Unifresh Exotics (K) Limited v Kaoyeni Enterprises Limited (Civil Appeal E065 of 2022) [2025] KECA 872 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KECA 872 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E065 OF 2022

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

MAY 23, 2025

BETWEEN

UNIFRESH EXOTICS (K) LIMITED .... APPELLANT

AND

KAOYENI ENTERPRISES LIMITED .... RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Mombasa (L. L. Naikuni, J.) delivered on 24th May 2022 in E.L.C No. 428 of 2017)

JUDGMENT

1. The appellant, Unifresh Exotics (K) Limited, moved to this Court on appeal from the judgment of the Environment and Land Court at Mombasa (L. L. Naikuni, J.) dated 24th May 2022 in ELC Case No. 428 of 2017 in which the respondent, Kaoyeni Enterprises Limited, sued the appellant vide a plaint dated 21st November 2017 praying for: a declaration that the contract of sale between the parties was rescinded and that the appellant was in wrongful possession of the suit property; an order granting the respondent the right to take immediate possession of the suit property; mesne profits actually receivable or which, with ordinary diligence, would have been received from the appellant on account of wrongful possession of the suit property; an order that all monies paid pursuant to the sale of the suit property stood forfeited; damages for breach of the contract of sale of the suit property; and costs of the suit and interest at court rates.

2. The respondent's case was that, on or about 14th May 2015, it entered into an agreement with the appellant for the sale of property described as Title No. Kwale/Mnanasini/763 situate within Kwale County and measuring approximately 64.58 hectares or 161.7356 acres (the suit property) together with the improvements thereon at an agreed price of Kshs. 24,230,340; that, under the agreement, the appellant was required to pay a deposit of Kshs. 1,000,000 and, thereafter, seven successive instalments ending on 30th November 2015, being the agreed completion date; that, prior to execution of the

principal Agreement, the appellant had taken possession of the suit property on 15th August 2014 and planted sugarcane thereon for commercial purposes; and that, due to subsequent failure on the appellant's part to pay the agreed monthly instalments, the appellant entered into a Supplemental Agreement with the respondent on 30th August 2016 by which they mutually varied the payment schedule to provide for payment in 10 instalments, the last falling due on 31st December 2016.

3. The respondent further averred that, despite the mutual variation of terms as to the payment schedule and completion date, the appellant failed, refused and or neglected to make payments within the agreed period; that, pursuant to Clause 7.1 of the Principal Agreement as read with Clause 3.4 and 3.5 of the Supplemental Agreement, the respondent gave the appellant 30 days' Notice confirming the respondent's readiness to complete the sale, and requiring the appellant to settle the outstanding balance with interest thereon at commercial rates before expiry of 30 days from the date of the notice; that it was an express term of the contract of sale that, in the event of failure of the appellant to comply with the notice to remedy the breach, the contract of sale would stand rescinded and all instalments paid towards the purchase price as at the date of default shall stand forfeited, and that the appellant shall relinquish possession of the suit property as well as any further claim to the property; that the parties further agreed that, upon termination of the contract of sale as aforesaid, possession of the property would revert to the respondent, and that the appellant would not be entitled to any crop standing or otherwise found within the property nor take any further action that would in any way amount to dilapidating waste on the property; and that, despite several demands made by the respondent, the appellant refused, failed or neglected to either pay the outstanding balance of the purchase price or relinquish vacant possession of the suit property.

4. In its Statement of Defence dated 24th April 2019, the appellant denied the respondent's claims as set out in the plaint and averred that it had made various payments towards the purchase price, and that it would apply for an account at the appropriate time; and that the sale Agreement had not been rescinded.

5. The appellant further averred that it was the respondent who frustrated completion of the transaction by: failing to obtain and release the consent from the Land Control Board, a condition precedent to payment of the purchase price by the appellant's financier; making fresh demands for increased of purchase price; registering a caution over the suit property in order to frustrate completion; and by refusing to collect cheques from the appellant's offices despite reminders to do so.

6. The appellant further contended that the respondent was seeking to unjustly enrich itself to its detriment by illegally retaining and forfeiting the deposit and instalments paid; that the suit was occasioned by the respondent's wanton breach of the terms of the Agreement; and that the appellant deserved the court's protection against the respondent's alleged scheme of unjust enrichment. It urged the court to dismiss the respondent's suit with costs.

7. When the suit came up for hearing on 23rd June 2021, Cecilia Rimber (PW1), a director of the respondent, and Festus Mng'ong'o (PW2), an agricultural economist, testified in support of the respondent's claim. In his testimony, PW2 stated that he visited the suit property and prepared a technical report, which he produced in evidence in support of the respondent's claim for mesne profits.

8. When the suit proceeded to further hearing on 2nd November 2021, the appellant called its legal officer, Gibson Kabue Mathenge, as its sole witness and who, according to the learned Judge, rendered very sketchy evidence and confessed that the appellant was facing dire financial constraints.

9. On close of the parties' respective cases, the learned Judge directed that the parties do file and serve their written submissions; that the matter be mentioned on 9th December 2021 for further directions

on the judgment date after a session with the appellant's directors, namely Rajesh Pabari and Kaushik Pabari, for the purpose of exploring the possibility of amicable settlement pursuant to Article 159(2)(c) of *the Constitution*; and that, summons be served on the two directors for that purpose.

10. On 6th December 2021, the appellant's advocates wrote to the Deputy Registrar of the trial court stating that the two directors were out of the country, and that they would not be available on 9th December 2021 for the intended session. Enclosing copies of documents in proof of the two directors' travel abroad, counsel indicated that they would be seeking directions to reschedule the session to an alternative date.

11. On further mention on 9th December 2021, the court directed that the parties do appear virtually on 1st May 2022 to highlight their submissions and take a judgment date; and that the appellant's directors be mandated to appear before the court on that date. However, the directors failed to appear as summoned, whereupon judgment was scheduled for delivery on 24th May 2022.

12. In his judgment dated 24th May 2022, the learned Judge held that it was undisputed that the parties executed a sale agreement and a supplemental agreement for the sale of the suit property at the price of Kshs. 24,260,340; that, upon payment of Kshs. 1,000,000, the appellant took possession of the suit property and commenced cultivation of sugar cane; that the appellant had paid a total sum of Kshs. 6,000,000; that the outstanding balance had not been settled to-date, over seven years from the completion date; that the appellant was in breach of the terms of the two agreements; that it was sufficiently proved that the appellant had failed to pay the outstanding balance; that it was in wrongful possession of the suit property; and that, it had failed to comply with the respondent's notice pursuant to Clause 7.0 of the Agreements.

