Emerg Investments Limited v Kenjap Motors Limited (Environment & Land Case 41 of 2019) [2023] KEELC 17592 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17592 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND CASE 41 OF 2019

FM NJOROGE, J

MAY 31, 2023

BETWEEN

EMERG INVESTMENTS LIMITED ..... PLAINTIFF

AND

KENJAP MOTORS LIMITED ..... DEFENDANT

JUDGMENT

1. The dispute herein arose from the act of the defendant vacating the suit premises for its own premises and the stripping of the suit premises of the developments that it had effected thereon. The plaintiff was obviously not amused by the defendant's actions and filed this claim.

2. According to the plaintiff there was no termination clause in the license agreement and therefore the defendant was bound to pay rent for the entire period of the license. Also, it proposes that upon termination of the license agreement, the defendant was not supposed to remove the items it removed from the premises. Further, the plaintiff held that the defendant was supposed to pay rent quarterly in advance which it did not do, and its plea is that the defendant terminated a licence agreement which it was not supposed to terminate, that the defendant owes it rent for the balance of the licence period, that the defendant ought to pay damages for breach of the license agreement and also pay damages for destruction of property.

3. The defendant on the other hand argues that it entered into a license agreement with the plaintiff dated 10/01/2019 for a period of one year running from 01/01/2019 to 31/12/2019. The defendant also argues that the said license did not have a clause specifically barring it from seeking the termination of the license and neither did it bar it from removing the developments and improvements it had made on the land at the time of determination of the license. The defendant admits that it sent a notice of intent to vacate dated 30/01/2019 to the plaintiff with four post dated cheques to cover for rent for the period up to the effective date of termination on which date they vacated the property. The defendant

points out that when it vacated the property, it removed the fixtures that it had put up that included cabro pavers, vehicles and roofing but it did nor remove the wall that it had constructed.

4. The plaintiffs in its plaint dated 26/4/2019 and amended on 27/05/2019 seeks the following orders:

    a. Kshs. 3,600,000 as liquidated damages for breach of the Licence Agreement together with interest at Court rates from the date of breach of the Licence Agreement;

    b. Kshs. 9,600,000 as rent payable for the period between May 2019 to December 2019;

    c. Kshs. 10,186,516 as liquidated damages for destruction of property;

    d. Exemplary and punitive damages;

    e. Costs of this suit together with interest thereon at such rate and for such period of time as this honourable court may deem fit to grant.

5. The basis of the plaintiff's claim is that on 10/1/2019 the plaintiff being owner of the suit premises known as Nakuru Municipality Block 4/33 granted a licence to the defendant to operate a business on the suit premises. The licence agreement was to last from 1/01/2019 to 31/12/2019. Prior to that agreement the parties had had another one that lasted from 1/11/2017 to 30/12/2018. The plaintiff set out in the amended plaint terms of that agreement which it alleged to have been breached by the defendant, inter alia, that monthly rent for the term of the licence would be Kshs 1,200,000/- payable quarterly in advance on or before the first day of each quarter; that the defendant would not part with possession of the premises and that the defendant would not remove the developments and improvements from the premises at the determination of the lease agreement.

6. The plaintiff's claim is that:

    i. The defendant never paid the stipulated rents;

    ii. The defendant on 30/1/2019 sent a letter communicating intention to terminate the licence agreement by 30/4/2019 and enclosed 4 postdated cheques for a total of Kshs 3,413,793/= whereupon the plaintiff wrote a letter on 31/1/2019 to warn the defendant against the breach of the licence agreement by way of premature termination thereof and non-payment of rent contrary to Clause No. 14 of the agreement.

7. The plaintiff further claims that in April 2019 it noticed that the defendant had commenced removal of the structures on the suit premises, namely, the cabro pavers and the roof. The plaintiff claims that there was damage to the property to the extent that the plaintiff would not be able to obtain a tenant thereafter, and that by such removal the defendant was in breach of clause 17 of the agreement.

8. The plaintiff gives the particulars of breach as follows:

    a. Premature termination of the agreement

    b. Parting with possession of the premises;

    c. Removing the developments on the premises; making alterations to the developments on the property;

    d. Destroying the developments on the property;

    e. Failing to pay the rent within the stipulated time;

    f. Failing to make good the breach.

