



**Syke Enterprises Limited & 2 others v Moi Teaching and Referral Hospital Staff Pension Scheme & 4 others (Environment & Land Case 389 of 2015 & 30 of 2016 (Consolidated)) [2023] KEELC 16452 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16452 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**  
**ENVIRONMENT & LAND CASE 389 OF 2015 & 30 OF 2016 (CONSOLIDATED)**  
**SM KIBUNJA, J**  
**MARCH 22, 2023**

**BETWEEN**

**SYKE ENTERPRISES LIMITED ..... 1<sup>ST</sup> PLAINTIFF**  
**MOI TEACHING AND REFERRAL HOSPITAL STAFF PENSION**  
**SCHEME ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MOI TEACHING AND REFERRAL HOSPITAL STAFF PENSION**  
**SCHEME ..... 1<sup>ST</sup> DEFENDANT**  
**SKYPE ENTERPRISES LIMITED ..... 2<sup>ND</sup> DEFENDANT**  
**JACQUELINE CHEPTEPKENY ..... 3<sup>RD</sup> DEFENDANT**  
**JOHN KORIR ..... 4<sup>TH</sup> DEFENDANT**  
**HOTEL HORIZON LIMITED ..... 5<sup>TH</sup> DEFENDANT**

**AS CONSOLIDATED WITH**  
**ENVIRONMENT & LAND CASE 30 OF 2016**

**BETWEEN**

**HOTEL HORIZON LIMITED ..... PLAINTIFF**

**AND**

**MOI TEACHING AND REFERRAL HOSPITAL STAFF PENSION**  
**SCHEME ..... DEFENDANT**



## JUDGMENT

1. The suit herein was instituted vide a plaint dated October 21, 2015 and amended on 1<sup>st</sup> November 2018. It is the plaintiff's case that the defendant is the registered proprietor of Land Parcel No Eldoret Municipality Block 4/332 measuring 0.0462ha with an eight story building constituting of a hotel, basement parking, restaurant, bar, accommodation rooms and other developments. By a lease dated 6<sup>th</sup> August 2013 the defendant leased the suit property and the said developments to the plaintiff who ran a hotel business under the name Hotel Horizon. The plaintiff averred that the rent payable was at a monthly rate of Kshs 1,000,000/= effective from July 1, 2013 for 20 months to be increased as follows: February 1, 2014 to February 28, 2014 at Kshs 1.5m a month, March 1, 2015 to December 31, 2015 at Kshs 1.7m per month and from January 1, 2016 to 31<sup>st</sup> June 2018 at Kshs 2m a month. The plaintiff averred that it became apparently difficult to run a hotel business at the suit property due to the challenges they faced and communicated the same to the defendant, but no action to remedy the situation was taken. The plaintiff claimed that the Kenya Urban Roads Authority excavated the road fronting the hotel for road construction limiting access to the hotel by clients. That further the County Government of Uasin Gishu designated a matatu terminus at the entrance of the hotel worsening the situation for the plaintiff. The parties held a meeting on the May 8, 2015 and it was agreed inter alia to review the rent downwards to Kshs 1,200,000/= per month for 2015. However, on September 14, 2015 the defendant issued the plaintiff with a letter rejecting the offer to review rent and demanded for Kshs 15,865,400/=. It is the plaintiff's case that the defendant went against their commitment to review the rent to Kshs 1,200,000/= a month and proceeded to distress for rent through Jomoki enterprises on October 6, 2015. The plaintiff maintained that they suffered loss and damage when the defendant further instructed Eshikoni Auctioneers on February 2, 2016 to seize her tools of trade which she had leased to Goshen Hotel. The plaintiff contended that the actions of the defendant and their agents were illegal, a nullity and in breach of the lease agreement and the terms of the meeting held on May 8, 2015. The plaintiff filed the suit prays for judgement against the defendant for:
  - a. An order of injunction restraining the defendant by itself, its agents, servants from distressing for rent or further distressing and or claiming rent at any rate other than the rent of Kshs 1,200,000/= per month for the period between June 1, 2015 and December 31, 2015.
  - b. A declaration that the plaintiff does not owe the defendant any rent as at the date of filing this suit.
  - c. A declaration that the lease agreement between the parties here has been fundamentally altered, or its terms waived by conduct of the parties and this no longer applicable to regulate the engagement between the plaintiff and defendant.
  - d. General damages for the breach of contract and seizure of the plaintiff's property.
  - e. An account to determine rent paid status.
  - f. Costs of the suit.
  - g. Any other or further relief as the court may be pleased to grant.