13. The learned Judge further held that the appellant's actions constituted wrongful possession of the suit property; that the respondent, on the expert evidence of PW2, demonstrated that the appellant was making profits from the use and occupation of the suit property; that, according to the uncontroverted expert evidence of PW2, the appellant had made profit amounting to Kshs. 80,906,844 during the period between 2014 and December 2021; that the appellant's challenge of PW2's report was contained in its submissions, which were to be treated as evidence from the bar; that the respondent had proved its case to the required standard; and that, therefore, the respondent was entitled to the reliefs sought.

14. Accordingly, the learned Judge gave judgment against the appellant in favour of the respondent for: a declaration that the appellant was in breach of the contract of sale; a declaration that the contract between the parties stood rescinded, and that the appellant was in wrongful possession of the suit property; an order granting the respondent the right to take immediate possession of the suit property together with the improvements thereon; an award of mesne profits in the sum of Kshs. 80,906,000 on account of the appellant's wrongful possession of the suit property; an award of an unspecified amount in damages for breach of the contract of sale; an order that all monies paid on account of sale of the suit property stood forfeited; an order granting the appellant 90 days to vacate the suit premises, but leaving all the improvements fixed and/or made thereon; an order issued to the OCS Diani Police Station, Ukunda, to ensure full compliance with the court orders aforesaid; an award of costs and interest thereon at court rates.

15. Aggrieved by the learned Judge's decision, the appellant lodged the instant appeal vide an undated Memorandum of Appeal containing a battalion of 27 grounds against the grain of rule 88 of the Court of Appeal Rules, 2022 which requires that a memorandum of appeal concisely states the grounds of objection to the decision appealed against, including the specific points of law and the desired order from the court, without argument or narrative. Whether or not the mistaken belief that the success

of an appeal rests on the number of grounds is attributable to sheer misperception of the law and procedure is not for us to judge. Suffice it to observe with profound respect to learned counsel that this undesirable approach to appeals does not demonstrate the advocacy skills the Rules require us to uphold. Be that as it may, we are nonetheless bound to consider the issues raised before us.

16. In summary, the appellant faults the learned Judge for: failing to appreciate that the sale agreement between the parties was not rescinded in accordance with Clause 7.1 and 14 of the sale agreement executed on 14th May 2015; failing to find that the respondent was in breach of the contract and not ready to complete the transaction when it issued the purported rescission notice; failing to address himself on the issue as to when the appellant came to be in wrongful possession of the suit property; awarding Kshs. 80,906,000 as mesne profits yet, when he delivered a summary of the judgment in the virtual session, he expressly and unequivocally directed that the respondent would have to move the court for assessment of mesne profits; awarding the said mesne profits despite the same not having been specifically pleaded and proven; awarding the said mesne profits without addressing himself as to what amounts of the mesne profits were occasioned by the improvements made by the appellant; and for awarding the said mesne profits based on a technical report prepared by PW2.

17. According to the appellant, PW2 failed to establish that he was an expert, and that his report was couched in general terms in that: it did not state that it was made in respect of the mesne profits recoverable for the suit property; it contained unsubstantiated figures drawn from thin air, did not factor the costs involved in cane development, harvesting, crop maintenance and other activities for the suit property or any other sugarcane field; it did not substantiate its conclusion that the soil on the suit property and the rainfall patterns for the area made the suit property good for sugarcane growing; it did not give any evidence of the specific variety of cane propagated on the suit property; it did not supply information regarding the factors that impact on cane quality and yield; and in that it did not substantiate PW2's statement that he did not inspect the land properly to confirm which areas had sugarcane because accessibility to the suit property was difficult due to heavy rains.

18. The appellant further faulted the learned Judge: for failing to appreciate that the expert report referred mainly to the Kwale International Sugar Company Limited (KISCOL) and not the appellant, yet no agreement for growing and supply of sugarcane was shown to exist between the appellant and KISCOL; for dismissing the appellant's criticisms of and issues raised with the expert report as evidence from the bar while at the same time accepting and awarding mesne profits allegedly based on a figure calculated and emerging for the first time in the respondent's submissions; for failing to appreciate that, where there is contest on the amount of mesne profits payable, the court was empowered under Order 21 rule 13(1) (b) and (c) of the Civil Procedure Rules to order that an enquiry of rent or mesne profits be taken; for purporting to summon the directors of the appellant for an out of court negotiation session after both parties had closed their case and drawing an adverse inference, yet the directors did not appear in court for the session since they had been exposed to COVID-19 at the time, and were also out of the country; for finding that the directors of the appellant never wrote and filed witness statements, but only sent an employee with no authority to represent them; for directing the OCS Diani Police Station, Ukunda, to ensure compliance with the court orders when the court was already functus officio while the suit property was located in a different sub-County; for not according the appellant a fair hearing since he was biased in favour of the respondent; and in entering a finding in conflict with the preponderance of the evidence adduced at the trial.

19. In view of the foregoing, the appellant prays that the appeal be allowed; that the impugned judgment and the consequential orders and decree be set aside and substituted for an order dismissing the suit; and that the costs of the appeal and the proceedings at the lower court be awarded to the appellant.

20. In support of the appeal, learned counsel for the appellant, M/s. Lloyd and Partners, filed written submissions, a list and bundle of authorities dated 28th April 2023, which we have duly considered.

21. In rebuttal, learned counsel for the respondent, M/s. Matemu Katasi & Associates, filed written submissions, a list and bundle of authorities, and a case digest dated 10th January 2025, which we have also taken to mind.

22. This Court's mandate on 1st appeal was espoused in Ng'ati Farmers' Co-Operative Society Ltd v Ledidi & 15 Others [2009] KLR 331 as follows:

> " 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."

23. 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."

24. However, we are conscious as cautioned by the predecessor to this Court in Peters v Sunday Post Ltd [1958] EA 424 that:

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion."

25. In our considered view, the main issues that fall for our determination are: (i) whether the learned Judge re-wrote the judgment after delivery virtually; (ii) whether the learned Judge erred in holding that the appellant was in breach of the contract of sale and, if the answer is in the affirmative, what consequences attended such breach; (iii) whether the learned Judge was at fault in holding that the contract of sale stood rescinded, or by failing to find that the respondent was in breach of the contract by issuing the purported rescission notice; (iv) whether the learned Judge erred in awarding the respondent mesne profits of Kshs. 80,906,000 based on the expert evidence; and (v) whether the learned Judge accorded the appellant a fair hearing.

26. On the 1st issue, the appellant contends that the learned Judge re-wrote the impugned judgment after delivery during the virtual session. Counsel for the appellant submitted that, when the judgment was

delivered virtually on 24th May 2022, the learned Judge expressly and unequivocally directed that the respondent would have to move the court for assessment of mesne profits, only for the appellant to be taken by surprise when they obtained a copy of the judgment and found that the learned Judge had awarded Kshs. 80,960,000 as mesne profits; that Order 21 rule 3 of the Civil Procedure Rules prohibits a Judge from altering or adding anything to his judgment upon pronouncement thereof in open court, save as provided under section 99 of the *Civil Procedure Act* to correct arithmetical or clerical errors or errors arising from accidental slip or omission; and that the fact that the learned Judge went the extent of re-writing his judgment in chambers after delivery is clear evidence of bias in favour of the respondent.

27. Counsel cited the case of Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees [2020] KECA 536 (KLR) where this Court held that a court will only correct a defect in a judgment where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given, as the court will have already become functus officio in the matter.

28. In rebuttal, counsel for the respondent submitted thus: that it was misleading and utterly dishonest of the appellant to allege that the trial Judge re-wrote the judgement after it was delivered in the presence of both parties during the virtual court session; that, on the contrary, the learned Judge notified all the parties in the presence of the Appellant's counsel that he would polish the judgement to include the exact quantum of mesne profits; that this was after the Judge was requested by the appellant's lawyer to clarify the orders relating to mesne profits and special damages; that, when the trial Judge suggested that the respondent may need to move the court and get to know exactly how much they think is entitled to them, counsel for the respondent informed the Judge that this was not necessary because, in the respondent's submissions, they had quoted an amount based on the expert's testimony on the profits receivable, and all the annual profits made by the appellant until it vacates the land; and that the learned Judge did not re-write the judgement, but merely corrected it to include the omission on the quantum, which had been pleaded, provided, uncontroverted and found due to the Respondents.

29. Having considered the respective submissions and the certified transcript of the virtual court session recorded on 24th May 2022, we take to mind the learned Judge's words when he began by stating that:

> "The judgment is quite lengthy, so I would [sic] only read some parts of it. Parties can pick copies from the registry."

30. After stating that the respondent had proved its case and demonstrated that the appellant was the party in breach, the learned Judge clarified the orders made in the following words:

> "For avoidance of doubt, this Honourable court now makes the following specific orders: ... that an order of immersed [read mesne] profits actually receivable of which with ordinary diligence have been received from the defendant on account of wrongful possession, [Inaudible 00:43:07] to the plaintiff..."

31. After the learned Judge read out the orders, counsel for the appellant then requested the learned Judge to clarify the orders relating to mesne profits and special damages. In response, the learned Judge stated:

> "Yes, they are entitled to immersed [read mesne] profits, all the profits that have been gathered. That can be calculated actually receivable. We have not received any reports of accounts of how much you have been making. Maybe the plaintiff will need to move the court and get to know exactly how much they think it's [sic] entitled to them."

32. In response to the learned Judge's suggestion, counsel for the respondent stated that, in their submissions, they had quoted an amount based on the annual profits receivable, which figure was hinged on the uncontroverted expert report. On the other hand, counsel for the appellant contended that they had demonstrated that the figures in the report were not practicable; that they were pulled from the air; and that the report was not prepared by an expert, but by a paid agent of the respondent.

33. Subsequently, the matter was put to rest by the following remarks:

> "Judge: I'll polish the judgment. You will get the final copy of which of course you will be entitled to make any appeal or set aside or review.
>
> At this stage it's very awkward for me to entertain any submissions whatsoever.
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> Njuru: The issue of special damages, I did not get what the judgement said on that.
>
> Judge: They are awarded as prayed.
>
> Katasi: You've mentioned that you will polish the judgment, do you then give us a date when [to] pick the polished judgement to use your words so that we are sure of what you are executing. Can you give us a date then we can … the judgement with the figures?
>
> Judge: That you will have to wait. Friday you will have the copies."

34. The bone of contention now arises from the orders contained in the certified copy of the judgment as contained in the record, and which makes the following orders with regard to mesne profits:

> "(d) THAT an order of Mesne Profits a sum of Kenya Shillings Eighty Million Nine and Six Thousand (Kshs. 80,906,000.00) actually receivable or which with ordinary diligence have been received from the Defendant on the account of wrongful possession of all that parcel of described as TITLE NO. Kwale/Mnanasini/763 situated within Kwale County measuring 65.0 hectares (approximately 161.7356 acres) from the 15th August, 2014 upto the time the Plaintiff regains possession of the said parcel of land."

35. When the learned Judged delivered the judgment in the virtual session on 24th May 2022, it was clear from his pronouncement of the orders made that the respondent had been awarded mesne profits. What emerged from the clarifications sought by the appellant's counsel was that the formal orders had not indicated the specific quantum of mesne profits awarded. The learned Judge initially suggested that the respondent move the court for an inquiry to establish the exact figures the respondent was entitled to, but subsequently directed that he would polish the judgment and thereafter avail the final copy to the parties. The issue arising from the foregoing is whether the court was functus officio on delivery of the judgment on the virtual platform, and whether the learned Judge could not thereafter make any corrections to reflect the quantum awarded in mesne profits.

36. In Kenya Deposit Insurance Corporation (as Liquidator of Dubai Bank Kenya Limited) v Rapid Communications Limited & 2 others; Bank of Africa Kenya Limited & 2 others (Interested Party) [2019] KECA 410 (KLR), this Court had this to say on the matter:

> "But the question still remains: when is a court of law rendered functus officio?
>
> Put another way, can a court, in its judgment or ruling, reserve the right to revisit a particular issue subsequent to the judgment or ruling? Again the Supreme Court gives further insights

when it quoted with approval the case of Jersey Evening Post Limited vs A1 Thani [2002] JLR 542 at 550, thus:

'A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available' [Emphasis supplied].

Considering the same issue, this Court in Telkom Kenya Limited vs John Ochanda (suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR stated as follows:-

'Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long as the latter part of the 19th Century.'"

37. As the Court went on to observe:

" In the Canadian case of Chandler vs. Alberta Association of Architects [1989] 2 S.C.R 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);

'The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in re St. Nazaire Co. (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

1. Where there had been a slip in drawing it up, and,
2. Where there was an error in expressing the manifest intention of the court. See Paper Machinery Ltd. vs. J.O. Rose Engineering Corp. [1934] S.C.R. 186 [Emphasis added].

So that, finality, which is at the core of the doctrine of functus officio, is achieved when the judgment or order has been 'perfected' or 'drawn up, issued and entered'. In the matter before us, the impugned order had not been perfected, and indeed, there was a further order made at the time of delivery of the ruling, that it would be revisited.'"

38. In Re L and B (Children) [2013] UKSC 8, the Supreme Court of the United Kingdom also held that:

" 18. .... In re Suffield and Watts, Ex p Brown (1888) 20 QBD 693, a High Court judge had made an order in bankruptcy proceedings which had the effect of varying a charging order which he had earlier made under the Solicitors Act... All the members of the Court of Appeal ... agreed that he had no power to do this once his order had been drawn up and perfected .... As Fry LJ put it, at p 697:

'So long as the order has not been perfected the judge has a power of re-considering the matter, but, when once the order has been completed, the jurisdiction of the judge over it has come to an end.'

Strictly speaking, the reference to what may be done before the order is perfected was obiter, but that this was the law was established by the Court of Appeal no later than the case of Millensted v Grosvenor House (Park Lane) Ld [1937] 1 KB 717, where the judge had revised his award of damages before his order was drawn up and the court held that he was entitled to do so.

19. Thus there is jurisdiction to change one's mind up until the order is drawn up and perfected. Under the Civil Procedure Rules (rule 40.2(2)(b)), an order is now perfected by being sealed by the court. There is no jurisdiction to change one's mind thereafter unless the court has an express power to vary its own previous order .... On any view, therefore, in the particular circumstances of this case, the judge did have power to change her mind. The question is whether she should have exercised it

....

... .

27. .... This court is not bound by Barrell or by any of the previous cases to hold that there is any such limitation upon the acknowledged jurisdiction of the judge to revisit his own decision at any time up until his resulting order is perfected. I would agree with Clarke LJ in Stewart v Engel [2000] 1 WLR 2268, 2282 that his overriding objective must be to deal with the case justly. A relevant factor must be whether any party has acted upon the decision to his detriment, especially in a case where it is expected that they may do so before the order is formally drawn up. On the other hand, in In re Blenheim Leisure (Restaurants) Ltd, Neuberger J gave some examples of cases where it might be just to revisit the earlier decision. But these are only examples. A carefully considered change of mind can be sufficient. Every case is going to depend upon its particular circumstances."

39. In the instant case, it is indisputable that the impugned judgment was yet to be perfected by a final decree drawn and duly sealed. When the learned Judge expressly indicated to the parties that he would polish the judgment after it became apparent that the quantum of mesne profits had not been indicated, his residual power to ascertain from the record the amount proved in evidence and correct the judgment accordingly had not been spent. In effect, the certified copy of the full judgment signed and dated by the learned Judge containing orders indicating the quantum of mesne profits, having been duly perfected, took primacy over the certified transcript of the summarised judgment delivered during the virtual court session.

40. In view of the foregoing, we find nothing to suggest that the learned Judge re-wrote or altered his judgment post-delivery. Accordingly, this ground of appeal fails.

41. Turning to the closely linked 2nd and 3rd issues as to whether the contract of sale was effectively rescinded by notice; and whether the learned Judge was at fault in failing to find that the respondent was in breach of the contract of sale, we take to mind the learned Judge's following observation and finding:

"33. Based on the above cited legal principles, it is not disputed that on 14th May, 2015 and 30th April, 2016 the Plaintiff and the Defendant herein did execute a sale agreement and a supplementary agreement for the sale of the suit land terms and conditions stipulated thereof .... Essentially, the purchase price was a

sum of Kenya Shillings Twenty Four Million Two Sixty Thousand Three Forty Hundred (Kshs. 24, 260, 340/=) and upon payment of the Kenya Shillings One Million (Kshs. 1, 000, 000.00) the Purchaser took possession of the suit land and commenced using it...So far a sum of Kenya Shillings Six Million (Kshs. 6, 000, 000.00) has been paid up by the Defendant as the Purchaser. It is a fact that the outstanding balance has not been cleared to date which is over seven years from the completion date ... .

35. Undoubtedly, in the instant case, and from surrounding facts and inferences in the matter, this Honourable Court will not hesitate to conclude that the Defendant is in utter breach of the terms from the two duly executed agreements for the sale of the suit land. I dare say that, it has been adequately proved that there was failure to make the payment of the outstanding balance, wrongful possession of the suit property and failure to comply despite being issued with a proper 14 days' notice in accordance with the provision of Clause 7.0 of the sale agreements.

... .

38. .... The only main defence advanced by the Defendants which this court takes to be pure semantics and splitting of hairs is the failure to be issued with the completion documents and the fourteen (14) days' notice. A keen assessment of Clauses 4.0 and 7.0 of the Sale Agreement, the Vendor was to pass the completion documents to the Purchaser upon the full payments of the purchase price was made. This never happened and therefore called for the rescinding of the agreement by the operation of the agreements."

42. Faulting the learned Judge's decision, counsel for the appellant submitted that clauses 7.1 and 14 of the sale agreement required that a 14 days' rescission notice be issued to the defaulting party, and that such notice be sent by electronic mail or registered post to the defaulting party's address and a copy delivered to their advocates' physical address; that no such notice was served in accordance with Clause 14 of the sale agreement; that the respondent exhibited before the court a letter dated 16th August 2017 purporting it to be a rescission notice, yet no email or certificate of posting was exhibited to prove that the said letter was duly served in accordance with the terms of the sale agreement; that the appellant's witness was categorical that the letter was never served upon the appellant's legal department as was the norm; that the email address stated therein was not correct; that he did not know the alleged "Simon" who allegedly received the notice, more so since no full name or official title was given; and that no affidavit of service was filed or any witness called to prove service of the rescission notice.

43. In view of the foregoing, counsel argued that the learned Judge ought to have found that the sale agreement had not been rescinded; that, instead, he elected to rubbish the appellant's evidence as "pure semantics and splitting of hairs"; that the learned Judge erred by stating that a notice was served, but that he failed to state how it was served; and that he failed to analyse whether the purported service complied with the terms of the agreement.

44. To buttress his submissions, counsel cited the cases of Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees [2020] eKLR for the proposition that, where completion has not taken place as intended by the parties, the issue between them is when it would; and that, before the agreement is rescinded, the party in default should be notified of the default and given reasonable time within which to rectify it; and Ann Mumbi Hinga v William Mwangi Gathuma & another [2017]

eKLR for the proposition that only a party who is not in default is entitled to issue a notice to rescind a contract.

45 Counsel further submitted that, although the respondent purported to have issued a rescission notice dated 16th August 2017, it was not ready to complete the sale since it did not have in its possession the completion documents ready for delivery to the appellant; that, according to Clause 4 of the Principal Agreement, the completion documents included the original title deed for the property and the relevant consents required to effect the transfer; that the respondent exhibited a letter dated 30th June 2017 and a notice signed by the Land Registrar Kwale in which it is stated that the respondent had lost its title deed to the suit property, and that a new title would be issued after expiration of sixty days from the date thereof; that, further, the respondent had not exhibited any Land Control Board consent to demonstrate that it had obtained the relevant consents required in the transaction; that it was therefore baffling that the respondent purported to issue a rescission notice dated 16th August 2017 in which its advocates stated that they had instructions to confirm "their client's readiness to complete the sale in all respects"; and that the respondent was not entitled to rescind the sale agreement since it was in breach thereof and not ready to complete as at the date of the rescission notice. According to counsel, the respondent was not entitled to demand for full payment of the purchase price when it was not ready to complete the transaction.

46. In rebuttal, counsel for the respondent submitted that, on 5th July 2022 during the hearing of the appellant's urgent application dated 20th June 2022 for stay pending appeal, it was agreed that only the Orders on payment of mesne profits and on costs would be stayed; that all other orders took effect; and that, therefore, the only issues for determination was whether the Respondent was entitled to mesne profits in the contested sum of Kshs. 80,906,844; and whether the trial Judge re-wrote the judgment post-delivery.

47. In our considered view, even though the appellant only obtained stay of the orders relating to mesne profits and costs pending determination of the appeal, this did not of itself preclude the appellant from challenging all of the other orders granted by the ELC in the absence of any evidence that the parties agreed to limit the appeal to any particular grounds in issue. However, we find no evidence of such agreement. To the contrary, the appellant has robustly submitted on the other issues, including the contested rescission of the contract. Accordingly, it cannot be said that it abandoned any of the foundational grounds advanced in its appeal.

48. Clause 3.1 of the Principal Agreement between the parties dated 14th May 2015 expressly provided that the initial deposit of Kshs. 1,000,000/= on the purchase price of Kshs. 24,260,340 was payable on or before execution of the Agreement. In addition, it set deadlines for payment of the agreed monthly instalments between the months of May and November 2015.

49. Clauses 4.1 and 4.2 of the Principal Agreement provided for completion arrangements in the following terms:

> " 4.1 Upon receipt of the entire Purchase Price as set out in clause 3.1, the Vendor shall deliver to the Purchaser or the Purchaser's Advocates the following documents in respect of the property-
>
> a. the original title deed for the property;
>
> b. the transfer (in quadruplicate) in favour of the Purchaser;
>
> c. certified true copy of the Vendor's certificate of incorporation;

d. certified true copy of the Vendor's personal identification number (P.I.N.) certificate;

e. the relevant consents required to effect the transfer; and

f. the rates clearance certificate.

4.2 The documents listed in clauses 4.1 (a) to (f) (both inclusive) are the documents referred to in sub-clause 1.1 (a) as the 'Completion Documents'".

50. For the avoidance of doubt, the interpretive clause 1.1 (a) of the Principal Agreement provided that:

> " (a) "Completion Date" means the day on which the Purchaser shall complete payment of the Purchase Price and the Vendor shall coterminously hand over the Completion Documents to the Purchaser or the Purchaser's Advocates, to wit, 30 November 2015."

51. The default clause 7.1 of the Principal Agreement stipulated the consequences of non-compliance with the Agreement in the following terms:

> " If the Purchaser fails to comply with any of the conditions hereof or the condition subject to which this sale is made, including the condition relating to completion, the Vendor may give to the Purchaser fourteen (14) days' notice (time being of the essence) in writing confirming the Vendor's readiness to complete the sale in all respects and specifying the default and requiring the Purchaser to remedy the same before the expiration of such notice AND if the Purchaser shall fail to comply with such notice, the Vendor shall be entitled to rescind this agreement and thereafter be at liberty to resell the Property PROVIDED THAT the Vendor shall only retain the Deposit being the agreed liquidated damages and shall within fourteen (14) days after the expiration of the notice period, return the balance of any monies paid by the Purchaser pursuant to this agreement without interest."

52. It is not disputed that, after paying Kshs. 6,250,000, the appellant failed to settle the remaining monthly instalments towards the purchase price, which necessitated enforcement by the respondent of the Supplemental Agreement dated 30th April 2016. We take to mind the parties' clear intention in executing the Supplemental Agreement as set out in the recital, which stated that:

> " (b) Since the execution of the Principal Agreement, the Purchaser has remained in possession of the Property and used the same for the realisation of pecuniary gain despite not having made the requisite instalment payments in terms of the provisions of the Principal Agreement,
>
> (c) In light of recital (b) above, the parties intend that, by virtue of the pecuniary gain realised by the Purchaser, the Purchaser will forfeit the Property and any instalments or deposits made towards the Purchase Price in the event of breach of the terms set out in clause 3 of the Principal Agreement (as amended by this agreement)."

53. In effect, the Supplemental Agreement varied Clause 3.1 of the Principal Agreement to revise the deadlines for payment of the monthly instalment and provided that the last instalment would become

due and payable on or before 30th December 2016. In addition, the Supplemental Agreement varied the terms of Clause 1.1 (a) of the Principal Agreement to read:

> " (a) "Completion Date" means the day on which the Purchaser shall complete payment of the Purchase Price and the Vendor shall coterminously hand over the Completion Documents to the Purchaser or the Purchaser's Advocates as are not already in the custody of the Purchaser at the Completion Date."

54. It is also noteworthy that the Supplemental Agreement introduced additional clauses 3.4 and 3.5 which provided that:

> " 3.4 If any instalment amount constituting a portion of the Purchase Price is not paid on the date on which it is required to be paid under sub-clause 3.1, this agreement shall immediately terminate and the Property, as well as the instalments or amounts that will have been paid towards the Purchase Price as at the date on which the default is made, will stand forfeited to the Vendor and the Purchaser shall forthwith relinquish possession of the Property and any other or further claim to the Property.
>
> 3.5 For the avoidance of doubt, if any portion of the Purchase Price remains unpaid on the date on which [it is due], the agreement shall stand terminated and the parties shall revert to the status quo in respect of the Property PROVIDED THAT (a) any amounts paid towards the Purchase Price under this agreement shall not be recoverable by the Purchaser, (b) possession of the Property shall forthwith revert to the Vendor, and (c) the Purchaser shall not be entitled to any crop standing or otherwise to be found on the Property."

55. The provisions of Clauses 3.4 and 3.5 of the Supplemental Agreement constituted mutual variation of the terms of clause 7.1 of the Principal Agreement with regard to the consequences of breach by the Purchaser of clause 3.1. While clause 7.1 of the Principal Agreement made provision for rescission of the agreement and the Vendor retaining only the deposit paid towards the purchase price. Under Clause 3.4 and 3.5 of the Supplemental Agreement, the sale agreement would be considered as terminated with immediate effect upon breach by the appellant, and without the need to effect the rescission notice hitherto contemplated in clause 7.1 of the Principal Agreement. Consequently, the appellant would be bound to forfeit all amounts previously paid towards the purchase price and relinquish the property with immediate effect as well as the improvements and crops being thereon. In effect, clause 7.1 of the Principal Agreement stood varied in terms of clauses 3.4 and 3.5 of the Supplemental Agreement.

56. The learned authors of Halsbury's Laws of England (4th Edn) (Reissue), Vol. 9(1) at paragraphs 774 and 775 observe that:

> " The contract must be construed as a whole in order to ascertain the true meaning of its several clauses .... The court may give effect to the intention of the parties by transposing words; supplying omitted words; rejecting misnomers or surplusage; correcting grammatical errors; and construing ambiguities to save a document. There is a presumption that a party cannot use a contractual provision to rely on his own breach.
>
> If the intention of the parties can be ascertained from the writing, the court will give effect to that intention, notwithstanding ambiguities in the words used or defects in the operation of the contract. But, where the intention of the parties is not sufficiently clear, the court will

not make a contract for them in order to prevent the whole agreement failing on grounds of uncertainty or otherwise. Where a document is contradictory, later provisions prevail over earlier ones. The wording of clauses prevails over headings."

57. To our mind, the intention of the parties as plainly shown in the recital to the Supplemental Agreement is that the provisions of clauses 3.4 and 3.5 of the Supplemental Agreement prevail over the provisions of Clause 7.1 of the Principal Agreement.

58. It is evident from the record that, even after the parties executed the Supplemental Agreement, the appellant persisted in failure to make payment of the agreed monthly instalments within the timelines stipulated in Clause 3.1 of the Principal Agreement as amended by the Supplemental Agreement. The effect of the continued breach was that the respondent was entitled to consider the agreement as terminated with immediate effect without having to give the appellant any rescission notice or an opportunity to remedy the breach. In addition, the respondent was entitled to retain the amounts paid by the appellant on account of the purchase price and regain possession of the suit property together with all the improvements and crops thereon.

59. The respondent contends that she elected to serve the appellant with a rescission notice dated 16th August 2017 pursuant to Clause 7. 1 of the Principal Agreement as read with Clauses 3.4 and 3.5 of the Supplemental Agreement in response to the appellant's continued breach. On the other hand, the appellant denied having been served with the rescission notice and, consequently, that the contract was not rescinded.

60. Whatever the case, we hasten to observe that no purpose would be served by determining whether the rescission notice was duly served on the appellant, or whether the agreement was rescinded by notice pursuant to Clause 7.1 of the Principal Agreement. To our mind, the provisions of Clause 7.1 was effectively varied and superseded by the terms of Clauses 3.4 and 3.5 of the Supplemental Agreement in accordance with which the sale agreement stood terminated without prior notice consequent upon the appellant's failure to settle the remaining instalments within the revised timelines set out in Clause 3.1 of the Supplemental Agreement.

61. The appellant's further contention is that it was the respondent who frustrated completion of the sale by failing to avail the original title deed, and to obtain the requisite consent from the Land Control Board. The appellant exhibited a copy of an undertaking dated 15th August 2014 together with copies of email correspondence between the parties' advocates during the period between 3rd November 2014 and 5th February 2015. It must be borne in mind, though, that these documents comprised the parties' negotiations before execution of the Principal Agreement on 14th May 2015 and, therefore, were not binding on the parties unless they or any of them contained terms incorporated in the Principal or Supplemental Agreements. It is instructive that neither the Principal nor the Supplemental Agreement contained an express term that delivery to the appellant of the Completion Documents was a condition precedent to payment of the purchase price in full.

62. In Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] KECA 152 (KLR), this Court held that:

> " 38. We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved. See National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd [2002]2 EA 503. The primary task of the court is to construe the contract and any terms

implied in it. See Megarry, J. in the case of Coco vs A. N. Clark (Engineers) Ltd. - [1969] RPC 41."

63. The "four corners" rule in contract law, also known as the plain meaning rule, states that a written contract should be interpreted based solely on its wording without considering extrinsic evidence of the parties' intent. This principle emphasizes that the meaning and import of terms of the contract is found within the text itself, rather than external factors, such as past negotiations or customs of trade. In Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited [2017] eKLR, this Court, citing with approval the decision in Prudential Assurance Company of Kenya Limited Vs Sukhwender Singh Jutney and Another [2007] eKLR, expressed itself thus:

> " ... where the intention of parties has in fact been reduced to writing, under the so called parole evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms. Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it."

64. In Prudential Assurance Company of Kenya Limited v Sukhwender Singh Jutney and Another (ibid), the Court citing a passage in Charles Edwin Odgers' Construction of Deeds and Statutes (5th edn.) at p.106 emphasized that, in construing the terms of a written contract:

> " It is a familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence."

65. To the extent that the contents of the correspondence exchanged prior to execution of the Principal and Supplemental Agreements did not form part of the written contract as subsequently varied, the learned Judge cannot be faulted for failing to find that the respondent was in breach of the contract and not ready to complete the transaction as at the time it unnecessarily issued the rescission notice, which was for all intents and purposes superfluous in light of Clauses 3.4 and 3.5 of the Supplemental Agreement, which did not require such notice.

66. On the 4th issue as to whether the learned Judge erred in awarding the respondent mesne profits of Kshs. 80,906,000 based on the expert evidence, the learned Judge observed that:

> " 36. .... In the instant case, the pleadings and the evidence adduced in Court indicates that the Defendant has been in occupation of the suit land from 15th August, 2014. Acting in good faith, the Plaintiff allowed the Defendant to take possession and they commenced cultivation of Sugar cane for commercial purposes. Despite taking possession and the use of the land they failed to complete the payment and knowing very well of the consequences as enshrined in the sale agreements. They failed to vacate the land though well served with the notice. All these constitutes wrongful possession of the suit land. This tantamount to trespass whereby a person enters without reasonable excuse or

remains, erects any structure on or cultivates or fills or grazes stock in private land without the consent of the occupier. The Plaintiff adduced evidence that all this time the Defendants was making profits from the use and occupation of the suit land. The evidence of PW – 2 was cogent and compact in testifying that the profits were derived from the original crop in the year 2014 and the subsequent crops referred to as ratoons harvested annually from the year 2014 todate. He testified that sugar cane being a unique crop that regenerates, and once planted, it could survive for a period of fifteen (14) years. He held that a farmer therefore makes pecuniary gain from yearly harvests of the crop. In the instant case, the Defendant has been harvesting the crop from the year 2014 and continue to do so until they will have handed over the possession of the suit land to the Plaintiff. According to the expert, and whose evidence was never controverted by another expert, the Defendant had made a profit of a sum of Kenya Shillings Eighty Million, Nine Hundred and Six Thousand Eight Hundred Forty Four (Kshs. 80,906,844/=) upto December, 2021. This Court has noted that the Defendant through its Advocates have mounted a very strong defence and fully castigated the report by the expert – PW – 2, unfortunately it was made under the submissions and not while adducing evidence. It is taken to be evidence from the bar.

Fundamentally, by the time of the delivery of this Judgement the profits will have increased drastically by a further period of five (5) months down the line. It is for that understanding that this court proceeds to award the Mesne profits to the Plaintiff as prayed."

67. Counsel for the appellant took issue with the learned Judge's decision, submitting that the award of mesne profits in the sum of Kshs. 80,906,000 was not specifically pleaded in the Plaint; that the amount aforesaid was not stated in the technical report of October 2017 or in the testimony of Festus Mng'ong'o (PW2), who was called as an expert witness; and that the figure emerged for the first time in the respondent's final submissions.

68. On the authority of Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] eKLR, counsel submitted that a claim for mesne profits is akin to special damages in that it must be specifically pleaded and strictly proved; and that a court has the duty to exercise an independent mind and determine if expert reports are reasonable.

6.9 Counsel argued that the technical report of October 2017 did not offer cogent and reliable evidence to support the claim for mesne profits as awarded for the following reasons: that the author did not establish that he was an agricultural expert with special knowledge and skill or experience in the sugar industry; that no academic/professional certificates were produced; that the report did not state the author's qualification/experience; that he was merely a paid agent or hired gun for the respondent; that the report did not relate to the suit land in that it was a generalised report that has no connection with the suit property; that the parcel number of the suit property is not stated anywhere in the report; that the author states that the farm he visited covered an estimated 200 acres, and yet the suit property was only 161.7356 acres; that Table 5 of Section 5.0 indicates estimated revenue for 105.1 hectares whereas the suit property was only 65.48 hectares; that there was no proof of commercial sugarcane farming by the appellant; that, save for the technical report, no iota of evidence was adduced to demonstrate the growing, harvesting and transportation of cane from the suit property; and that no cane supply contract between the appellant and any sugar miller was produced.

70. According to counsel, the author ought to have visited the only sugar cane miller in the coast region (KISCOL) to ascertain whether the appellant was in the register of growers. Counsel further submitted that the data forming the substratum of the report was not exhibited; that the data as to the costs of sugarcane production and revenues were indicated as having been sourced from the Agriculture and Food Authority (AFA); that no request to AFA for supply of data or government report was attached to substantiate that the figures indeed emanated from AFA; that the report was replete with internal contradictions in that it gives different figures for average cane yields at section 3.2 (Potential Cane Yields) and at section 5.0 (Revenue); that no basis was laid for using these figures as cane yields; and that, Section 5.0 uses the cane price of Kshs. 4,200 per tonne without any basis despite stating earlier that KISCOL pays farmers between Kshs. 2,700 and 3,100 per tonne while also acknowledging that there are regular price controls for sugar cane set by the Pricing Committee thereby resulting in upward and/or downward fluctuations in the price.

71. In addition, counsel cited the cases of Stephen Kinini Wang'ondu v The Ark Limited [2016] eKLR; and Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others (supra) for the proposition that it is a trite principle of evidence that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof.

72. On their part, counsel for the respondent bolstered their rebuttal by citing the cases of Rajan T/A Rajan S. Shah & Partners v Bipin P. Shah [2016] eKLR; and Peter Mbuthia & Another v Samow Edin Osman [2014] eKLR for the proposition that it is a settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor's liability; and that, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits.

73. Counsel further submitted that the respondent adduced evidence beyond a balance of probabilities that the appellant had, since 2014 when it took possession of the land, made profits from sugarcane planted on the farm; that these profits, according to a Mr. Festus Mng'ong'o (PW2), an Agricultural Economist, were delivered from the original crop in 2014, and from subsequent crops referred to as ratoons (sprouts) harvested annually from 2014 up to the date of judgement in May 2022; that PW2 testified that sugarcane is a unique crop that regenerates and that, once planted, it can survive for a period of fifteen (15) years; that a farmer makes pecuniary gain from yearly harvests of the crop; that, in the instant case, the appellant harvested cane since 2014, and continued to do so up to the time the hearing commenced in June 2021; and that it is not known when they vacated the land.

74. In conclusion, counsel submitted that, according to the expert witness, the appellant made a profit of Kshs 80,906,844 up to December 2021; that, in reaching his conclusion, PW2 took into account several factors determining the expenses incurred and the profits receivable as set out in the report and explained in his testimony; that, as to the source of his information, PW2 explained that he collected the information from the Ministry of Agriculture, AFA, Kenya Sugar Directorate, and KALRO; that he also consulted Kenya Research Institute; and that the learned Judge considered the factors relied on by PW2 in forming his opinion on the basis of which he awarded the contested mesne profits.

75. Even though the appellant insisted that it was never served with any rescission notice by the respondent, it ought to have known that the agreement stood terminated with immediate effect when it failed to settle the remaining instalments within the timelines set out in Clause 3.1 of the Supplemental Agreement. We find no evidence to show that the appellant took any steps to remedy its breach during the period between 31st May 2016 (when it was required to pay the third instalment of the purchase price) and 22nd November 2017 (when the respondent filed its suit in the ELC). In effect, the appellant

was at all material times in wrongful possession of the suit property since 1st April 2016 after which the respondent was entitled to claim mesne profits.

76. Section 2 of the *Civil Procedure Act* defines mesne profits thus:

> " mesne profits", in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;

77. Mesne profits, which are profits earned by a person in wrongful possession of property during a period of unlawful possession, must be specifically pleaded and strictly proved. This means that the party claiming mesne profits must explicitly mention it in their pleadings and provide sufficient evidence to support their claim. Pleadings are comprised of all allegations of fact that are relevant to the case. On the other hand, a prayer is a request for a certain relief. In the instant case, the respondent merely prayed for mesne profits, which were not specifically pleaded in its plaint, but only surfaced in its prayers and in its counsel's submissions.

78. In principle, parties are bound by their pleadings (see: Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR). It is not enough to make a request for a specific relief in respect of which no pleadings are proffered to found the basis for such relief.

79. While mesne profits are generally recoverable by a seller of land when a purchaser breaches the sale agreement and remains in possession of the land after the breach as was the case here, such relief must be founded on express averments of fact in the pleadings, which comprise the building blocks of the claim in which the relief is sought.

80. The High Court of India at Bombay in Purificacao Fernandes v Hugo Vincente de Perpetuo Socorro Andhrade, AIR 1985 Bom. 202 correctly defined mesne profits thus:

> " The term 'mesne profits' relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor's liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits."

81. In support of its claim for mesne profits, the respondent called PW2, Festus Mng'ong'o, an agricultural economist, who it engaged as a consultant to assess the value of, and profits receivable from, the sugar cane crop on the suit property. PW2 prepared and produced a Technical Report on the basis of which the contested amount was awarded, but which the appellant challenges on the grounds that PW2 lacked the expertise to prepare the report. In addition to challenging PW2's expertise, the appellant also took issue with the quantum of the estimated value or profits generated from the cane production in the suit property during the period in issue.

82. It is not in dispute that the respondent prayed for mesne profits on account of the economic benefits allegedly acquired by the appellant from the use of the suit property as computed in accordance with PW2's expert opinion. We hasten to observe that the expert opinion on the basis of which the learned

Judge awarded mesne profits was of little or no value to a claim that remained at large in the absence of pleadings in that regard. Put differently, a prayer or request for a certain relief coupled with submissions is inconsequential. This Court in Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others (supra) cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed that:

> "... any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

83. The respondent having failed to plead and set out the factual basis of its prayer for, and submissions on, mesne profits, we find that the learned Judge was at fault in holding that the respondent had proved its claim on a balance of probabilities; and in awarding its claim for mesne profits in the sum of Kshs. 80,906,000 based on the expert evidence given by PW2, which did not support any averments in the pleadings.

84. Turning to the 4th and 5th closely linked issues as to whether the learned Judge was biased in awarding the reliefs aforesaid; and whether he accorded the appellant a fair hearing, counsel for the appellant submitted that the manner in which the learned Judge handled the matter clearly shows that he did not afford the appellant a fair hearing; that he was biased in favour of the respondent; and that the whole judgment was thus vitiated by bias and was ripe for setting aside.

855. To buttress their submissions, counsel cited the case of Accredo AG & 3 others v Steffano Ucceli & another [2018] eKLR for the proposition that the test for establishing real likelihood of bias has evolved over time from the point where suspicion of bias was sufficient to the reasonable man test, that is, whether a reasonable man taking into account the surrounding circumstances would conclude that there is a real likelihood or reasonable apprehension of bias.

86. On their part, counsel for the respondent made no submissions in rebuttal on this particular issue.

87. In Judicial Service Commission v Shollei & another [2014] KECA 334 (KLR), Okwengu, JA held that:

> "78. Thus it is crucial in determining real or apparent bias, that the first step be the ascertainment of the circumstances upon which the allegation of bias is anchored. The second step is to use the ascertained circumstances to determine objectively the likely conclusion of a fair minded and informed observer, on the presence or absence of reasonable apprehension of bias."

88. In the same case, Kiage, JA additionally observed that:

> "102. I do not accept the thesis that bias is established merely by the seriousness or the stridentness of the allegations. What is required is proof by evidence, the burden being borne by he or she that alleges. It is not difficult to see what mischief would arise were courts to hold that seriousness of allegations, as opposed to their proof, is the proper basis for apprehending bias. Such apprehension, in my respectful view, is regrettable, not reasonable."

8.9 In our considered view, it is one thing for a party to allege bias in a judicial decision made in favour of the adverse party; it is another thing to go beyond mere suspicion and lay bare the circumstances under which such bias may be imputed. Put differently, 'bias' is an inclination or prejudice for or against one

person or group, especially in a way considered to be unfair, and is characterised by prejudice, partiality, partisanship, favouritism or outright unfairness. We find no evidence of such negative qualities to suggest that the impugned decision was tainted with bias.

90. In particular, the following cannot reasonably be construed as an indication of bias on the part of the learned Judge:

a. to revisit and 'polish' his judgment in the manner aforesaid before it was perfected;

b. the prior attempt to summon the appellant's directors suo moto in an attempt to encourage and facilitate an out-of- court negotiation as required under Article 159(2) (c) of *the Constitution*; and

c. finding that service of a rescission notice was a non-issue in light of the amendments made to the Principal Agreement.

91. In view of the foregoing, the appellant's allegation of bias on the part of the learned Judge remains unsubstantiated and amounts to no more than a bare allegation.

92. As to whether the appellant was accorded a fair hearing, the appellant has not told the Court what was expected of the learned Judge beyond giving counsel for the appellant an opportunity to call witnesses in defence of the respondent's claim; granting several adjournments to give its directors the opportunity to appear and explore the possibility of amicable settlement; and waiting on them to call evidence on such issues as to the actual benefits obtained from possession of the suit property. The appellant took no advantage of the glaring indulgence. In the circumstances, we find nothing to suggest that the appellant was not accorded a fair hearing.

93. Having carefully considered the record of appeal, the grounds on which it was anchored, the impugned judgment, the rival submissions, the cited authorities and the law, we find that the appeal partly succeeds to the extent that the award of mesne profits in the sum of Kshs. 80,906,000 be and is hereby set aside.

94. Consequently, the judgment and decree of the ELC at Mombasa (L. L. Naikuni, J.) dated 24th May 2021 be and is hereby upheld with regard to the awards and orders specified in paragraph 41 (a), (b), (c), (f), (g), (h) and (i) of the impugned judgment.

95. The appellant shall bear the costs of the appeal.

Orders Accordingly.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF MAY 2025.

A. K. MURGOR

....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR