



**Kenya Power & Lighting Co Ltd v Membly Housing Company (Civil Appeal 336 of 2017) [2022] KECA 742 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KECA 742 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 336 OF 2017  
W KARANJA, A MBOGHOLI-MSAGHA & F TUIYOT'T, JJA  
JULY 29, 2022**

**BETWEEN**

**KENYA POWER & LIGHTING CO LTD ..... APPELLANT**

**AND**

**MEMBLY HOUSING COMPANY ..... RESPONDENT**

*(An appeal against the judgment of the High Court at Nairobi (H.P.G. Waweru, J.) dated 16th September 2016 in Nairobi HCCC No. 575 of 2005)*

**JUDGMENT**

1. In Nairobi HCCC No. 575 of 2005, the respondent filed suit against the appellant seeking judgment for a balance of purchase price in the sum of Kshs. 1,953,864.70, interest of Kshs. 4,110,689.70 (as at May 13, 2005 and further accruing interest), a reimbursement of Kshs. 18,350.00, and general damages.
2. The respondent's case according to its plaint was as follows: On or about August 2002, the appellant approached the respondent seeking to acquire a 40 metres wide wayleave trace crossing over part of the respondent's property (LR Number 10901/46 registered with the Certificate of Title Number IR 57473/1) on which the appellant intended to erect and carry its 220 KV Olkaria – Dandora electricity transmission line. After negotiations, the parties agreed the price for the wayleave trace to be Kshs. 7,020,000; and upon the agreement, the appellant took possession of the wayleave trace area, had the same surveyed and proceeded to erect pylons thereon. In its letter of acceptance dated November 13, 2002, the appellant represented that the area covered by the trace was 4.642 acres. The respondent responded on November 15, 2002 reiterating that what it was selling to the appellant was a 40 metre wide wayleave trace, regardless of what that area turned out to be on actual survey. According to the respondent, its response made it clear that the respondent was not sure of the area of the wayleave, did not consider the area of the way leave of any importance in the context of the sale, and it did not accept the figure of 4.624 acres put forward by the appellant as correct.



3. The respondent then sent a Draft Sale Agreement to the appellant for its approval, leaving the area of the way leave blank. The appellant however returned the Draft Agreement duly approved, but amended it by inserting “4.624 acres” in the blank space as the measurement of the said wayleave. The respondent, having made it clear that what was being sold to the appellant was a 40 metre wide wayleave trace lying between parallel boundaries regardless of the eventual area after survey, engrossed the representation of the appellant as to the area of the wayleave and forwarded the engrossment to the appellant for execution. The Agreement incorporated the Law Society Conditions of Sale (1989). Pursuant to the Agreement, the appellant paid a deposit of Kshs. 702,000 being 10% of the agreed purchase price.
4. The respondent caused the property to be surveyed and subdivided, and the wayleave to be excised therefrom. The same was delineated in Deed Plan No. 250525 and measured 1.340 Hectares or approximately 3.311 acres. A copy of the deed plan was forwarded by the respondent’s advocates to the appellant’s advocates on 22<sup>nd</sup> September 2003. The Transfer of the wayleave was duly drawn, approved, stamped and registered in the name of the appellant on 20<sup>th</sup> August 2004 as Number IR 57473/6 and the appellant was duly notified of the registration. The respondent then demanded payment of the entire balance of the purchase price as provided in the Agreement, but the appellant refused or neglected to pay the same.
5. According to the respondent, the appellant wrongly alleged that under the Agreement it was purchasing 4.642 acres of land and not just the wayleave trace of 40 metres width; and that as the land covered by the way leave transferred to it was only 3.35 acres, the appellant offered to pay a pro rata sum of Kshs. 4,364, 135.30 instead of the full balance of Kshs. 6,318,000. The respondent accepted the said payment on a without prejudice basis and on account. A term of the Agreement along with the Law Society Conditions of Sale was that the appellant would, in default of payment of the balance, pay interest thereon at the rate of 25% per annum. The interest was payable from the date the appellant took possession, namely November 1, 2002, to the date of actual payment. It was also an implied term of the Agreement that the appellant, while in possession, would pay and discharge rates, land rent and other outgoings payable in respect of the land covered by the wayleave, but the appellant failed to do so despite demand. The respondent had to pay such outgoings in the sum of Kshs. 18,350.
6. The case of the appellant as pleaded in its defence was as follows: Against its practice policy of installation of power lines, the respondent insisted on, and forced the appellant to purchase outright the said property measuring 4.462 acres or thereabouts. An agreement was prepared by the respondent’s advocates and executed by the appellant for the outright sale of the 4.462 acres for Kshs. 7,020,000. The appellant denied that the respondent wrote a letter clarifying that what was being sold was a 40 metre wide wayleave trace, and that even if such a letter was written, it could not have superseded a clear and signed Agreement between the appellant and respondent. The appellant denied ever participating in the preparation of the Deed Plan No. 250525, and denied receiving from the respondent a copy of the said deed plan on September 22, 2003.
7. According to the appellant, it was to pay the respondent the balance of Kshs. 6,318,000 upon successful registration of the purchase property and not part of it. That the respondent was in breach of the Sale Agreement when it registered only a portion of the purchase property and could therefore not be entitled to the full balance of the purchase price. The appellant chose to pay the respondent the balance on a pro rata basis, having already laid its line over the land. That the 25% interest applicable on delay of payment of the balance applied only upon notification on completion under the Law Society Conditions of Sale, and further applied upon such notification being verified to be pursuant to a full and complete conveyance and not otherwise. That the respondent did not fully and completely convey



- the said land as agreed and in any event, partial conveyance was effected on 20<sup>th</sup> August 2004, which fact was communicated to the respondent on 29<sup>th</sup> October 2004.
8. The appellant contended that it only discovered that the acreage transferred was not as agreed when it received the Transfer, Deed Plan and Certificate of Title, and it immediately lodged its protest for the blatant breach. The appellant denied that it declined to meet any statutory land levies and if any payment was made by any party for it, the payment was not solicited for and it was not bound to reimburse the same.
  9. At the trial, Stephen Benson Mbugua, a managing partner of the respondent, testified as PW1. His testimony was that the appellant approached them in 2002 requesting for a 40 metre wide wayleave trace with parallel lines for erection of pylons to carry high voltage transmission lines. The appellant provided a sketch plan. Apart from the 40 metre wide way leave trace, no other dimensions were mentioned. They favourably considered the request and negotiated the sale price, culminating in the Sale Agreement. The area of the wayleave was left blank in the Draft Agreement they sent to the appellant because survey had not been completed. The appellant inserted the area covered by the wayleave as 4.642 acres. Mbugua thought that the appellant's surveyors may have calculated the area of the wayleave and found it to be 4.642 acres so he had no misgivings. 10% of the purchase price was paid. Mbugua signed the application for Land Control Board consent but he did not know who signed for the appellant. The area of land given in the application was 1.340 Ha and was sent to the appellant for signing. The appellant's legal officer Beatrice Mwangwa attended the Land Control Board meeting and Mbugua attended for the respondent. The area of the land covered by the wayleave was excised and it became LR No. 10901/46/1. The same was transferred to the appellant. The transfer was registered in 2004 long after the appellant had taken possession in November 2002. Mr. Mbugua stressed that the appellant took possession and occupied only the 40 metre wide wayleave, no more no less.
  10. In cross-examination, Mbugua stated that there was no request for free wayleave. He denied that the appellant sought to buy only after the respondent refused to give free wayleave. He stated that it was the respondent's intention to sell to the appellant the land covered by the 60 plots subject to the survey that would establish the exact area to be covered by the wayleave. That they must have provided the documents requested in the appellant's letter of 13<sup>th</sup> November 2002. That the re-survey was done pursuant to Clause 7.2 of the Sale Agreement, but he was not sure whether the appellant was represented at the re-survey. It was possible that the 4.642 acres indicated in the Sale Agreement had included the riparian reserve that had not been taken into account by the appellant's surveyor. The river line was not indicated in the deed plan. The deed plan was approved by the appellant before it was registered as the respondent's lawyers had submitted it to the appellant. The Transfer was approved by the appellant but he did not know why the Transfer was prepared by the vendor's advocates.
  11. Samuel Kamau Ndungu, who was at the material time employed by the respondent's advocates as a court clerk, testified as PW2. He recalled that he had delivered many letters to the appellant and in most cases he hand-delivered the letters without a delivery book. He would deliver the letters to a secretary at Stima Plaza 2<sup>nd</sup> Floor off Limuru Road. On 22<sup>nd</sup> September 2003, Ndungu recalled that he received a letter from his employer with instructions to deliver it to the appellant at Stima Plaza. There were enclosures in the letter namely a sale agreement, copy of a deed plan and copy of a transfer. He stapled the documents together and put them in an envelope which he delivered to the appellant. He would give the letters to the legal officer through her secretary. No written acknowledgments were given in most cases.
  12. In cross-examination, Ndungu stated that he did not use a delivery book to deliver letters to the appellant. He was shown two letters from his employer to the appellant which was acknowledged by a rubber stamp but stated that he was not the one who delivered those letters. That they may have been



delivered by the respondent's own messenger or other staff as they had offices in the same building as their advocates.

13. Benson Meshak Okumu, a land surveyor, testified as PW3. His account was that in May 2003, he was asked by the respondent to survey and measure a 40 metre reserve that the respondent wanted to transfer to the appellant. The reserve was to be used as a power line wayleave. The centre line of the reserve had been marked by the appellant. There were holes dug along the centre line. On the strength of a letter of approval from the Commissioner of Lands and a final approval from the same Commissioner, he surveyed the wayleave, measuring 20 metres on each side of the centre line. He marked the wayleave and prepared the deed plan. The way leave corridor amounted to 1.34 Ha and was to become LR No. 10901/46/1. The wayleave did not include the riparian reserve. The deed plan was forwarded to the Director of Survey who approved and sealed it as Deed Plan No. 250525.
14. In cross-examination, Okumu stated that his client in the transaction was the respondent, he did not act for the appellant. He received his instructions from the respondent. He did not conduct the survey in conjunction with surveyors of the appellant. He did not see the appellant demarcate the wayleave, he was told by the respondent's representative that the appellant's people had demarcated the centre line of the wayleave reserve.
15. Redirected, Okumu stated that a survey exercise is normally between the surveyor and client. That it is the vendor's obligation to provide a deed plan of what he intends to sell.
16. Awuor Awiti, the appellant's Manager for Legal Services, testified as DW1, adopting her witness statement dated 9<sup>th</sup> July 2015. Cross-examined, she stated that she was not an employee of the appellant during the negotiations in 2001/2002. That all matters in her witness statement were not of her own knowledge but gathered from the appellant's records as at the time of negotiations. That the acreage in the sale agreement was not an insertion but was countersigned by the respondent's lawyer. That the appellant erected a transmission line over the 60 plots sold to it by the respondent. Re-directed, she stated that the only change at Recital C of the sale agreement is the cancellation of hectares and insertion of acres.
17. The parties agreed that the issues for determination the suit were as follows;
  - a. Was the agreement for sale between the parties in respect of a plot of land of specified acreage, or was it a 40-meter-wide wayleave trace (of whatever acreage) for an overhead electricity transmission line across the Plaintiff's property L.R. No 10901/46?
  - b. Regarding the portion that was the subject-matter of the sale –
  - c. Was the actual acreage to be ascertained by survey subsequent to the sale agreement?
  - d. As between the Plaintiff and the Defendant, who represented the area of the 40 meter-wide wayleave trace across L.R. No.10901/46 as variously measuring 4.642 or 4.462 acres?
  - e. Did the portion excised out of L.R. No 10901/46 upon survey correspond with the 40 meter wayleave trace already previously marked and occupied by the Defendant?
  - f. Is the Defendant entitled to raise any objections about the identity or measurement of the subject property, or to claim compensation after the completion date?
  - g. Was the payment of the agreed purchase price of Kshs. 7,020,000/00 or any balance thereof dependent upon the acreage of the 40-meter wide wayleave trace across L.R. No.10901/46, and was such payment to be pro rata? And if so, in reference to what?



- h. Did the Defendant oppose the draft transfer of the subject property with a copy of the Deed Plan No 250525 for L.R. No 10901/46/1, or was it indolent in that regard?
  - i. Were the Transfer and Deed Plan approved by the Defendant prior to registration, and if so, did such approval override the pertinent contents of the Agreement for Sale?
  - j. Was the transfer in breach of the Agreement for sale?
  - k. Was the Defendant entitled to elect to either terminate the Agreement for sale or make a prorated payment should the court hold that the Plaintiff was in breach?
  - l. From what date, or upon the occurrence of what event, was the interest of 25% per annum payable?
  - m. Which of the prayers made is the Plaintiff entitled to?
18. On the first issue, whether the subject matter of the sale was a plot of land of specified acreage or a 40 metre wide wayleave trace of whatever acreage, the learned judge first held that Clause 1.4 of the Agreement restricted the interpretation of the agreement of sale to the agreement itself. Therefore all the evidence to do with the parties' talks, negotiations and agreements could not be resorted to in interpreting the agreement; and the court would accordingly ignore all such evidence. The learned judge held that the definitions and interpretations section of the agreement defined "subject property" as "the portion of L.R. No. 10901/46 measuring approximately forty (40) metres wide covered by the wayleave trace of the 220 KV Olkaria-Dandora Electricity Transmission Line comprising 4.642 acres or thereabouts excluding any road or roads of access passing through or across the same." The learned judge concluded that the property the subject of the agreement for sale was therefore the wayleave trace of approximately 40 metres in width across part of the respondent's land. That the property being sold and purchased was not a piece of land of definite acreage but rather a swathe of wayleave trace measuring 40 metres wide across part of the respondent's parcel of land, whatever its acreage might turn out to be.
19. On whether the actual acreage was to be ascertained subsequent to the sale agreement, the learned judge held that Clause 2.3 taken in conjunction with other clauses of the Agreement shows that the survey and excise of the wayleave trace of 40 metres in width was for the purpose of transfer of the same to the appellant and issuance of title to it. That the exercise entailed ascertainment of the acreage of the portion excised, but the ascertainment was not for the purpose of determining the purchase price. That the price would not be affected by whatever the actual acreage turned out to be. That therefore, the representations of the parties as to what the actual acreage was or might be were of no consequence. That the appellant had not complained that its wayleave trace across the portion of land, and for which it ultimately got title, was any less than 40 metres wide, rendering Issue 2 (c) moot; and that there would be no cause for the appellant to raise any objections about the identity or actual acreage of the subject property, or to claim compensation for any perceived shortfall in the acreage (Issue 3).
20. The learned judge restated in determining Issue 4 that, the purchase price of Kshs. 7,020,000 was not dependent upon the actual acreage the 40 metre wide wayleave trace. That the survey and measurement was for the purposes of issuance and transfer of title. The judge also stated that Issue Nos. 5, 6, 7 and 8 needed not be answered in view of his findings in Issues 1, 2, 3, and 4.
21. On the issue of the date or event that would cause the interest of 25% per annum to become payable (Issue 9), the learned judge found that under Clause 5.3 of the Agreement, the balance of the purchase price was to be paid within five days of successful registration of transfer to the Defendant of the subject property. That the transfer was registered sometime in October 2004 and the respondent informed the



- appellant of the transfer by a letter dated October 29, 2004 and by the same letter demanded payment of the balance of the purchase price. That the appellant declined to pay the full balance of the purchase price and elected to pay pro rata for the actual acreage of the parcel transferred. That the appellant was not entitled to pay pro rata for the actual acreage of the parcel transferred as the purchase price was Kshs. 7,020,000 for the 40 metre wide wayleave trace purchased. That the letter gave a five day notice for payment of the balance in line with Clause 5.3, rendering the balance payable on or before November 3, 2004.
22. The learned judge therefore held that the appellant paid to the respondent Kshs. 4,364,135.30 of the Kshs. 6,318,000 balance on or about January 26, 2005, leaving a balance of Kshs. 1,953,864.70. That as per Clause 5.4 the respondent was entitled to interest upon the sum of Kshs. 6,318,000 at 25% per annum from November 3, 2004 to January 26, 2005. That the respondent was also entitled to further interest at the same rate on Kshs. 1,953,864.70 from January 26, 2005 to the date of payment in full; in addition to payment of the balance itself of Kshs. 1,953,864.70. The learned judge gave judgement for those sums and held that the respondent had proved its case on a balance of probabilities in respect to its claim for payment of the balance of the purchase price and interest thereon.
  23. As for the respondent's claim of reimbursement of Kshs. 18,350 for rates, land rents and other out goings; the learned judge considered the claim as not proved as there was no demand from the respondent calling upon the appellant to pay, and there was no request from the appellant requesting the respondent to pay the same on its behalf.
  24. Dissatisfied with the judgment, the appellant filed the present appeal on the grounds that the learned judge erred in law and in fact by:
    - a. Failing to give the Agreement for Sale executed by the parties its correct and legal interpretation thereby arriving at a wrong decision.
    - b. Deciding against the law and the express provision of the Agreement for Sale when he proceeded to hold that the parties were selling and purchasing an undefined and non-distinctive parcel of land when in fact the Agreement expressly defined the acreage of the parcel of land subject of the said Agreement.
    - c. Introducing new matters to a closed Agreement for Sale when the Agreement expressly excluded such matters, thereby rewriting a contract for the parties.
    - d. Failing to consider in totality all the evidence adduced in the case more so the appellant.
    - e. Failing to lawfully determine all the issues that were agreed upon by the parties to be issues in the suit.
    - f. Condemning the appellant to pay interest for the entire 12 year period even after appreciating that the case took so long before the superior court for reasons beyond the appellant.
    - g. Failing to critically evaluate in totality all the evidence presented before the court before reaching the decision in the judgement.
    - h. That on a balance of probability, the learned judge should have dismissed the suit.
  25. In written submissions Counsel for the appellant faulted the learned judge's interpretation of the agreement, more so provision C of the agreement. That it was clear that the acreage that was being sold by the respondent was 4.642 acres which represented the acreage of the 60 plots affected by the wayleave that the respondent had insisted that must be acquired at Kshs. 130,000 each, coming to Kshs. 7,020,000 as the purchase price. Counsel submitted that as at the time of executing the Agreement,



the appellant had already installed its power line across the 60 plots and determined the acreage of the 60 plots to be 4.642 acres such that as execution, the acreage being sold was already determinable. That without involving the appellant in the sub-division, the respondent proceeded to excise an area of 3.81 acres as the purchase property and, without the knowledge or consent of the appellant, registered the same in the name of the appellant and sought full payment of the purchase price for the intended 4.642 acres. That the learned judge chose only to read Clause 2.3 to determine the issue of the actual acreage of the property being sold.

26. Counsel submitted that the judge's finding that the parties initially thought that the wayleave trace would cover 4.642 acres was not supported by any evidence. That the evidence available clearly showed that the respondent insisted on the appellant paying the full price of the 60 plots, that the plots measured 4.642 acres and the parties duly put the acreage in the agreement. That the respondent had a duty to excise the 60 plots and transfer the same to the appellant to be paid the full purchase price. That the evidence of Awour Owiti was clear that ordinarily the appellant does not buy properties for wayleave purposes the respondent insisted on outright purchase and as such the respondent must give the appellant full value for the public money the appellant was spending in acquiring the land.
27. Counsel submitted that the holding by the learned judge that the appellant did not complain about the acreage transferred to it by the respondent was not supported by any evidence. That the appellant did complain of being short- changed by the respondent on the acreage transferred. That it was agreed at paragraph 5.2 of the Agreement that the appellant was to be responsible for the registration of the purchase property. That the respondent proceeded to register the property on their own in order to conceal the lesser acreage being transferred.
28. On the issue of the interest, Counsel submitted that interest was only payable 5 days after the purchaser/appellant had successfully registered the transfer. That the appellant never successfully registered the transfer, the transfer by the respondent was disputed on material defects of the acreage being transferred. That the record showed that it is the respondent that declined receipt of the pro rata payment when offered. That there was therefore no basis for the award of interest as made by the court.
29. In written submissions, Counsel for the respondent submitted on the issue of the learned judge's interpretation of the Agreement that the learned judge took the right approach by taking cognizance of Clause 1.4 of the Agreement which placed a restriction on the interpretation of the Agreement by providing that it constitutes the entire agreement in regard to its subject matter and supersedes and cancels out all previous negotiations and agreements.
30. On the contention that the subject property was determined as 4.642 acres and not a 40 metre wide wayleave trace, Counsel submitted that the Agreement was made on 3<sup>rd</sup> April 2003 by which time the exact area to be taken up by the wayleave trace had not been surveyed and therefore the Agreement at Clause 2.3 provided for the re-survey of the property by the Vendor for the purposes of excising the subject property and transferring the same to the appellant; and that Clause 7.2 provided that the actual boundaries and beacons shall be defined and fixed upon the re-survey. That pursuant to the Agreement, the subject property was surveyed by Benson Meshak Okumu and found to amount to 1.34 Ha. Counsel submitted that the acreage of 4.642 acres emanated from the appellant's finding that the power line was installed across the 60 affected plots and determined the acreage of the plots to be 4.642 acres. That the Agreement made no mention of the 60 plots alluded to, the subject property was not the 60 plots. That the Agreement did not give the appellant the duty to re-survey the respondent's property or excise therefrom the subject property. That based on its self-assigned and misguided survey exercise, the appellant wrote the letter of 13th November 2002 claiming the wayleave area to be 4.642 acres to which the respondent's advocates responded that the respondent was not sure about the actual



area of the way leave trace except that it would be a span of 40 metres wide with parallel sides. That the appellant has never to date complained that the way leave is less than 40 metres wide.

31. On the ground that the learned judge introduced new matters, Counsel submitted that the learned judge actually cautioned himself on the need to strictly interpret the terms of the Agreement without taking into account past negotiations. That the learned judge set out the agreed issues and preceded to determine each one of them, contrary to the appellant's complaint that the judge failed to determine all the issues that were agreed upon.
32. On the ground that the court penalized the appellant interest for the 12 years the matter was in court through no fault of its own, Counsel submitted that the respondent as the plaintiff closed its case on 25<sup>th</sup> November 2009. That when the matter came up for defence hearing on 13<sup>th</sup> March 2015, the appellant for the umpteenth time sought a 30 day adjournment. That the court declined to grant an adjournment noting that the appellant had in the 5 years since the close of the respondent's case found reasons not to present its defence. That had the appellant's counsel demonstrated willingness to proceed with the defence soon after the close of the respondent's case, the suit would not have taken 11 years to be determined.
33. The duty of this Court in a first appeal is set out in *Selle and another v Associated Motor Boat Company Limited and others* [1968] 1 EA 123 as follows:

“Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
34. Having considered the record before us we set out what we believe to be the issues for determination as follows,
  - a. Whether the learned judge's approach to interpretation of the Agreement for Sale was proper
  - b. What constituted the subject property according to the Agreement
  - c. The interest payable by the appellant
35. The learned judge's approach to the interpreting the provisions of the Agreement for sale was guided by Clause 1.4 of the Agreement which provides that:

“This agreement constitutes the entire agreement of the parties with regard to its subject matter and supersedes and cancels all previous negotiations and agreements.”
36. This clause constituted an entire agreement clause which the learned judge held that the clause naturally imposed a restriction in interpretation of the agreement for sale to the agreement itself. The previous negotiations, discussions, communications and agreement would have to be ignored by the court where the words of the agreement clearly conveyed the intention of the parties. On the other hand, this Clause would not prevent terms from being implied into a contract if there was a plain and obvious gap in the Agreement that was inconsistent with the objective intentions of the parties. See *J N Hipwell & Son v Szurek* [2018] EWCA Civ 674.



37. This clause is in line with the parole evidence rule that generally guides the court's interpretation of a written contract by according primacy to the intention of the parties as set out in the document. This court in *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited* [2017] eKLR summarised the appropriate approach as follows:

“... 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.

...

38. The rule of exclusion of negotiations prior to entry of a contract as well as the parole evidence rule are subject to a number of exceptions. For instance, evidence of surrounding circumstances will be admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible to more than one meaning, but not to contradict the language of the contract when it has a plain meaning. Extrinsic evidence of terms additional to those contained in the written document will be admitted if it is shown that the document was not intended to express the entire agreement between the parties. If the parties intend their contract to be partly oral and partly in writing, extrinsic evidence is admissible to prove the oral part of the agreement.

39. The recitals of the Agreement provided the general context in which the parties were entering into the Agreement as follows:

“B. The Purchaser is in the process of erecting a 220 KV Olkaria-Dandora electricity transmission line whose way leave trace traverses across a part of the vendor's said piece of land.

C. The said wayleave trace measures approximately forty (40) meters and covers an area approximately 4.642 acres of the vendors' said land (which area or ground is hereinafter referred to as “the subject property”).

D. The Purchaser is desirous of acquiring for its said use the subject property and the Vendors are willing to sell the same to the Purchaser at the price and upon the terms and conditions hereinafter set forth.”

40. The subject matter of the Agreement for Sale was set out in the definitions and interpretations section at Clause 1.1 (b) which provides:

“Subject property” means the portion of L.R. No. 10901/46 measuring approximately forty (40) metres wide covered by the wayleave trace of the 220 KV Olkaria-Dandora Electricity Transmission Line comprising 4.642 acres or thereabouts excluding any road or roads of access passing through or across the same.”



41. What these provisions clearly convey is that the property subject of the agreement, as intended by the parties, was the wayleave trace of approximately 40 metres in width across the respondent's land. The subject property was not 60 plots as intimated by the appellant in the submissions. The consideration for the subject property was agreed as Kshs. 7,020,000. As for the exact area of the wayleave trace, Clause 2.3 of the Agreement provided for a re-survey to excise the subject property and transfer the same to the appellant:
- “The Vendors hereby agree and undertake to cause L.R. No.10901/46 to be re-surveyed and sub-divided to the intent that the subject property will be excised therefrom and have a separate and distinct deed plan and land reference Number.”
42. Clause 7.2 further provided that the actual boundaries of the wayleave area would be defined after the re-survey exercise:
- “It is hereby agreed and understood by and between the parties hereto that the actual boundaries and beacons shall be defined and fixed upon the re-survey provided for in Clause 2.3 hereof and that the Purchaser shall be entitled to be represented at its own cost by a Surveyor in the resurvey exercise.”
43. There appears to be a contradiction or uncertainty in the Agreement in that it provided that the wayleave area comprised “4.642 acres or thereabouts” and at the same time required a re-survey to establish the actual boundaries (and therefore the actual area) of the wayleave area after the execution of the Agreement. This contradiction or uncertainty can only be resolved by considering the evidence tabled at the trial to aid in proper construction of the Agreement. The uncontested evidence of the respondent's surveyor PW3 was that in May 2003, after the power line had already been laid by the appellant, he carried out the survey as provided under Clause 2.3 and marked out the wayleave corridor and found it to amount to 1.34 Ha or 3.31 acres; after which he prepared a Deed Plan for the excised portion which became LR No. 10901/46/1. The actual acreage of the 40 metre wide wayleave trace on the respondent's property was nowhere near the “4.642 acres or thereabouts” indicated in the Agreement, therefore strongly implying that the ascertainment of the true acreage of the subject property was contingent on the findings of the re-survey exercise provided under Clause 2.3. The learned judge was therefore correct in concluding that the purchase price would not be affected by the actual acreage of the wayleave trace once it was surveyed and measured for purposes of issuance of title thereto to the appellant. The respondent had proved its case on a balance of probabilities and was therefore entitled to payment of the balance of Kshs. 1,953,864.70 and the interest payable according to the Agreement.
44. Clause 5.4 of the Agreement provided that interest would become payable by the appellant to the respondent if the balance of the purchase price was not paid as stipulated for any cause other than non-completion caused by the default of the respondent. The Completion date was defined as being 90 days from the date of execution of the Agreement or any other date as the parties agreed. The manner of completion was set out under Clauses 5.1, 5.2 and 5.3 of the Agreement. The said Clauses provided that on or before the Completion date, the appellant's Advocates were required to have delivered an undertaking to pay the balance of the purchase price within 5 days of the successful registration of the Transfer. Once the undertaking was received, the respondent's Advocates were to deliver to the appellant's Advocates the Completion documents. The onus would then be on the appellant or the appellant's Advocates to arrange for the registration of the Transfer in a timely manner; and pay the balance of the purchase price within 5 days of successful registration of the Transfer.



45. The appellant argued that there was no basis for the award of interest because the interest was only payable after 5 days of the appellant' successfully registering the Transfer, yet the appellant did not perform the transfer. However, no evidence was adduced indicating that the appellant's Advocates had delivered an undertaking as stipulated in the Agreement, even when requested by the respondent's Advocates many months later. There was also no evidence to demonstrate that the appellant protested the respondent's Advocates taking up the onus of registering the Transfer. The appellant did not appear to have a problem with this transfer of responsibility. The only protest raised by the appellant came after the registration of the Transfer and concerned the exact area of the subject property.
46. The respondent completed the registration of the Transfer and informed the appellant of the same through the letter of October 29, 2004. Through the same letter, the respondent demanded payment of the balance within 5 days, by November 3, 2004. On January 26, 2005, the appellant paid Kshs. 4,364,135.30 purporting it to be a pro rata payment of the subject property transferred to it. The appellant was therefore liable to pay interest for the initial delay of payment of the actual balance of Kshs. 6,318,000 from November 3, 2004 to January 26, 2005; and further interest on the unpaid balance of Kshs. 1,953,864.70 at the rate of 25% per annum.
47. The appellant's other argument was that the interest should not be paid for the entire 12 year period that the matter took to be determined in the superior court, as the delay was through no fault of its own. The appellant significantly contributed to the delay through adjournments of the defence hearing for various reasons. It is only between October 4, 2012 and March 11, 2014 that there is an unexplained gap in the proceedings. There was also a further 3 months delay caused by the transfer of the file to Murang'a for the learned judge to complete the hearing. This amounts to a delay of about 2 years which cannot be directly attributable to the parties. The call by the appellant for a reprieve on interest finds support in the decision of this court in *Lee G. Muthoga v Habib Zurich Finance (K) Limited & another* [2016] eKLR where the Court expressed itself thus:

“Interest is normally granted at the discretion of the court and in exercising that discretion the court has to act judiciously and ensure fairness to the parties. It would not be fair, in our view, for the appellant to bear the burden resulting from the long delay which has given rise to the interest that has accrued. The delay of 15 years in the disposal of the suit is attributable to the court...

... the issue of payment of interest for the remaining period of delay for which the wheel of justice turned tortuously slowly must be determined on the basis of two competing interests, first, the need to excuse the appellant from payment of interest accruing due after what should be a reasonable period for determination of the suit, and the need to ensure that the respondent does not suffer loss of interest on the money which should have been in his hands.”

48. Yet there is another view which would be in favour of the respondent's position. Recently, called upon to resolve a similar question, this Court in Kisumu Civil Appeal No 138 of 2017 *South Nyanza Sugar Company Limited Vs Awino Okero* stated;

“The argument of the appellant that the delay in hearing and finalizing the litigation has placed on it an onerous burden of interest when it is not to blame for the slow speed of the wheels of justice can also be said of the loss suffered by the respondent who has been kept out of money for a long period due to the delay in completing the trial, a current feature of our court system. There is no reason why the respondent should be the one to get the short end of the stick. The solution may lie in the party which may eventually find itself at fault



putting away some contingency funds to cover the interest it may be liable to pay. Whatever the solution it is not in denying interest to the victim of breach.”

49. At the end the question of interest will be in the discretion of the court, as always to be exercised judiciously. We have keenly read the trial record. As pointed out the unexplained delay was substantially between October 4, 2012 and March 11, 2014. The appellant’s final submissions were filed on December 2, 2015 and it had opportunity to seek a freeze of interest because of the supposed delay in the hearing and determination of the matter but did not do so. As the issue is being raised for the first time at appeal, we cannot call out the trial court as having exercised its discretion injudiciously.
50. Having addressed the issues that were central to the dispute, we have come to the conclusion that this appeal is lacking in merit and is therefore dismissed with costs.

**DATED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF JULY, 2022**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**A. MBOGHOLI MSAGHA**

.....

**JUDGE OF APPEAL**

**F. TUIYOTT**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