2. The defendant filed their defence and counterclaim on the May 24, 2016, admitting the lease agreement but averred that the plaintiff was in default of rent since October 2014. It was the defendant's case that there was no contractual obligation to review the rent payable for 2015 to Kshs 1,200,000/= from Kshs 1,700,000/=. The defendant admitted to inviting the plaintiffs to review the contract in terms of the rent payable to Kshs 1,200,000/=: however the plaintiff did not issue a written confirmation of receipt and acceptance of the said terms as agreed vide the letter dated May 21, 2015. The defendant averred that the said offer stood rejected and the terms of the lease dated August 6, 2013 remained in force. It was within their rights under Section 3 of the Distress for Rent Act to distress for rent arrears due on 22<sup>nd</sup> January 2015 through Jomoki Auctioneers for Kshs 8,950,000/=. As at 5<sup>th</sup> September 2015, the rent arrears stood at Kshs 15,865,400, which was communicated to the defendant vide a statement dated August 6, 2015 from Sedco Consultants. The defendant mounted a Counterclaim against the plaintiff, together with Jacqueline Cheptepkeny, John Korir and Hotel Horizon as the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants were said to be the guarantors of the lease executed between the plaintiff and defendant and therefore liable for the debt of the hotel. It was the defendant's case that the plaintiff has never paid rent, taxes, service charge, deposit or legal fees when they fell due, and the same were paid through the 2<sup>nd</sup> or 3<sup>rd</sup> defendants. The plaintiff was said to have moved goods from the suit property on the night of January 23, 2016 in an attempt to evade paying rent and in its wake, left the premises damaged, occasioning the defendant to meet the repair costs, pay electricity and water bills. The defendant denied ever offering to review the rent on account of road construction or on account of the matatu terminus, and averred that those conditions existed prior the execution of the lease. The defendant insisted that any offer to review the rent was on account of the plaintiff's financial constraints. The defendant urged court to dismiss the plaintiff's case and enter judgement against the plaintiff for:

- a. Kshs 18,975,000/= due on account of the accrued rent from July 2013 when the lease started to January 24, 2016 when the 1<sup>st</sup> defendant left the tenanted premises and Kshs 140,000/= in respect of unpaid service charge total Kshs 19,115,000/=.
- b. Kshs 70,000,000/= due as rent for the remainder of the lease period from January 24, 2016 to December 30, 2018 together with its attendant VAT, Kshs 11,200,000/= total Kshs 81,200,000/=.
- c. Kshs 15,000,000/= on account of repair costs the plaintiff is incurring to repair the premise upon the 1<sup>st</sup> defendant's exit and damage inflicted in its wake.
- d. Kshs 570,000/= due on account of the 1<sup>st</sup> defendant unpaid water, Kshs 250,000/= and electricity Kshs 320,000/= and other bills the plaintiff was forced to settle.
- e. Kshs 6,188,000/= on account of unpaid VAT taxes.
- f. Kshs 500,000/= on account of legal fees for the preparation of the lease.
- g. Interest on all above at the rate of 6% above Barclays Bank base interest rates per annum; (i) in rent from the date the rent became due, (ii) on the other claims from the date of filing of the suit in respect to the other claims of the filing of the suit.
- h. Costs.



- i. Any other or further orders and or directions the court may deem fair and just to grant.
3. The plaintiff filed a response to the defence and counterclaim on July 14, 2016, denying that the plaintiff had been defaulting on rent since October 2014 and reiterated that there was a contractual obligation to review rent payable for 2015 downwards from Kshs 1,700,000/= to Kshs 1,200,000/=. Further the plaintiff averred that the doctrine of estoppel was applicable in the review of the rent downwards, and that the acts of the defendant to distress for rent was illegal. The plaintiff mounted a defence against the counterclaim and averred that no damage was occasioned when they moved from the suit premises, and the said movement was never meant to evade paying tax and rent. The plaintiff urged court to dismiss the counterclaim and allow the prayers sought in the plaint as prayed.
4. During the hearing Jacqueline Korir, the plaintiff's director, testified as PW1. She testified that she signed the lease agreement dated August 6, 2013 together with her husband, John Korir as plaintiff's guarantors. She outlined the rent payable between the execution of the lease till its determination on December 31, 2018. It was her testimony that the plaintiff did not use the premises for the whole lease period because the defendant evicted them on the January 26, 2016 after distressing for rent. She stated that on November 15, 2013, the plaintiff requested the defendant to review the rent to Kshs 1,000,000/= as the hotel was not performing well, which was accepted by the defendant vide a letter dated February 20, 2014. On February 26, 2015, they requested the defendant to be allowed to continue paying Kshs 1,000,000/= per month, but the defendant insisted they pay Kshs 1,200,000/=: which amount the plaintiff paid till December 2015. The plaintiff did not receive any communication from the defendant on whether they had agreed to the Kshs 1,200,000/=. Nonetheless in July 2015, PW1 was issued with an auctioneer notice which sought to distress for rent, though on May 6, 2015 they had informed the defendant of the structural defects on the suit property, including; washroom flooding, electric problem, smelling rooms, low electric cables. The defendant did not respond to the letter or address the issues that had been raised that had adversely affected the plaintiff's business. The witness stated that they never received the defendant's letter dated September 16, 2015, which stated that they had not complied with the resolutions of the meeting held on May 8, 2015. PW1 stated that the business was greatly affected by the road construction in 2015 since it made the hotel inaccessible for about six months. That the customers were cancelling their bookings, as the place was muddy and there was no parking. On cross examination PW1 stated that she was a veteran in the hotel industry and was well aware of its challenges when she voluntarily leased the suit property and set up Hotel Horizon. She stated that the defendant's letter dated January 14, 2014 rejected the plaintiff's request to pay Kshs 1,000,000/= per month, and that by a letter dated February 20, 2014, the plaintiff was allowed to pay Kshs 1,000,000/= per month up to June 2014, on condition it deposited Kshs 3,000,000/= and Kshs 500,000/= as legal fees. PW1 claimed that she never received the fee note for legal fees and admitted to making a deposit of Kshs 1,500,000/= as opposed to Kshs 3,000,000/=. She further admitted that the defendant had intimated that the plaintiff would revert back to paying Kshs 1,500,000/= after June 2014. In 2014, she claimed to have paid Kshs 1,000,000/= between January to July. PW1 insisted that in 2015 the rent was Kshs 1,200,000/= and not Kshs 1,700,000 and further stated that she paid Kshs 1,200,000/= from January to September. She admitted to be in rent arrears of October till December 2015, which stood at Kshs 3,600,000/=. PW1 testified that on January 26, 2015 the defendant sent auctioneers who seized items which were in a similar hotel to the one on the suit property.
5. For the defendant, Albert Kigen, the defendant's Pension Manager, testified as DW1. He testified that the plaintiff had an opportunity to inspect the suit property including the road outside the hotel that was due for upgrading by the County Government and the matatu terminus that was outside the hotel before executing the lease. DW1 stated that the plaintiff failed to pay rent as determined in clause 6 of



the lease as well as depositing security. He testified that on May 8, 2015 the defendant offered to alter the lease agreement in terms of rent payments but the plaintiff never responded to the said proposal dated May 21, 2015. After the said offer was never accepted, the defendant proceeded to issue a notice for distress for rent for Kshs 15,865,400/= on September 5, 2015 and proceeded to proclaim on January 22, 2016. That after the proclamation, PW1 took advantage of the night of January 22, 2016 to vacate the premises, leaving the suit property damaged, and the defendant had to incur costs of repairs. During cross examination, DW1 stated that he was not certain if the plaintiff was served with the letter dated May 23, 2015, since the copy in court did not bear a received stamp by the plaintiff. He agreed that if the plaintiff never received the said letter they were not in a position to know about its compliance. DW1 further admitted to receiving letters from the plaintiff concerning the structural situation of the suit property, but he could neither confirm whether the said issues were acted upon by the defendant, nor establish to court the extent of damage caused on the suit property by the plaintiff. DW1 was also at pains to explain to the court whether the plaintiff was served with a notice for breach of contract, before the auctioneers were sent in to distress for rent as required by clause 14 of the lease.

6. The learned counsel for the Plaintiff and the defendant filed their submissions dated the June 6, 2022 and June 27, 2022 respectively, which the court has given due considerations.

7. The following are the issues for the court's determinations;

- a. Whether the defendant failed to make good the structural defects on the hotel situated on the suit property, and if so whether that amounted to a breach of the lease terms.
- b. Whether the plaintiff failed to pay the rent when it became payable and if so, whether that amounted to a breach the lease agreement.
- c. Whether the plaintiff is indebted to the defendant in rent arrears, and if so how much.
- d. Whether the plaintiff was in arrears of rent when the distress for rent was levied.
- e. Which party is liable to the other in damages, and how much.
- f. What are the orders that commends themselves to the court.

8. The court has considered the parties' pleadings, evidence tendered by both sides, submissions by the learned counsel, superior courts decisions cited thereon and come to the following findings;

- a. It has not been disputed that on the August 6, 2013, Moi Teaching and Referral Hospital Staff Pension Scheme, the defendant, entered into a lease agreement with Syke Enterprises Limited, the plaintiff, over Land Parcel No Eldoret Municipality/Block 4/332 together with the developments thereon. That clause 6 of the said lease stipulated the graduated rent payable was as follows;

- I July 15, 2013 to January 30, 2014 to pay Kshs 1,000,000/=,
- II February 1, 2014 to February 28, 2015 to pay Kshs 1,500,000/=,
- III March 1, 2015 to December 31, 2015 to pay Kshs 1,700,000/=,



IV January 1, 2016 to December 31, 2018 to pay Kshs 2,000,000/=.

The rent was payable by quarterly installments together with service charge of Kshs 10,000 per month, exclusive of VAT.

- b. The first request for alteration of the terms of the lease was when the plaintiff requested to be allowed to pay Kshs 1,000,000 on the November 15, 2013, per month due to unfavorable business environment. The defendant accepted the said alteration vide a letter dated February 20, 2014, where the board allowed the plaintiff to pay monthly rent of Kshs 1,000,000/= from July 15, 2013 to 30 June 2014. Thereafter, the rent was to revert back to the rent graduated in the lease agreement. Further the plaintiff was reminded to make a deposit of Kshs 3,000,000/= and pay legal fees as agreed in the lease agreement. The evidence available show the legal fees was not paid and the deposit made was only Kshs 1,500,000/=.
- c. The second request for rent alternation was made by the plaintiff on the May 8, 2015 and allowed by the defendant vide the letter dated May 21, 2015 for the plaintiff to pay rent at a rate of Kshs 1,200,000/= from January 1, 2015 to December 30, 2015 on condition that the plaintiff would write, sign and confirm receipt of the offer, as well as accept the said terms, and in default the parties would revert back to the lease. The defendant maintain that the plaintiff never adhered to the said conditions, and on September 6, 2015, they made a demand of Kshs 15,865,400 that was due as at September 5, 2015 from the plaintiff. The plaintiff claimed that the defendant never served them with the letter dated May 21, 2015 and hence they were not aware of the conditions set out therein. From the evidence available, the position taken by the plaintiff is far from the correct one. This is because there is a letter dated April 7, 2015 (PEX-10) from the defendant informing the plaintiff that the rental income has been reduced to Kshs 1,300,000/= per month exclusive of VAT and service charge, subject to confirmation from the plaintiff in writing within 14 days which was to be accompanied by a draft lease addendum to be approved. It was clearly stated that failure to respond to the letter in 14 days, or adhere to the said terms the offer would lapse and parties would go back to the terms of the lease. The terms of the letter dated April 7, 2015 are not far from the ones in the letter dated May 21, 2015 in as far as demanding of the plaintiff to put the terms altering the lease in writing. The plaintiff did not adhere to the said terms and the defendant was entitled to revert back to the terms of the lease as far as rent payment was concerned. In any case, both parties had voluntarily entered into the agreement of August 6, 2013 and it was the one guiding the terms of engagement, including requiring any variation to be in writing and duly executed before it can become binding. That is the essence of clause 9.5 of the lease agreement, to the effect that no amendment or modification of the lease agreement dated the August 6, 2013 shall be valid or binding on any party unless the same is made in writing and refer expressly to the lease and is signed by the parties concerned or its authorized representative(s). It went on to provide that no provision contained in the lease shall be waived or varied by



either party except by agreement in writing, which agreement if so required, shall be duly registered in the land registry at the costs of the person requesting such variation.

- d. It is clear to court that the only rent relief extended to the plaintiff was between July 15, 2013 to June 30, 2014 to pay Kshs 1,000,000/= monthly as rent. Indeed, PW1 admitted during cross examination that she did not have any evidence to confirm that the defendant had allowed her to pay rent of Kshs 1,000,000/= beyond June 2014. Further she stated that in 2015 she paid Kshs 1,200,000/= from June 2015 to September 2015 and acknowledged being in default of rent for the months of October 2015 to December 2015 amounting to Kshs 3,600,000/=. The plaintiff has failed to demonstrate through documentary evidence that the defendant extended the rent relief beyond June 2014. Further, the plaintiff has failed to justify to court as to how they arrived at paying Kshs 1,200,000/= as the rent payable, without a variation of rent payable agreement in writing in accordance with clause 9.5 of the lease agreement. The plaintiff appears to invite the court to rewrite the terms of the lease agreement between it and the defendant. In the case of *Jiwaji versus Jiwaji* [1968] EA 547, cited with approval by the Court of Appeal in *Feba Radio (Kenya) Ltd t/a Feba Radio versus Ikiyu Enterprises Ltd* [2017] eKLR, it was held that;

“Where there is no ambiguity in an agreement it must be construed according to the clear words by the parties.”

And in the case of *Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd* [2017] eKLR, the court reviewed the case law and held as follows;

“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.”

The plaintiff herein has not pleaded or proved coercion, fraud or undue influence in the process of negotiating and executing the lease agreement dated the August 6, 2013 with the defendant. The Defendant was therefore entitled to demand for rent arrears calculated in accordance with the terms of the lease agreement when the Plaintiff failed to prepare and have signed the variation of rent offer document in 2015.

- e. The further, the plaintiff has not produced receipts that would establish that they paid all the rent throughout the year of 2015. The only documentary evidence the plaintiff produced to support payment of rent was an application for funds transfer dated January 29, 2015 for Kshs 2,000,000/=:, and a deposit slip dated December 16, 2015 for Kshs 2,020,000/=: . Indeed, PW1 admitted during cross examination that at the time the auctioneer’s distressed for rent on the January 22, 2016 the plaintiff had rent arrears. The plaintiff conceded to owing Kshs 3,600,000 for the months of October to December 2015 only. PW1 also conceded that as of June 2015 the plaintiff was in arrears of rent. The defendant’s position is that the arrears then stood at Kshs 15,000,000. That



distress for rent on the two occasions by Eshikoni and Jomuki auctioneers were therefore lawfully done in accordance with section 3 of the [Distress for Rent Act](#) and clause 9.3 of the lease agreement, as the Plaintiff was evidently in rent arrears.

- f. The lease agreement has detailed the developments on the suit property to include the eight storey building, hotel block with basement parking, a ground floor restaurant, mezzanine bar, sixty ensuite accommodation rooms and other developments. The defendant leased out the suit premises and the developments thereto which included 70 beds, bar counter, fitted shelves, kitchen, hall fitted with extractor, power generator, one lift, water heating solar belonging to the landlord. The lease was to be held for 5 years and 6 months. Clause 8 of the lease outlined the defendant's obligations. Sub-clause 8.4 specifically obligated the defendant to maintain the walls, floors, roofs and main structure of the building in a good and substantial repair and condition, together with the fixtures, fittings and equipment. The defendant was also required to remedy and repair any structural defects, design defects, defects on construction workmanship and materials and any defect obtaining and owing to the construction, as well making repairs and remedies arising from any failure occasioned by the defendant to perform its obligation or by reason or fair wear and tear, on condition that the repairs will not be necessitated by the plaintiff's breach or default on part of the plaintiff. Further the defendant was obligated under sub-clause 8.5 to pay and make good to the plaintiff all and every loss and damage incurred as a consequence of every breach of the said obligation, and to indemnify the plaintiff from any action, claim, liability, costs and expenses. The plaintiff also had obligations to do some specified internal repairs. The plaintiff has established through the letters done to the defendant that it had made reports of structural and other defects that were the cause of the challenges the hotel was facing. These letters are dated October 6, 2013, December 16, 2013, February 17, 2014, October 14, 2014 and May 6, 2015. The letters raised the following issues; leaking drainage in the basement, kitchen, dining hall, bar, conference hall and accommodation rooms, faulty water pump, low generator batteries, lack of ventilation in the dining area and accommodation rooms. In order to contain or address the said issues, the plaintiff did some minor repairs like repairs on the kitchen drainage, dug the terrazzo and repaired the slope to allow the flow of water, replaced shower units in the rooms and repaired some broken wardrobes. The plaintiff recommended that the defendant takes urgent steps and assess the plumbing and electrical systems of the entire building, find a permanent solution to the entire building when it rains as there is flooding, leakages in the bathrooms, windows that keep coming off and provide reasonable accommodation to ensure the building is disability inclusive. The defendant only wrote back to the plaintiff on two occasions, that is on January 14, 2014 and February 20, 2014. On January 14, 2014 the defendant requested the plaintiff to submit a detailed list of all the structural defects to be rectified, and the costs implications for deliberations. The defendant vide the letter dated the February 20, 2014 promised the plaintiff that it would engage a consultant who would make an assessment of the building to enable the board carry out renovations and maintenance as soon as possible. It is clear that



the defendant failed to act within reasonable time or at all upon the defects reported by the plaintiff which must have had some negative impact on the business conducted in the premises. That though the lease agreement provided arbitration processes, none of the parties herein used that processes to address the issue of repairs or any other matter before the plaintiff filed these suits in court.

- g. Individually the parties in their pleadings have pleaded damages as a result of breach. However, having found that both the Plaintiff and Defendant had been in breach of the lease, the next question is whether they are entitled to damages as a result of the breach complained off. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. However, where there is breach of contract, general damages are not recoverable. Therefore, neither the plaintiff nor the defendant are entitled to general damages on the ground that both are in breach of the lease. In the Court of Appeal, case of *Kenya Tourist Development Corporation v Sundowner Lodge Limited* [2018] eKLR the court stated that;

“A general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In *Dharamshi v Karsan* [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication.”

- h. It is trite law that special damages must not only be specifically pleaded, but must also be strictly proved with as much particularity as circumstances permit. The defendant has not placed before court any invoices, receipts or even bank statements to prove the specific claims. The costs that the defendant claims to have incurred in repairing the suit property or the utility bills said to have been paid, have not been proved at all. The defendant’s evidence was in general terms without any specificity as to the losses they suffered. There was no explanation given to court as to the particulars of the special damages pleaded. In my view, the defendant simply threw numbers to court and expected court to make its own assessment of what it conceives the defendant to be entitled to as special damages. The Court of Appeal stated in the case of *Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited* [2016] eKLR that,

“Starting with the first issue, it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See *National Social Security Fund Board of Trustees vs Sifa International Limited* (2016) eKLR, *Macharia & Waiguru vs Muranga Municipal Council & Another* (2014) eKLR and *Provincial Insurance Co. EA*



Ltd vs Mordekai Mwangi Nandwa, KSM CACA 179 of 1995 (ur).  
In the latter case this Court was emphatic that

“... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract ...”.

The appellant apart from listing the alleged loss and damage, it did not, according to the respondent lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed, there was not credible documentary evidence in support of the alleged special damages.”

- i. Now I turn to the prayers sought in the plaint, and make a determination as to whether they are merited. The plaintiff’s witness PW1 admitted in her testimony that she cannot demonstrate that the plaintiff allowed her to continue paying Kshs 1,000,000/= rent beyond June 2014. Further to that the defendant has demonstrated that the offer to alter the rent downwards was on condition the plaintiff would reduce the same into writing, in line with the defendant’s letter dated April 6, 2015 and or May 21, 2015, which the plaintiff did not do. There is therefore no evidence presented to the court by the plaintiff to support their contention that the rent payable had been altered or varied as they allege. The plaintiff’s claim that it was not in arrears in 2015 was therefore erroneous as its calculations of the rent payable was based on the amount it had set for itself, and not in accordance with the terms set out in the lease of August 6, 2013.
- j. It is therefore the finding of the court that the plaintiff breached the lease by reason of failing to pay rent in accordance of the terms in the lease, and falling into rent arrears. The plaintiff’s witness, PW1, admitted on oath that the plaintiff had failed to pay rent as required and fallen into arrears, which cannot be entirely blamed on the defendant’s failure to repair the reported structural defects in the leased premises. The plaintiff’s prayer of permanent injunction against the defendant cannot therefore be allowed. The Plaintiff has since left the leased premises. In the case of *David Mushokambere v Qwanza Homes Limited* [2015] eKLR the court held that;  
  
“The court finds that indeed, both the Plaintiff and the Defendant were bound by the terms of the Sale Agreements... I will refer to the case of *Ripples Limited v Kamau Mucuha* Nairobi High Court Civil Case Number 4522 of 1992, where the court held that, “It is trite law that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of covenant by the other party as that would be inequitable”
- k. The plaintiff, having admitted to have been in rent arrears, should pay the outstanding amount that was due, even though it has since left the premises. The defendant has particularized the unpaid rent and service charge and prayed for it in the counterclaim to be Kshs 18,975,000, and Kshs 140,000 for



unpaid service charge, making a total of Kshs 19,115,000. The defendant has established that the plaintiff was to pay the legal fees for preparing the lease amounting to Kshs 500,000 and PW1 admitted that amount had not been paid. In respect to the claim for Kshs 70,000,000 being expected rent for the remainder of the lease for the period of January 24, 2016 to December 30, 2018, the court having found that the defendant was in breach of the terms of the lease by failing to attend to the reported structural defects and repairs is not entitled to that prayer. As for the claim for costs of repairs of Kshs 15,000,000, water and electricity bills totaling Kshs 570,000, no supporting documents evincing payments were availed to the court and are therefore not allowed.

- l. That as the plaintiff has failed in all its prayers, and the defendant has substantially succeeded in some of the prayers in its counterclaim, then pursuant to Section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya, the Plaintiff and other defendants in the counterclaim, will pay the defendant/plaintiff in the counterclaim, the costs in both suits and counterclaim.

8. Flowing from the foregoing determinations, the court finds and order as follows;

- a. That the plaintiffs in both Eldoret ELC No 389 of 2015 and 30 of 2016 have failed to prove their claims against the defendant on a balance of probabilities and their suits are hereby dismissed with costs.
- b. That the Defendant/Plaintiff in the counterclaim, has partially established its counterclaim in accordance with the law and the same is allowed in the following terms.
  - i. That the plaintiff/1<sup>st</sup> defendant in the counterclaim do pay the defendant/plaintiff in the counterclaim, Kshs 19,115,000 [nineteen million one hundred fifteen thousand], and Kshs 500,000 [five hundred thousand], as prayed for under prayers (a) and (f) of the counterclaim.
  - ii. The plaintiff/1<sup>st</sup> defendant in the counterclaim to pay the defendant/plaintiff in the counterclaim costs.

It is so ordered.

**DATED AND VIRTUALLY DELIVERED THIS 22<sup>nd</sup> DAY OF MARCH 2023.**

**S. M. KIBUNJA, J.**