9. The plaintiff claims to have suffered loss and damage hence the present suit.

The Defence

10. The defendant filed its defence on 4/6/2019 stating as follows: that it denies that the agreement was to run the full term stipulated; that prior, longer licence periods had been contracted between the parties; that also prior to the subject agreement the defendant had intimated to the plaintiff of its intention to relocate to its own premises and had thus requested for an extension of the licence as it readied the said premises. The defendant further stated that the licence agreement did not bar it from terminating it and maintained that the agreement could be terminated; that it had paid rent fully for the period ending April 2019 by which time it vacated the premises and handed over the keys; that according to the agreement, the developments that the defendant could not remove were those put up by the plaintiff under other clauses in the agreement; that the agreement never vested any goods possessions or movables or what the defendant calls "removables" to the plaintiff and the defendant was as part of the exercise of giving up possession entitled to remove whatever item it had fixed onto the premises; that the defendant had assumed possession while the premises were an open ground; that the defendant did not cause any destruction; that it was not true that the property in its condition after the defendant's departure could not fetch a tenant as it had left the premises in the same state as it had been when it took up possession; that that agreement was a licence and not a lease and did not confer the defendant any right over the property; that the defendant was only to give up possession after the termination of the agreement; that the defendant lawfully gave sufficient notice to the plaintiff of its intention to vacate in writing and the plaintiff accepted payment for the period the defendant was in occupation and no rent was claimable after the date of termination and departure from the premises; that the claim for the balance of rent for the rest of the duration after the termination is misplaced and an attempt at unjust enrichment by the plaintiff; that negotiations for an amicable settlement failed due to the plaintiff's absence; that had it been the intention of the parties that the defendant's developments be the plaintiff's then the agreement should have included their value and that the same be paid for by the plaintiff. The defendant denied occasioning the plaintiff any loss or damage.

11. Hearing of the suit took place between 11/3/2021 and 21/11/2022. Thereafter the plaintiff filed submissions on 17/2/2023 while the defendant complied on 28/2/2023.

Evidence of the plaintiff

12. Nalinkumar Meghji Shah testified as PW1. He gave sworn evidence and adopted his witness statement filed on 29/04/2019 and produced the documents numbered 1 to 8 in the plaintiff's list of documents dated 26/04/2019 as PExh.1 to 8 respectively. His evidence is that the plaintiff leased the premises to the defendant for a period 61 months from 1/10/2012 to end of October 2017 under the agreement dated 1/10/2012 where the defendant was to cater for all utilities, customization and improvements. The defendant was to give the plaintiff vacant possession at the end of October 2017. On 19/09/2017 the defendant wrote to the plaintiff seeking an extension of the lease. They entered into a license agreement from 1/11/2017 for 14 months up to December 2018. At the end of December 2018, the defendant requested for and the plaintiff agreed to an extension. They negotiated for some time and came to an agreement as to an extension during first week of January 2019. The plaintiff signed its part and forwarded the agreement to the defendant for their execution. The extension was for a 12-month period with effect from 1/01/2019 to 31/12/2019. It was agreed among other things that the defendant would not part with the premises and would pay rent quarterly in advance. On 30/01/2019, PW1 received a note from the defendant that they would be vacating the property as of 30/04/2019. No rent had been paid at that time. He responded to the note on 31/01/2019 and informed the defendant that

it was in breach. He demanded payment within 15 days but no payment was made. On 25/04/2019, he was informed that the defendant had started destroying property on the plot.

13. Under cross-examination by Mr. Matiri, PW1 stated that prior to the defendant taking the premises in 2012, another tenant had been there who had been selling motor vehicles on the premises. The previous tenant was Autorec and another portion was rented by Sakinya Motors. The first lease was dated 1/10/2012. PW1 stated that under paragraph 4 of the plaintiff's letter dated 1/10/2012 (P. Exh 4) the parties had agreed on a 1-month period to enable the defendant to customize the premises to its needs. They accordingly constructed some structures such as a wall to separate their area from Sakinya area, constructed a shed for the cars, laid cabro paving, constructed an office and constructed a fence fronting Kenya Avenue. PW1 admitted that the defendant put up the shed and the office block. However, he maintained that though the defendant effected these developments, the cabro paving removed by the defendant belonged to the plaintiff by virtue of the defendant having used the land; the office block too was the plaintiff's because it was put up on its land. PW1 admitted that the wall that Kenjap put up is still standing and stated that Kenjap had erected everything which they later removed despite the fact that the licence agreement dated 10/01/2019 provided at its Clause 17 that the structures on the premises would remain intact after termination. PW1 did not know of any other paragraph in the said licence agreement that confers on the plaintiff ownership of the structures put up by the defendant. PW1 stated that he owns several buildings in Nakuru town and that some of his tenants leave their furnishings when they leave the premises. In this case he expected the defendant to leave everything that was attached to the land; however, Kenjap in its letter dated 19/09/2017 stated that they needed time to demolish structures and to return the property to its original state. PW1 was aware as at 19/09/2017 that they were going to demolish their structures as they had stated so while seeking an extension. The 2019 agreement was drafted by the plaintiff's lawyers. Clause 19 of the 2019 agreement provided that the plaintiff had a right to carry out developments on the property. The plaintiff however did not carry out any developments on the property from October 2012 to the time the defendant exited. The plaintiff appointed a Quantity Surveyor after May 2019 but the defendant was not involved in the appointment. The Quantity Surveyor visited the premises after the defendant had left. The defendant forwarded a letter and keys to PW1 stating that they had vacated. However, the Quantity Surveyor went to the premises after the defendant had brought down and removed everything. The defendant did not go back to the premises to remove anything after 2/5/2019. The Quantity Surveyor relied on photographs of the premises taken before the defendant left. Parts of the walls were however still there. PW1 had quantified the amount himself and he did not tell the Quantity Surveyor what figures to state in the report; the Quantity Surveyor later came up with a figure of Kshs. 10,880,324. The initial work to improve the premises by the defendant was not done by Shruyash Building & Material Ltd but by the father of the owner of Kenjap and PW1 was witness to that. PW1 had received the defendant's notice of termination on 30/01/2019 stating that they would vacate on 30/04/2019. They gave a notice of 3 months and the notice period therefore went beyond the first quarter while the licence was for a fixed period of 12 months. PW1 stated that the notice was unreasonable and a breach of the agreement and that the defendant should have stayed on the premises up to the end of the term. PW1 however admitted that he knew that the parties were entering into a licence agreement and not a lease. He stated at that the time the defendant left on 30/04/2019, they owed unpaid rent for January to April which they paid through post-dated cheques and the cheques were honoured. Therefore, at the time of their exit on 30/4/2019 the rent for January to April 2019 had been paid. PW1 was aware that the defendant moved to their own land which they had owned since 2015. Clause 23 of the agreement provided for negotiation in the event of a dispute. On 5/02/2019 the defendant's advocates wrote to the plaintiff about negotiations but the defendant did not avail themselves for meetings.

14. Upon Re-examination by Ms. Wachira he stated that the letter dated 18/10/2019 from Sakinya Motors refers at paragraph 3 to improvements done by Kenjap. According to P. Exh 8, the request for extension was for 3 months only. They then negotiated and mutually agreed on a period of 14 months. The defendant did not remove their structures at the end of the 14 months as agreed. Instead, they entered into a new agreement. The defendant signed the agreement dated 10/01/2019 in the presence of their own lawyer and returned it to the plaintiff. The rent of Kshs.1,200,000/= was similar across both the first and the second agreements.

15. PW2 – Margaret Muthoni testified. Her evidence is that she is a Quantity Surveyor by profession working at Costeng Consultants and she prepared a bill of quantities for the plaintiff when it asked her to do a valuation for replacement costs of the damage on their premises. She considered what was on the premises initially against what was left after the defendant exited. She visited the site and took details. She prepared a Bill of Quantities report dated 10/09/2019 (P. Exh 9) in which the cost came to Kshs.10.880,324.

16. Upon cross-examination by Mr. Matiri PW2 stated that she had a current practicing certificate from Institute of Quantity Surveyors Kenya; that she was appointed by Mr. N. M. Shah of the plaintiff and did not know at the time of her appointment that there was a dispute. The defendant did not participate in her appointment. Before doing a report, she usually asks for the title deed of the relevant land. Mr. Shah did not tell her if the defendant owned the structures on the land. According to her, whatever was on the land belonged to the owner of the land and she did not go into whether someone else owned it. If she had known that the structures on the land belonged to someone else, as a matter of professional ethics she would not have done the job. She visited the site on 10/9/2019 not in May 2019 though her report has the date May 2019 which she attributed to a typing error. While on the land she saw found broken cabro blocks and steel structures which had been tampered with. The partitioning walling in the building had been removed. The roofing of the shed had been removed. She was not shown photographs of the site prior to destruction. She was familiar with the place even before knowing Mr. N. M. Shah since she passes along Kenyatta avenue daily on her way home. She went in there about three times between 2017 and 2018 when she was shopping for a vehicle. On that shopping occasion, she went into the office and even the garage where they were repairing vehicles. She therefore had a clear picture of the place. When she went back in September 2019 the place looked totally different. Part of the cabro paving and the sheds had been removed. The ceiling, the walls and the doors were all missing. Her past knowledge of the place was important but professionally, she normally does not include such knowledge in her reports. She included in the report what was required by the client. Mr. N.M. Shah did not tell her that he had done any previous estimate of the cost of damage prior to instructing her. She does not know if her figures are similar to those of the client. In 2017 or 2018 when she was there for a private shopping mission, she saw that there were still doors. If she had not gone there in 2017 or 2018 she would not have prepared the report since she would not have had knowledge of the place. She ultimately did not buy any vehicle from the defendant. It is not true that she made up the story of having gone there in 2017/2018 to fill gaps in her report. In September 2019 when she inspected the premises there were no MDF boards; her inclusion of them is based on her recollection from 2017/2018 and observations in September 2019. Her client knew that she had visited the place earlier in 2017/2018 after she told him so. The amounts in her report are based on hardware prices in Nakuru and prices vary from hardware to hardware. She has contacts at the local hardwares in Nakuru. However, their rates are based on guidelines from the government. She called one local hardware and compared her figures with what they had as market rates. Upon re-examination by Ms. Wachira she stated that she had been instructed by her client that the costs he was to give were for replacement only. At that point the plaintiff's case was marked as closed.

17. DW1, Hamadan Varsani, the director of Kenjap Motors adopted his witness statement filed on 18/6/2019 as his evidence-in-chief and produced the documents as Exhibits Nos. 1 – 5. He stated that his fellow director is called Arunalrajari Naim. He testified that the defendant had a licence agreement with the plaintiff. DW1 stated that the site was an empty plot when the defendant took possession, that only a small office made of iron sheet was there. There was no perimeter wall. Suriya, a contractor was hired by the defendant to do construction on the suit land. They gave DW1 a Bill of quantities and the defendant spent Kshs. 19,923,754/= on improvement of the premises. A stone boundary wall, an office, a store and a workshop are what the defendant built on the suit land. The offices were made of stone and aluminium windows and an iron sheet roof and cabro. They made a workshop with iron sheets. Whatever items which PW2 had stated had been removed were the defendant's. It did not belong to the Plaintiff. The defendant removed nothing from the plot that belonged to the Plaintiff. Under the Licence agreement the items constructed by the landlord were not to be removed. The landlord never built anything during the defendant's tenure as licensee on the suit land. The defendant did not owe the landlord any rent as at the time it vacated on 30/4/2019 and the plaintiff acknowledged receipt of the cheques sent vide DExh.2. Prior to vacating, they issued a Notice to the Landlord dated 30/01/2019 giving a month's notice. The lease the defendant terminated was dated 10/01/2019. The notice is dated 30/01/2019. Business was going down. The landlord had rejected the defendant's plea for rent reduction. The defendant was selling used cars. Ksh.1,200,000/= was the monthly rent. They decided to move to their own land.

18. Upon cross-examination by Ms. Wachira the witness DW1 stated that the defendant requested for two-month extension in 2017 September in writing; that the license agreement was for 10 months 1/11/2017 to 30/12/2018; during which the defendant never removed anything and upon its expiry the parties negotiated a new licence on 10/1/2019; in consideration of a rent of Kshs.1,200,000/=; that at the end of the first licence in 2018 they still had their own premises located elsewhere; nevertheless, they entered into a fresh agreement with the plaintiff for 12 months. They sent a letter 20 days after execution saying they wanted to vacate because business was going down. In the 2019 agreement, rent was to be paid quarterly. PExh.2 was written after the defendant sent their notice. Though rent was payable in advance as per the 2019 agreement, the defendant paid rent after the rent periods. He testified that the landlord had told them that they needed to pay the January - December rent and that the defendant never asked for any insertion of a clause for termination of the license agreement. The wall the defendant had erected around the premises had a foundation. During removal, the cabro came out without any effort. The roof was fixed with bolts and nuts. The defendant handed over the property on 2/5/2019 to the plaintiff. The defendant was to vacate on 30/4/2019. Though it handed over the premises on 2/5/2019, the letter is dated 30/4/2019. When shown Clause 13 of the agreement, he agreed that rent was payable quarterly beginning in January; that though the defendant executed works on the suit premises, DW1 did not have receipts to show for what it paid for it.

19. Upon re-examination by Mr. Matiri DW1 stated that Clause 4 of the letter of 1/10/2012 allowed the defendant to improve the premises for the purpose of its business. That DW1 understood "vacant possession" under Clause 17 of 2019 agreement to mean removal of the defendant's items, but leave only those of its Landlord intact. He reiterated that from 2012 the Landlord never effected any developments. He stated that previously, by way of a letter dated 19/9/2017 (PExh.8), the defendant had sought ample time to demolish its developments on the suit premises and the plaintiff had not objected to the intended demolition. DW1 stated that the defendant paid rent up to April 2019 and the landlord acknowledged receipt thereof and there is no clause that says the defendant could not terminate the agreement.

20. By consent, the letter dated 18/10/2019 listed as document No. 2 in the Defendant's Supplementary list of documents dated 25/10/2019 was produced as DExh.7. It is a letter from the defendant's neighbour at the suit premises, stating that the bulk of the developments that were on the suit premises were effected by the defendant. The evidence of DW1 marked the close of the defendant's case and parties were ordered to file submissions. The plaintiff filed its submissions on 17/2/2023 while the defendant complied on 20/2/2023. I have considered those submissions in this judgment.

Determination

21. It is not disputed that the plaintiff and the defendant herein entered into a license agreement dated 10/01/2019. It is also not disputed that 20 days after that execution, the defendant issued a Notice of intent to vacate dated 30/01/2019 to the plaintiff. What is disputed is whether the defendant could properly and legally terminate the said license by issuance of a notice and whether he ought to have removed the fixtures that he had put up on the suit premises. I will first address the issue of termination of the license before I address the issue of removal of fixtures from the suit premises.

22. First, it must be remembered that the agreement was a license and not a lease. The Blacks Law Dictionary 11th Edition defines a lease as follows:

    1. To grant the possession and use of (land, buildings, rooms, movable property, etc.) to another in return for rent or other consideration..."

23. The Blacks Law Dictionary 11th Edition also defines a license as follows:

    2. ... an agreement (not amounting to a lease or profit a prendre) that it is lawful for the licensee to enter the licensor's land to do some act...

        "[A] license is an authority to do a particular act, or series of acts, upon another's land, without possessing any estate therein. It is founded in personal confidence, and is not assignable, nor within the statute of frauds."

24. The *Land Act* defines a lease as follows:

    " lease" means the grant, with or without consideration, by the proprietor of land of the right to the exclusive possession of his or her land, and includes the right so granted and the instrument granting it, and also includes a sublease but does not include an agreement for lease;

25. The *Land Act* defines a license as follows:

    " licence" means a permission given by the Commission in respect of public land or proprietor in respect of private or community land or a lease which allows the licensee to do some act in relation to the land or the land comprised in the lease which would otherwise be a trespass, but does not include an easement or a profit;

26. As seen in Spannerright Auto Limited V Shell & Bp (Malindi) Kenya Limited [2008] eKLR which cited with approval the case of BP Nairobi Service Station Ltd. –vs- BP Kenya Ltd. [1989] KLR 112 there may be occasional difficulty in distinguishing between a lease and a license and relations between a land owner and an occupier may not be necessarily a lease or a license simply because the parties label

it so, and may depend on a wholistic construction of the context of the arrangement. In that case it was stated as follows:

> " The nature of the relationship between the parties is to be determined on a full examination of the dealings between them in their entirety. It does not depend solely on the interpretation of any agreement between them, nor does it depend on the payment or otherwise of any rent or other consideration. It does not, it would appear, also depend merely on having or not having exclusive possession or as it is sometimes exclusive occupation by the user. It is no longer possible to say that because a person has exclusive possession of the premises for which he pays rent or other consideration he is "ipso facto" a tenant and conversely that if he does not have such exclusive possession or occupation he is by that reason alone to be regarded as a licensee..."

27. The above notwithstanding, the principal distinction is that a lease offers to the tenant exclusive possession of land while a license is a mere permission to do some act in relation to land. My interpretation of the agreement between the plaintiff and the defendant is that the said agreement is a license that allowed the defendant to operate a motor bazaar business. This is reinforced by Clause 19 of the agreement where the plaintiff reserved the right to sell the property or carry out developments on the property and in the event the property was sold, the licensee would have to vacate the premises within fourteen days after service of a written notice to vacate the premises. The defendant did not therefore have exclusive possession of the property. Any of the parties could bail out of the relationship and they were not bound to remain till the end of the licence period. Also, the parties had previously entered into a lease agreement in 2012, which upon expiry was replaced with a license agreement in 2018 the latter which gave way to the license agreement of 2019 subject matter of the instant dispute.

28. As pointed out before, the plaintiff alleges that the defendant breached the license by purporting to terminate the said license through its Notice to Vacate dated 30/01/2019. The defendant on the other hand argues that there was no clause in the license that stopped it from terminating the license and it was therefore not in breach of the license agreement.

29. A perusal of the license agreement indicates that some of its terms were that the term of the license would be for a period of twelve months from 1/01/2019 to 31/12/2019, the monthly rent was to be Kshs. 1,200,000/= payable quarterly and if the licensee failed to pay rent for a period of seven days then it would be lawful for the plaintiff to reenter the premises. The license agreement does not have any clause that provides for termination of the license save in Clause 19 where the plaintiff reserved the right to sell the property or carry out developments on the property and in the event the property was sold, the licensee would have to vacate the premises within fourteen days after service of a written notice to vacate the premises.

30. The decision in Ram International Ltd vs Maasai Mara University [2021] eKLR relied on by the plaintiff relates to a lease and not a licence. The letter of offer which formed the basis of the Contract between the parties in that case was to run for a period of 6 years commencing from 1st February 2015 and terminating on the 31st January 2021. However, in breach of the letter of offer, the defendant unilaterally vacated the demised premises on 31st July 2019 without regard to the terms of the lease. The plaintiff claimed that as result of the breach, it was deprived of rental income, for a total of 88 months for the remainder period of the lease term, between the 31st May 2017 to the 31st January 2021. The defendant averred that the plaintiff could not turn around to claim rent payment from the defendant over the duration when the defendant had surrendered occupation of the premises. It stated that the termination of the tenancy was on account of an unforeseeable factor without the control of the defendant and in any case the termination was mutually agreed upon by the parties and the

defendant could not therefore be said to be in breach. It claimed that there were never any explicit terms and conditions of the letter of offer. The court in that case expressed its considered opinion that termination of the lease would not be available to the defendant before the lapse of time specified in the agreement. However, the facts of that case are clearly different from the instant case.

31. The court in the case of Agriner Development Limited V W. K. Martin & Others [2008] eKLR addressed the issue of termination of a license and stated as follows:

> " In the premises therefore, this court having found that the agreement in respect of the leased premises is a licence, the same is liable to be terminated upon reasonable notice being issued."

32. Similarly, in the present matter, having found that the agreement between the plaintiff and the defendant herein was a license and that it did not have a termination clause, then the said license was liable to be terminated upon reasonable notice being issued. If its terms were that the plaintiff was entitled to terminate the licence upon notice, then the converse must be deemed to be correct: that the defendant was entitled to issue notice and terminate it. And the defendant gave a three-month termination notice.

33. The decision in Winter Garden Theater v Millenium (1947) ALL ER 331 (House of Lords) relied on by the defendant relates to the termination of a license that had been entered into by the parties in the said case. Before the matter went to the House of Lords, the Court of Appeal had held, just like the approach the instant plaintiff adopts herein, that the subject contract must be construed in the light of its own terms and with no leaning towards revocability or irrevocability, and further held, reversing the decision from the court below, that the licensors lacked power to revoke the license. Among the terms of the agreement was that the license was for six months which was to run from 6/07/1942 at £ 80 a week with an option to continue for a further period of six months. The license was repeatedly renewed until 11/09/1945 when the licensors gave the licensees notice to vacate the theater on 13/10/1945. The licensors stated that they were prepared to give fresh notice for a later date if the licensees required further time to make other arrangements. The licensees contended that the license was not revocable by the licensors and alternatively, if it were revocable, reasonable notice had not been given. It was held that whether the license was or was not revocable was entirely a question of the construction of the contract, and, on the true construction of the terms of the contract, the license was not intended to be perpetual. It was on appeal that the court quoted the decision in Wood v Leadbitter by Alderson B who stated that every license must be revocable so long as it's a mere license. Lord Porter agreed with the said proposition and stated that the rule of law applicable to such a licence was that a license is prima facie revocable. The facts of this case are somewhat similar to the present matter and it is clear that a license is revocable.

34. The Plaintiff also relied on the case of Kenya Shell Ltd V Kileleshwa Service Station Ltd [2006] eKLR. The facts of the said case are that the plaintiff had issued the defendants with a 90 days' termination notice which had been served on it on 28/11/2004. The defendant refused to vacate the property and so it was sued for it to give vacant possession. The plaintiff had earlier issued a termination notice dated 10/03/2000 which led to the defendant filing Kileleshwa Service Station Limited –Vs- Kenya Shell Limited HCCC NO. 462 OF 2000 where the court had held that the relationship between the parties was that of a Licensor/Licensee and the termination notice issued on 10/03/2000 was of no legal effect. It was upon determination of that case that the plaintiff issued the notice dated 28/11/2004 requiring the defendant to vacate the premises. The defendant argued that the notice issued on 28/11/2004 did not have legal effect. After considering the circumstances of the said case, the court held that six months' notice for termination of the license would be reasonable.

35. I am also of the view that imposing a condition that the defendant should not part with possession, even when that parting is in favour of the plaintiff and not a third party, is an onerous demand on a licensee who no longer needs premises allowed to him by a landowner and in the circumstances the plaintiff was not entitled upon receipt of a notice to vacate to invoke the provisions of Clause 14 of the License agreement. Equity demands that only an unwritten right to terminate by notice on the defendant's part can render the parties equal in view of a similar right extended to the plaintiff by Clause 19. The plaintiff's demand in the former's letter dated 31/1/2019 to the defendant for payment of a penalty of Kshs.3,600,000/= for breach was therefore unwarranted.

36. It is therefore my finding that the defendant in issuing the Notice to Vacate dated 30/01/2019 did not breach the license agreement and so the plaintiff is precluded from seeking for damages for breach of the license agreement of Kshs.3,600,000/= as per Clause 14. It is also this court's view that adequate notice of termination was issued to the plaintiff by the defendant.

37. The Plaintiff had relied on the Court of Appeal case of Caltex Oil (Kenya) Ltd v Evanson Njiriri Wanjihia [2017] eKLR where the parties had entered into a contract that did not have a termination clause. The Court of Appeal noted that their agreement was a 'license for value' which meant that as long as the respondent met the set targets, then the license would not be taken away from him. The court also noted that since there was no evidence of breach of the license by the respondent, there was no reason for the termination of the contract without notice. The Court of Appeal then stated that in such circumstances, the court has to take a reasonable approach in calculating damages. It emphasized that in circumstances where there is no termination clause, like in the present case, the court has to determine what amounts to reasonable notice while taking into consideration the peculiar circumstances of each case. The Court of Appeal also emphasized that in awarding of damages, the court has always frowned upon as unjust enrichment.

38. During the hearing, the plaintiff's witness admitted that at the time the defendant was vacating the suit property, it had paid all the rent that was due. The plaintiff has sought in its prayers the payment of Kshs. 9,600,000/= as rent payable for the period between May 2019 to December 2019. However, the defendant never occupied the premises after 30/4/2019. In the light of the previous determination by this court that the termination of the license by notice was proper, to compel the defendant to pay rent for a period that he never occupied the land would be not only unjust but also unfair enrichment of the plaintiff as the license had been properly and effectively terminated on 30/04/2019 and all the rent that was due had been paid.

39. On the issue of removal of developments from the suit premises, the plaintiff alleges that that Clause 17 of the license agreement stopped the defendant from removing any developments from the property. The plaintiff is therefore seeking a sum of Kshs.10,186,516 as liquidated damages for destruction of property. Blacks Law Dictionary defines fixtures as follows:

> " An article in the nature of personal property which has been so annexed to the realty that it is regarded as a part of the real property...that which is fixed or attached to something permanently as an appendage, and not removable. A thing is deemed to be affixed to real property when it is attached to it by roots, imbedded in it, permanently resting upon it, or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws."

40. It is true in this case and as submitted by the plaintiff, that the license agreement barred the defendant from removal of developments made to the property during the term of the licence. Clause 17 of the license agreement which the plaintiff is relying on provides as follows:

> " At the determination of the license the licensee shall give vacant possession of the premises to the licensor in good and tenantable repair and condition and shall not make any alterations or remove the developments made thereon during the term of the license" (Emphasis mine)

41. During the hearing, the plaintiff's witness admitted that when they entered into the lease agreement in the year 2012, the plaintiff allowed the defendant to occupy the suit property for a period of one month during which time it did not pay the rent in order to customize the premises to its needs.

42. The plaintiff's principal witness also admitted that it was the defendant who had constructed a wall, an office, put up a shade for cars and laid cabro paving. As aforementioned, the defendant admits that when it was leaving the suit premises it removed the cabro paving, the vehicles, the shade for the cars but it left intact the wall that it had constructed.

43. However, the noteworthy aspect herein is that as at the time the parties were entering into the license agreement on 10/01/2019, the defendant had already customized the suit premises to enable it run its business. My interpretation of Clause 17 which the plaintiff alleges impeded the defendant from removing any developments thereon, is that it was very specific on the types of developments that the defendant was not to remove. Clause 17 quoted above specifically provided that the defendant was not to "make any alterations or remove developments made thereon during the term of the license". From the license, its term was for a period of twelve months with effect from January 2019 to 31/12/2019. Further, from the license agreement, it was only the plaintiff who was allowed to carry out any developments on the suit premises as per Clause 19 which provided as follows:

> " The licensor reserves the right to sell the property and or carry out developments on the property, the Licensee covenants that in the event the property is sold before the lapse of the term of the license, the licensee shall vacate the premises within 14 days after service of a written notice to vacate the premises." (Emphasis mine)

44. From the evidence adduced at the hearing, it was clear that during the term of the license, the plaintiff did not make any developments on the suit premises.

45. The stone wall which is the only permanent development that had been made on the suit premises by the defendant, was not removed. The fixtures removed by the defendant herein were put in place by the defendant before the parties entered into the license agreement and they were not fixtures put by the plaintiff. The question arising is whether they were "in the nature of personal property which has been so annexed to the realty that it is regarded as a part of the real property...that which is fixed or attached to something permanently as an appendage, and not removable. A thing is deemed to be affixed to real property when it is attached to it by roots, imbedded in it, permanently resting upon it, or permanently attached to what is thus permanent ..." as in the Black's Law dictionary definition above.

46. The fixtures that the defendant removed from the suit premises were the cabro paving that was removed without any effort and the roof that had been fixed with bolts and nuts both of which had been fixed prior to the parties entering into the license dated 10/01/2019. The defendant's evidence which was not controverted by the plaintiff, was that it wanted to leave the premises in the same condition it was in when it assumed possession.

47. The plaintiff relied on *the Constitution* 2010 for the definition of property to include any vested or contingent right to, or interest in or arising from land or permanent fixtures on, or improvements to, land. It also cites Section 2 of the *Land Act* as providing that "building" includes any structure or erection of any kind whatsoever whether permanent or temporary whether movable or immovable and whether completed or uncompleted. It stated that the licence does not grant the licensee any rights in the land comprised in the premises. The plaintiff relied on the latin maxim "quicquid plantatur solo solo cedit," that is, "whatever is permanently attached to the soil becomes part of the soil and runs with the land."

48. The plaintiff also relied on the decision in the Matter of the Estate of Joseph Peter Ndungu Njuguna (Deceased) 2014 eKLR but it must be pointed out that the court dealt effortlessly with the issue of whether a permanent house is the property of the registered owner of the land and held that it was. In the case of Methodist Church of Kenya Registered Trustees v Attorney General & 6 others 2010 eKLR the court dealt with the issue of a dispensary which was affixed to the land. The case of Mukuru Munge v Gilead Mwanyasi [2006] also dealt with a house. In the present case the structures involved are different. In the case of Leonard Otwori Juma v Francis Ongaki Mamboleo [2022] eKLR the court dealt with the issue of trees which are undoubtedly permanently fixed into the soil.

49. I do not find that any of the decisions cited by the plaintiff on the current issue support its argument in the matter and I think the plaintiff's submission at paras 33 and 36 misses the point; it is not disputed that there was no permanent building on the premises by the time the defendant took possession. In this court's view, the items removed by the defendant were not appurtenances fixed onto a permanent building but in themselves temporary items installed to make the operations of the defendant's car sale operations possible. Also, in this court's view, removal of the car sheds and the cabro had minimal effect on the property and the defendant can not be said to have been part of the land, or to have left the property in a condition that was not tenantable. It is my view that the defendant was not by reason of removal of items from the suit premises, in breach of Clause 17 of the license agreement. Based on the foregoing, it is my view that the plaintiff has not established a basis upon which the court can grant liquidated damages for destruction of property.

50. The upshot of the foregoing is that the plaintiff has failed to prove its claim on a balance of probabilities and the plaintiff's suit is hereby dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 31ST DAY OF MAY 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU