...The feasibility study makes assumptions based on sugar prices, expenses etc. The claim is based on projections not actuals...Factory was constructed at some later stage Feb 2010. It took 16 months to build the factory...Factory was to commence July 2005 and end in June 2006...Visibility study has not indicated that the project was to commence in July 2005...There was further uncertainty arising from further litigations...”

135. He further testified;

“Production started in January 2011. The reasons beyond Jan 2007 led to delay multiple interferences and disturbances led to delay”

136. We have extensively set out the evidence of PW1 in order to ascertain whether there was certainty regarding the period that was required for the milling to commence. From the evidence, PW1 stated that although the stay was vacated on 27<sup>th</sup> July 2006, production did not start until January 2011. This is despite the evidence that the initial planning was that the period required to complete the construction would have been 12 months. The delay for more than three years attributed to “multiple interferences and disturbances” which were not expounded upon save for the disclosure that there “was further uncertainty arising from further litigations”. And not without significance, he does not attribute this substantial delay to the impugned stay.

137. On our part, we are unable to be as casual about this further unexplained delay as the trial Judge. This is how the trial Judge treats that period;

“There were other intervening events which led to the same being realized in 2011 which are outside the purview of this case”

138. In light of these uncertainties, the question remains whether the inability by the 2<sup>nd</sup> respondent to commence the milling in June 2006 can be solely traced to the stay. We are unable to attribute the delay solely on the actions of the appellant notwithstanding our finding that the circumstances leading to the withdrawal of the judicial review proceedings placed some culpability on the door steps of the appellant. Said differently we are unable to ascertain, from the record, the extent to which the order of stay contributed to the inability on the part of the 2<sup>nd</sup> respondent to commence milling as earlier



projected. And this has an unforgiving impact on the damages claimed by the 2<sup>nd</sup> respondent because the substantial damages claimed were predicated on the mill commencing operations by June 2006.

139. Yet for completeness of the record, we proceed to deal with each award.

140. In his judgement, the learned Judge held that:

“Since the claim is for the period between July, 2005 and July, 2006 when the sugar mill had not been constructed, I do not think the plaintiff could have put the actual cost. There was evidence that quotations and invoices before and after the subject order were obtained and compared. There was evidence that the difference between the two the basis of the losses that was suffered by the plaintiff. The plaintiff could not put the actual cost as that would have meant making a claim on what happened in 2011 which is way beyond the interference period (2005-2006).”

141. Regarding the loss of profits, the learned Judge held that:

“Loss of profits for delay, Kshs. 135,975,479.00. In his report dated January, 2007 and produced as PExh 2, PW1 explained how the plaintiff had done the preparatory work and how it was expected to complete the plant and start milling by 30/6/2006. He explained that the order of 27/7/2005 created a disruption. The machinery ordered was cancelled. Release of funds was put on hold. That the estimated loss of profit was to be 2 years 6 months. That due to the change in circumstances, the increased demand of sugar globally and other orders in India, delivery of machinery increased to 18 months. That therefore, the projected commissioning would have been December, 2008.”

142. It is clear that this head of losses falls within what is called anticipatory losses. Such losses are not actual losses and their quantification involves a hypothetical exercise and unless keenly scrutinised may well be speculative. Therefore, a party urging the Court to award such losses must prove that in all probability such losses would be incurred. Where the losses arise in an industrial enterprise, comparisons from similar enterprises within the same environment may be useful in determining whether the claims are real or speculative but such comparisons are not necessarily binding since there are imponderables in such enterprises that may not lead to uniformity in profit making. Dealing with this head of loss, the learned Judge expressed himself as hereunder:

“Loss of profits for delay, Kshs. 135,975,479.00. In his report dated January, 2007 and produced as PExh 2, PW1 explained how the plaintiff had done the preparatory work and how it was expected to complete the plant and start milling by 30/6/2006. He explained that the order of 27/7/2005 created a disruption. The machinery ordered was cancelled. Release of funds was put on hold. That the estimated loss of profit was to be 2 years 6 months. That due to the change in circumstances, the increased demand of sugar globally and other orders in India, delivery of machinery increased to 18 months. That therefore, the projected commissioning would have been December, 2008.”

143. There was another award of loss of profits which was attributed to price change. Addressing this head of losses, the learned Judge held that:

“Loss of profits due to sugar price change, COMESA period protection, Kshs. 145,312,906.00. The 1st defendant submitted that this claim was based on 2 false assumptions, that the factory was to be operational within 1 year and that there would be sufficient cane. 98. PW1 testified on this head. He explained how he arrived at this sum.



The calculations and explanations given were not displaced. The Court has already made a finding that the factory would have been ready by June, 2006. The feasibility and crop study were clear on the availability of the cane. There is evidence that even after the factory was opened 5 years later, there was enough cane for both the plaintiff and the 1st defendant. In my view, this claim was proved to the required standard and is accordingly awarded.”

144. In his judgement, the learned Judge does not seem to have addressed his mind on how these amounts totalling Kshs. 281,288,385.00 were arrived at. The learned Judge did not scrupulously analyse the evidence in order to rule out the possibility of awarding speculative claims as loss of profits. The law on proof of damages was succinctly laid down by this Court in the case of *Idi Ayub Omari Shabani & Another v City Council of Nairobi & Another* Civil Appeal No. 52 of 1984 [1985] 1 KAR 681:

“Plaintiffs must understand that if they bring actions for damages it is for them to prove the damage and it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, this is what I have lost, I ask you to give me these damages. They have to prove it.”

145. We set aside these two awards for the reasons of my finding that there was no certainty as to when the milling would have started as well as the speculative nature of this award.
146. Regarding the claim for interest accrued due to additional borrowing of Kshs. 34,752,476/=, the learned Judge held that:

“It was contended by the plaintiff that due to increase in capital expenditure and construction costs, there would be increased borrowing which was estimated at Kshs. 211,296,589/=. That the interest on this amount amounted to Kshs. 34,752,476/=. The defendant submitted that since the earlier projected period was of 12 months, the claim for 2.5 years was an attempt by the plaintiff to falsely enrich itself. It is clear that there was to be increased capital expenditure and construction cost. This has already been determined to total Kshs. 211,296,589/=. The expert estimated that since 33% was to be equity, the additional borrowing would have been Kshs. 141,568,715/=. The interest on this being Kshs. 34,752,476/= would obviously be a loss on the plaintiff. The claim was proved and therefore allowed.”

147. It is our view that this award does not fall within what can be termed as damages which may reasonably be supposed to have been in the contemplation of the applicant, at the time the applicant applied for and obtained stay. Under the principles of causation/remoteness, this award is not justified and ought not to have been made based on that reason and also on the uncertainty we have pointed out above. We similarly, set it aside. Based on the same reason, we set aside the award of Kshs 36,696,100/= in respect of increase in construction costs as well as the award in respect of escalation in costs of machinery amounting to Kshs. 171,547,689.00
148. The only limb of damages that survives the uncertainty that the delay in commencement of operations was solely attributable to the stay is the claim for Kshs 18,267,438/70 in respect of preliminary expenses. This too were not speculative. They were specifically proved. In the result, we would set aside the learned Judge’s assessment of damages. We substitute the award of Kshs 507,799,612/= with Kshs 18,267,438/70.
149. On the issue of the interest at 12% per annum from the date of filing the suit until payment in full, the appellant submitted: that the 2<sup>nd</sup> respondent’s claim was founded on the differences between quotations and invoices before and after thus not a claim for actual loss but hypothetical loss that



- may or may not occur; that this claim was not a special damage because no such loss was proven to have occurred; that based on the case of *Shariff Salim & Another v Mulundu Kikara (1989) eKLR*, interest should only be awarded on special damages if the amount claimed had been actually expended or incurred at the date of filing the suit and that where damages have to be assessed by the Court, interest should only be fixed from the date of the judgment; that despite the 2<sup>nd</sup> respondent itemizing the losses, it had not actually incurred or expended the sums claimed; and that the learned Judge did not give reasons for its decision that interest should run from the date of filing the suit.
150. On the part of the 2<sup>nd</sup> respondent, it was submitted: that under section 26 of the *Civil Procedure Act*, a court has discretion to award interest on money decrees from date of suit until payment in full; and that the suit was for pleaded liquidated losses suffered by the 2<sup>nd</sup> respondent as a result of the wrongful and actionable acts of the appellant, thus on the authority of the cases of *Mbogo & Another v Shah [1968] EA 98* and in *Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited (1970) EA 469*, the trial court's discretion was exercised in accordance with the law.
  151. In light of our decision on the claim for loss of profits, this issue does not fall for determination since what the appellant refers to as hypothetical loss were the said claims. We however, hold and direct that the interest will accrue from the date of filing of the suit in respect of Kshs. 18,267,438/70 at court rates till payment in full.
  152. According to the appellant, the existence of substantial errors in the judgment is partly attested by the fact that in the wake of its delivery, the 2<sup>nd</sup> respondent filed an application dated 29<sup>th</sup> November 2023 seeking the correction of numerous errors that it claimed could be corrected under section 99 of the *Civil Procedure Act*; that the judgment is unconstitutional for contravening express constitutional provisions and principles.
  153. The 2<sup>nd</sup> respondent explained that the Court issued a ruling on 24<sup>th</sup> March 2024 correcting errors under section 99 of the *Civil Procedure Act*, pursuant to the Slip Rule and therefore this Court cannot question the verity of that ruling; that based on the decisions in the cases of *Leonard Mambo Kuria v Ann Wanjiru Mambo (2017) eKLR* and *Republic v Attorney General & 15 others, Ex-Parte Kenya Seed Company Limited & 5 others [2010] eKLR*, for the Court had jurisdiction under section 99 of the *Civil Procedure Act*, to correct its judgment on errors arising therein from any accidental slip or omission which did not affect the nature of the judgment; and that the correction of inadvertent errors under the Slip Rule, cannot constitute a ground of appeal.
  154. Suffice it to say that this appeal is against the main judgement and not the decision arising from the exercise of the Court's discretion under section 99 of the *Civil Procedure Act*. Accordingly, the issue is improperly before us and we find no basis for dealing with it. We take a similar view regarding the objection by the appellant that its Supplementary List of Documents filed on 13<sup>th</sup> July 2022 containing the Sugar Board Cane Census Report of 2009/10-2010/11 and the witness statement by Sohan Kumar Sharma on 23<sup>rd</sup> May 2022 were wrongly rejected. A witness statement without more does not amount to evidence unless admitted as part of the evidence. Without an appeal against the learned Judge's decision, we cannot consider that ground in this appeal. See *Nairobi City Council v Resley (2002) EA 494*, *Nguruman Limited v Shompole Group Ranch & Another [2014] eKLR*, *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others (supra)* and the Supreme Court's decision in *Mawathe Julius Musili v Irshadali Sumra & others, Petition No. 16 of 2018*.
  155. Regarding the 1<sup>st</sup> respondent's appeal, it was submitted on behalf of the 1<sup>st</sup> respondent that the issues for determination involve; a) the Undertaking to Damages dated 1<sup>st</sup> August 2005; b) the existence of sugar zones allegedly designated by Agriculture and Food Authority c) the coined letter of assurance and comfort dated 23<sup>rd</sup> September 2004. On the first issue, the 1<sup>st</sup> respondent submitted:



that any loss suffered by the 2<sup>nd</sup> respondent flows directly from the Stay Order issued in the Judicial Review application for which it was not party; that consequently, any such liability must fall on the appellant being the party that issued the Undertaking as to Damages; that it is plainly evident that the express terms of the Undertaking as to Damages are definitive and specific as to who would bear the responsibility thus the attempt to rope in the 1<sup>st</sup> respondent to the liability is nothing short of an impermissible overreach; that based on Gicheru, JA's decision in the case of Chatur Radio Service v Pronogram Limited [1994] eKLR, justice requires that such damage should fall on the voluntary litigant who fails, and not on the party who has been made a litigant without a just cause; and that the learned trial Judge erred in apportioning liability to it for damages arising from the said Stay Order.

156. The appellant countered this submission by contending: that on account of the documentary evidence that the undertaking and assurances contained in the letter dated 23<sup>rd</sup> September 2004 were made by the Board rather than its Chief Executive Officer, there was no basis for the finding that the 1<sup>st</sup> respondent was only 30% liable for consequences of its own representations and assurances; that the 2<sup>nd</sup> respondent did not seek to have the 1<sup>st</sup> respondent's representations contained in the said letter declared unlawful; that the learned Judge was at fault in finding the appellant 70% was culpable for overstressing its reliance and asserted rights that never existed in law and/or facts, yet the appellant was enjoined to rely on the legal representations, assurances and representations of the 1<sup>st</sup> respondent as the industry regulator and administrator of the Sugar Act, 2001; and that the Judicial Review application was settled on the basis of the Agreement dated 21<sup>st</sup> July 2006 which incorporated the previous representations, assurances and undertaking contained in the letter dated 23<sup>rd</sup> September 2004.
157. On behalf of the 2<sup>nd</sup> respondent it was submitted: that the adjudication of the finding of 30% indemnity by the 1<sup>st</sup> respondent to the appellant does not affect the 2<sup>nd</sup> respondent as it is indisputable that it is the appellant that issued the undertaking, enforcement of which obligation the 2<sup>nd</sup> respondent filed the suit; that the High Court did not err in law or fact in apportioning liability between the appellant and 1<sup>st</sup> respondent after full consideration of the civil culpability of the parties; and that the determination of the claim against Co-Defendant does not affect the principal judgment in favour of the 2<sup>nd</sup> respondent against the appellant, but would only affect the apportionment of liability inter se the appellant and 1<sup>st</sup> respondent.
158. It is true that the 2<sup>nd</sup> respondent's claim was based on the Undertaking as to Damages which was given by the appellant in the Judicial Review application. Ordinarily the judgement could only have been based on the cause of action as presented by the 2<sup>nd</sup> respondent. However, the appellant filed a Notice of Claim against Co-defendant which, though a separate claim, had to be decided in the same claim for convenience. That being the position, the learned Judge cannot be faulted for dealing with that Notice.
159. From the learned Judge's own finding regarding the conduct of the 1<sup>st</sup> respondent, we are satisfied that the appellant showed that the circumstances prevailing at the time it moved the Judicial Review Court were such as to warrant his apprehension that its interests were in jeopardy of being infringed. In his judgement, the learned Judge held that:

“104. -In its defence to that claim, the 2nd defendant admitted making the representations and assurances but contended that the same were subject to rescission. The 2nd defendant in particular admitted the letter dated 23/9/2004 by its CEO but claimed that the same was written without the authority of the board. That the 2nd defendant could not indemnify the 1st defendant as the latter's liability arose out of its undertaking given on 1/8/2003 for the stay order.



105. It is clear that the claim by the plaintiff arises out of the undertaking given by the 1st defendant on 1/8/2005. However, there is admission in the defence of the 2nd defendant that it did make representations and assurances to the 1st defendant as alleged. Further, the Court has seen the letter dated 23/9/2005 by the CEO of the 2nd defendant, the same gave the assurance that the 1st defendants “sugar zone” was secure and no other miller would be licensed to operate therein.
106. Firstly, it cannot lie in the mouth of the 2nd defendant that it can make representations and assurances and make them subject to rescission. That can only hold if those representations were made without prejudice at the time they were so made. That is not the case here.
107. Secondly, the general rule is that, where a party makes a representation which it knows to be untrue and the party to whom the same is made acts on it to its detriment, the party making the misrepresentation is liable to the innocent party for damages.
108. In the present case, although the 2nd defendant sought to disassociate itself from the letter of 23/9/2004 by its CEO, it cannot avoid the consequences of the wrongful acts of its officers. I hold that in so far as the 2nd defendant made representations and assurances to the 1st defendant, which made the latter belligerently assert that there were sugar zones for which it was exclusively entitled to a portion, which was not the case both in law and fact, the 2nd defendant cannot escape the consequences. The 2nd defendant has to shoulder some blame for its own acts which led the 1st defendant to the disastrous misadventure.”
160. It was the above finding that led to the finding that the 1<sup>st</sup> respondent was liable to indemnify the appellant since, according to the learned Judge “where a party [read the 1<sup>st</sup> respondent] makes a representation which it knows to be untrue and the party [read the appellant] to whom the same is made acts on it to its detriment, the party making the misrepresentation is liable to the innocent party for damages.”
161. We are therefore unable to find any basis for apportioning liability at 70 to 30. No justification whatsoever was given by the learned Judge for this apportionment which seems to have been arbitrarily done. It would seem that the apportionment was “plucked from the air”. Accordingly, we find that the appellant and the 1<sup>st</sup> respondent ought to have been found to be jointly and severally liable.
162. Having considered the material on record, the submissions and the law, we set aside the judgement by the learned Judge to the extent that it apportioned liability as between the appellant and the 1<sup>st</sup> respondent and substitute therefor, judgement for the 2<sup>nd</sup> respondent against the appellant and the 1<sup>st</sup> respondent jointly and severally in the sum of Kshs. 18,267,438/70 with interest at court rates from the date of filing the suit till payment in full
163. There has being partial success and partial loss in this appeal. Let each side party bear its costs.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF MARCH, 2025.**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**A. O. MUCHELULE**

.....

**JUDGE OF APPEAL**

**G.V. ODUNGA**

.....

**JUDGE OF APPEAL**

I certify that this is the true copy of the original

signed

**DEPUTY REGISTRAR**

