



**Mombasa Trade Centre v East Africa Institute of Certified Studies Limited & 2 others
(Civil Suit 104 of 2021) [2023] KEELC 18582 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18582 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 104 OF 2021
LL NAIKUNI, J
JUNE 22, 2023**

BETWEEN

MOMBASA TRADE CENTRE PLAINTIFF

AND

**EAST AFRICA INSTITUTE OF CERTIFIED STUDIES
LIMITED 1ST DEFENDANT
DANIEL WAKABA MACHARIA 2ND DEFENDANT
SERAH WANJIRU MACHARIA 3RD DEFENDANT**

JUDGMENT

i. Preliminaries

1. The Judgement of this Honorable Court emanates from the suit instituted The Plaintiff herein The Plaintiff herein, Mombasa Trade Centre against the 1st, 2nd and 3rd Defendants herein. It was brought to Court through a Complaint dated 2nd June, 2021 and filed on 4th June, 2021. Upon service with Summons to Enter appearance, on 23rd June, 2021 the Defendants obliged accordingly and filed their statement of defence and the Defendants' list of documents and copies of documents. On 13th May, 2022, with leave of the Court, the Defendants filed an Amended Statement of Defence which substantively consisted of mere denials, innuendos and misrepresentation of facts. Subsequently, on 17th May, 2022, the Defendants filed a Witness Statement signed by the 2nd Defendant, Daniel Wakaba Macharia.
2. Upon full compliance on the requirements of the case management under the provision of Order 11 of the Civil procedure Rules, by the consensus of the parties the matter was set down for full trial from 12th October, 2022 to its logical conclusion on 8th December, 2022. Thereafter, a date was reserved for the delivery of this Judgement accordingly following the filing of written submissions by the parties.



ii. The pleadings on the Plaintiff's case

3. From the filed pleadings, the case by the Plaintiff was as follows:-

- a. At all material times hereinafter referred to the Plaintiff was the registered owner of the demised building known as Mombasa Trade Centre situated along Nkrumah Road on Plot No. Mombasa/Block XXV/100 while the 1st Defendant was hitherto a lessee of 7 units of demised spaces on the said building. (hereinafter referred to as “the demised premises”).
- b. The Plaintiff and the 1st Defendant entered into Leases in respect of the 7 units of demised spaces as hereunder;
 - i. Lease dated 29th October, 2019 for Unit N3.01 and N3.02 for the period from 1st April, 2017 to 31st March, 2023
 - ii. Lease dated 29th October, 2019 for Unit N1.04 for the period from 1st January, 2018 to 31st December, 2023
 - iii. Lease dated 29th October, 2019 for Unit N1.10 for the period from 1st August, 2017-31st July, 2023
 - iv. Lease dated 29th October, 2019 for Unit FC07 for the period from 1st August 2017 to 31st December, 2023
 - v. Lease dated 29th October, 2019 for Unit ST01 for the period from 1st August, 2019 to 31st July, 2025
 - vi. Lease dated 29th October, 2019 for Unit ST02 for the period from 1st August, 2019 to 31st July, 2025
 - vii. Lease dated 29th October, 2019 for Unit N.3.06 for the Period from 1st January, 2020 to 31st December, 2025.
- c. The 2nd and 3rd Defendants guaranteed the 1st Defendant as sureties and undertook to jointly and or separately guarantee the performance of the 1st Defendant of its obligations under the Leases and in the event of default to be bound to make good any losses, damages, costs and/or expenses occasioned to the Plaintiff as a consequence of such default by the 1st Defendant.
- d. The 1st Defendant separately took over possession of the various demised spaces each for a term of 6 years and was expected to remain in possession thereof until the determination of the terms of the Leases when the 1st Defendant was in the absence of any negotiated surrender of any of the term of the Leases to vacate and hand over the vacant possession of the demised premises to the Plaintiff.
- e. The 1st Defendant during the tenure of the Leases in the demised suit premises severally and regularly breached the terms and conditions of the said Leases by failing to regularly discharge the rental accruing thereunder prompting the Plaintiff to severally recover the accrued rental arrears through distraint processes.
- f. The 1st Defendant on or about the 30th day of March, 2021 vacated from the 7 demised suit premises prior to the determination of the terms of the Leases, in the absence of negotiated surrenders of the terms of Leases and was to that extent liable for the rentals accruing until the



determination of the terms of the Lessor until such a time any of the demised suit premises could be let out earlier to alternative third-party tenants.

- g. The 1st Defendant at the instance of vacating from the demised suit premises failed to undertake the necessary repairs and renovations to restore the demised suit premises to an acceptable tenatable state and condition of repair as the separate dates of taking over possession of the several demised suit premises. And the Plaintiff holds the Defendants liable for the incidental costs of repair and renovation of the demised suit premises.
 - h. It was a material term to all the Leases executed between the parties that in the event that the Defendant defaults to effect payment of rent or other monies payable under the Leases on the respective dates the Plaintiff shall be entitled to charge interest from the date upon which such rent or other monies should have been paid until actual payment thereof. The interest rate applicable is at 7% per annum above the commercial lending rates of Barclays Bank of Kenya Limited (now Absa Bank) and which rate applied herein is 20% per annum.
 - i. In the premises, the Plaintiff's claim as against the Defendants jointly and severally, the sum of Kenya Shillings Sixty Nine Million Five Ninety Thousand Three Hundred and Seventy Four Sixteen cents (Kshs. 69,590,374.16) due and owing from the 1st Defendant to the Plaintiff in respect of - accrued and unpaid rental arrears for the months of 1st April, 2020 to 30th day of May 2025 and for the cost of repairs and renovations made up as hereunder:-

Sub Total -- Kshs. 70,819,343.78
Less deposit (all Units inclusive) Kshs. 3,559,760.00
Total Kshs. 69,590,374.16
 - j. And the Plaintiff claims as against the Defendants jointly and severally for the said sum of Kenya Shillings Sixty Nine Million Five Ninety Thousand Three Hundred and Seventy Four Sixteen cents (Kshs. 69,590,374.16).
 - k. Despite demand made and notice of intention to sue in default of payment having been issued to the Defendants, the Defendants have jointly and/or severally failed, refused and neglected to pay the said sum or any part thereof, wherefore this suit is rendered necessary.
 - l. The Plaintiff stated that there was no other suit pending and there have been no previous proceedings in any Court between the Plaintiff and the Defendants over the same cause of action herein.
 - m. The demised suit premises were situated at and the Lease was to be fully performed at Mombasa within the jurisdiction of this Honourable Court.
4. The Plaintiff prayed that judgement be entered against the 1st, 2nd, & 3rd Defendants for:-
- a. A sum of Kshs. 69,590,374.16.
 - b. A Declaration that the 1st Defendant having vacated from the 7 demised suit premises prior to the determination of the terms of the separate Leases executed as between the Plaintiff and the Defendants continues being liable for the rentals accruing until the dates of the determination of the several terms of the various Leases or until such earlier date that any of the demised suit premises could be let out to alternative third-party tenants.
 - c. Costs of and incidental to this suit;



- d. Interest on (a) and (b) above at the rate of 20% per annum from the date when the separate amounts fell due and became payable until payment thereof in full..

iii. The testimony by the Plaintiff

5. PW - 1 was sworn and testified in English. He stated that he was Abdulkadir Mohamed Said Mohamed of I.D. Number 14491800 born on 17th August, 1973. He told the court that he stayed at Nkurumah Road and worked as a financial controller of the Mombasa Trade Centre Ltd. He was aware of the case which involved rent arrears. He knew the 1st Defendant as they were tenants and the 2nd and 3rd Defendants were the 1st Defendant's directors. The leases had not expired.
6. PW – 1 had a letter authorizing him to swear an affidavit and appear on behalf of the Plaintiff. He produced the letter as Plaintiff exhibit 1 dated 12th March, 2021 after the board meeting. He recorded a witness statement dated 2nd June, 2021 which he adopted as his evidence in chief. He also told the court that he filed a list of documents dated the same day. They were 16 documents:
 - i. Title deed dated 16th December, 2008 – Pex 2
 - ii. 7 leases of Mombasa Trade Centre Ltd dated 27th October, 2019 (page 6 to 236) – Pex 3
 - iii. Plaintiff Advocate Letter dated 21st October, 2020 – Pex 4
 - iv. Plaintiff Advocate letter dated 21st October, 2020 – Pex 5
 - v. Auctioneers letter dated 22nd October, 2020 and proclamation – Pex 6 (a – e).
 - vi. Defendant's Advocate letter dated 23rd April, 2021 – Pex 7
 - vii. Advocate letter dated 29th April, 2021 – Pex 8
 - viii. Account statement dated 26th May, 2021 – Pex 9
 - ix. Proposed renovation – Pex 10.
7. The witness testified that he was claiming for rent arrears a sum of a sum of Kenya Shillings Sixty Nine Million Five Ninety Thousand Three Seventy Four Hundred and Sixteen Cents (Kshs. 69,590,374.16) under Paragraph 12 (i) to (h) of the Plaint. They left the premises without payment of the rent during the renovations. The leases are standard. The rent arrears were already there even before the insurgence of the Covid 19 Pandemic. This position was supported by the statement of account from Pages 246 to 249 of the Paragraph 12 of the Plaint.
8. He told the court that it was seen from (i) to (viii). (iii) rent arrears for Unit 10 for April 2020 to 30th March, 2021 being a sum of Kenya Shillings One Million Six Ninety Eight Thousand Nine Twenty Three Hundred Fifty cents. (Kshs 1,698,923.50/=). There was a provision in the lease where there was damage by fire, they need to meet their costs not with the eventuality such as Covid 19 as opposed to Clause 3.14 of the leases. There were 7 leases for each unit that were in the name of the tenant. They were all for commercial use which was an institution.
9. On cross examination, PW – 1 told the Court that the 7 leases were from pages 6 to 249 marked as Plaintiff Exhibit 3(a) to 3(h) respectively. Each had different rent and deposit paid. Under clause 1 of each of these leases were to be used as deposits security but not as rent. By the time they left the premises the deposits were a sum of Kenya Shillings Three Million Five Hundred Thousand (Kshs. 3,500,000/-) which was not refunded. The deposits were still in their possession.



10. He testified that page 20 of the Bundle under Clause 1.25 per user to be used as an office and training. When they rent out they were open spaces, but the tenants/ lessees who caused the partitioned and renovated at their own costs. By the time the tenants left there was distress. The auctioneers took their equipment. As per the property, they retained them. There was no provision for the landlord to retain the property in the lease.
11. He made reference to Clause 3.19 of the lease stating that the provisions of Sections 65 and 66 of the Land Act shall not apply to the lease. He indicated he was not a lawyer. In the year 2020 Covid – 19 pandemic hit the whole world and there were Government restrictions/ lock downs. There was a letter from the Defendants requested for the leniency on rent due to the pandemic but the Plaintiff replied through a letter dated 18th August, 2020 declining the request. Besides even their notice of termination of the lease agreement but the Plaintiff refused instead they sent auctioneers to levy distress. They sold them and recovered a sum of Kenya Shillings Three Hundred Thousand (Kshs. 300,000/-) which they had retained as their fees. There was no money recovered hence it could not be reflected in the accounts statement. From the Plaintiff, Clause 12 they charged interest on the accrued rent at 20%.
12. It was found in the lease under Clause 226 – interest of 70% per annum above the commercial lending rate of Barclays Bank of Kenya Limited applicable from time to time. It was not true that the tenants tried to come back and they refused them access. He told the court that it was not true that they had evicted the tenants, the tenants had left voluntarily and they were not allowed to come back and carry out their files or any property.
13. He made reference to the Plaintiff Exhibit no. 10 stating that the proposed renovation and alterations at Ambalal House (page 248) to allow other tenants in the premises and were paying rent. They allowed them to pay for the rest of the term of the lease,, which were for a period of 6 years. It was not fair.
14. When re - examined he stated that he kept the deposits for the damages caused to the building, the deposits are not to be utilized as rent. The Defendants left the premises without paying rent and left the premises in a bad state of despair. The Defendants never gave the Plaintiff vacant possession. The partitions were incurred by the tenants who had requested for collection of the partition materials.
15. He told the court the Tenant was then under the Legal Counsel of Thomas Thuku Advocates and they voluntarily accepted the terms of the leases and knew what they were getting themselves into. With reference to Plaintiff Exhibit 6(a) and (b), be charged at a sum of Kenya Shillings Two Hundred and Fifty Thousand (Kshs 250,000/-). The proclaimed goods were a sum of Kenya Shillings Three Hundred Thousand (Kshs. 300,000/-). There was nothing to show that they wanted to come back. Since they were not in occupation of the suit property, it was vacant. The Plaintiff could not leave it unoccupied. They needed to mitigate their losses.

IV. The pleadings on the 1st, 2nd, & 3rd Defendants case

16. The Defendants in their amended Defence dated 14th March, 2022 contended that:-
 - a. The 1st, 2nd & 3rd Defendants admitted the contents of paragraph 5 on allegations relating to of the period of the various lease signed between the Plaintiff and the 1st defendant.
 - b. The defendants denied the contents of Paragraph 6 of the plaint and further states as follows:
 - i. The lease agreements were between the Plaintiff and 1st Defendant
 - ii. That any claim on rent only affects the Plaintiff and the 1st Defendant



- iii. That the 2nd and 3rd Defendants would not be called upon to give any account for any purported omission unless and only if the 1st Defendant was incapable to meet its obligations.
- iv. That the 1st Defendant was a registered limited liability company which was capable to handle its matters independently, the issue of guarantorship guarantees notwithstanding.
- c. The 2nd and 3rd Defendants were are illegally wrongly brought into this suit and shall therefore raise a point of preliminary objection at the hearing of the suit.
- d. The 1st Defendant denied the contents of Paragraph 7 and stated as follows:
 - i. The terms of the lease agreement stated in Paragraph 5 of the Plaintiff were very clear in all leases executed between the Plaintiff and the 1st Defendant.
 - ii. The 1st Defendant was removed from the premises by the Plaintiffs' auctioneers vide a proclamation of distraint of movable properties dated 3rd December 2020.
 - iii. The 1st Defendant in the Circumstances contents that the auctioneers being agents of the Plaintiff and having forcefully removed the 1st Defendant from the premises in effect repossessed the premises for the Plaintiff and in the rents in respect of the premises.
- e. The 1st Defendant denied the contents of Paragraph 8 of the Plaintiff.
- f. The 1st Defendant denied the contents of paragraph 9 of the Plaintiff and further stated as follows:
 - i. The payment of rents was affected by Government policies which closed down the 1st Defendants' operations from March 2020 to the end of the year.
 - ii. The 1st Defendants met all its obligations per the lease agreement by paying all the rents agreed in time without fail.
 - iii. That due to the closure of the leased properties or premises, the 1st Defendant approached the Plaintiff for moratorium on rent but all in vain.
 - iv. The Plaintiff sent auctioneers and proclaimed the 1st Defendant's good on 21st October 2020 on allegations that the outstanding rents were a sum of Kenya Shillings Eight Million One Ninety Eight Thousand Seven Fifty Two Hundred (Kshs.8,198,752).
 - v. The 1st Defendant instituted Civil Suit no 799 of 2020 and orders restraining the Plaintiff from distressing for rent were issued.
 - vi. The Plaintiff instructed auctioneers who levied distress on the leased properties on 3rd December 2020.
 - vii. All the 1st Defendants' goods were carried away the Plaintiff took possession of the premises, and the leases were determined on account of the above the 1st Defendant shall put the Plaintiff proof thereof at the hearing of the suit.
 - viii. The 1st Defendant further states that the premises were let out for use as a school and in view of the Covid -19 global pandemic all places of education and learning were closed by the government and the premises for which they were let and in the circumstances



the 1st Defendant lawfully terminated the leases under the provision of Section 65 (f) of the Land Act.

- ix. The 1st Defendants further averred that the leases became frustrated following the onset of Covid 19 pandemic.
- g. The 1st Defendant denied the contents of Paragraphs 10 & 11 of the Plaintiff.
- h. The Defendants prayed that the suit be dismissed with costs to the Defendants.

V. The testimony by the 1st, 2nd & 3rd Defendants

- 17. The defence called DW - 1, Mr. Daniel Wakaba Macharia, a business man. He told the Court that he used to run an educational institution called East Africa Institute of Certified Studies Ltd as the Director. He recorded his statement dated 16th February, 2022 which he adopted as his evidence in chief. He told the court that he adopted his list of documents dated 23rd June, 2022. There were 20 documents produced as Defendant Exhibits 1 to 20.
- 18. He told the court that he was a tenant in the premises for a long time. However, their business was one of those that were closed down during the Covid 19 pandemic by the Government directives. There was a distress for rent arising from the lease hence Auctioneers came and proclaimed their property, which they sold. The auctioneers took their assets from the school including the ICT lab, journalism, catering department, they took all the equipment apart from the files which they were given back by the Landlord.
- 19. He told the court that there was no communication between them and the Landlord. They said they were never wanted in the premises. They said it was taken over by the other tenants. They tried to get access to the building but without success. They only allowed in the building to pick up the files. They picked the files from the entrance of the building. They had done the portioning of the premises.
- 20. He testified that the partition was close to a sum of Kenya Shillings Seven Million (Kshs. 7,000,000/-) for both Administration block. They paid a sum of equivalent to 3 months rent or each remit a security deposit. It was more than a sum of Kenya Shillings Four Million (Kshs. 4,000,000/-) which they never got back. He had never been given any refund nor allowed back. They got another tenant there who had rented out the premises.
- 21. On cross examination, he stated that he occupied 7 units, he signed one lease. The tenant agreement was for payment of rent. With reference to Clause 3.1-page no. 22, it made reference to when rent could be suspended. By this time, they were not in a position to get money to pay rent. It was affected by the restriction imposed during the global Covid - 19. They could not come to an agreement with the Landlord.
- 22. When referring to the letter dated 9th June, 2020, the witness told the court that after the closure of the institution for distance/ on line teaching, the lecturers were not using the premises. They filed a Civil Matter No. 799 of 2020 where they obtained a temporary injunction and after their Advocate died, the auctioneers stormed their offices. They received a letter dated 21st October, 2020 from Sherman Nyongesa and Mutubia Advocate seeking they vacate the premises. They were kicked out in February 2021. The landlord took away everything they had including their very expensive partitions. Between the year 2020 to 2021, he had been in rent arrears.
- 23. When re – examined, DW – 1 stated that his advocate passed away. The letter dated 30th May, 2020 on the bundle of keys. They were in two for the toilet. The Government shut down all institutions due to



the global Covid – 19 pandemic. The management blocked them from accessing the offices. He had never been refunded any deposit nor the items the auctioneers took; They were denied access.

VI. Submissions

24. On 8th December, 2022, immediately after the closure of the Defendant's case, the Honorable Court directed the Advocates for the Plaintiff and the Defendants to file written submissions in support of this suit within stipulated timeframe. Subsequently, the parties fully complied. On 28th February, 2023 the Honorable Court reserved a date for delivery of Judgement on notice accordingly.

A. The Written Submissions by the Plaintiff

25. On 13th February, 2022, the Learned Counsel for the Plaintiff, the Law firm of Messrs. Sherman Nyongesa & Mutubia Advocates filed their written submissions dated on the even date in support of the Plaintiff's suit. Mr. Mutubia Advocate submitted that the Plaintiff sued the Defendants vide a Plaint dated 2nd June, 2021 and filed in Court on 3rd June, 2021, praying that Judgment be entered against the Defendants' jointly and/ or severally for:-

- a. A sum of Kshs. 69,590,374.16;
- b. A declaration that the Is Defendant having vacated from the 7 demised suit premises prior to the determination of the terms of the separate Leases executed as between the Plaintiff and the Defendants continues being liable for the rentals accruing until the dates of the determination of the several terms of the various Leases or until such earlier date that any of the demised suit premises could be let out to alternative third-party tenants;
- c. Costs of and incidental to this suit;
- d. Interest on (a) and (b) above at the rate

26. The Learned Counsel submitted that in support of the Claim, the Plaintiff filed the List and copies of documents and the Witness statement signed by Abdulkader Mohamedali Sale Mohamed both dated 2nd June, 2021 and filed on 4th June, 2021. On 23rd June, 2021, the Defendants' filed their Statement of Defence and the Defendants' List and Copies of Documents. On 13th May, 2022, with leave of the Court, the Defendants filed an Amended Statement of Defence which substantively consisted of mere denials, innuendos and misrepresentation of facts. Subsequently, on 17th May, 2022, the Defendants filed a Witness Statement signed by the 2nd Defendant, Daniel Wakaba Macharia. The matter went for full trial with the Plaintiff's Witness on 12th October, 2022 testifying on behalf of the Plaintiff while the Defendants' Witness testified on behalf of the Defendants on 8th December, 2022.

27. According to the Counsel, the background of the case was that at all material times, the Plaintiff was the registered owner to the premises known as Mombasa Trade Centre situated along Nkrumah Road on Plot No. Mombasa/ Block XXV/100 while the 1st Defendant was a Lessee of 7 units of the demised spaces on the said building (hereinafter referred to as "the demised premises"). See the Plaintiff's Exhibits No. 2 which is a copy of the Title Deed for Plot No. Mombasa/Block XXV/100 which appear at pages 4-5 of the Plaintiff's List & Copies of documents. The Plaintiff and the 1st Defendant entered into Leases in respect of the 7 units of demised spaces as hereunder:-

- a. Lease dated 29th October, 2019 for Unit N3.01 and N3.02 for the period running from 1st April, 2017 to 31st March, 2023;
- b. Lease dated 29th October, 2019 for Unit N1.04 for the period running from 1st January, 2018 to 31st December, 2025;



- c. Lease dated 29th October, 2019 for Unit N1.10 for the period running from 1st August, 2017 to 31st July, 2025;
 - d. Lease dated 29th October, 2019 for Unit FC07 for the period running from 1st August, 2017 to 31st December, 2025;
 - e. Lease dated 29th October, 2019 for Unit ST01 for the period running from 1st August, 2019 to 31st July, 2025;
 - f. Lease dated 29th October, 2019 for Unit ST02 for the period running from 1st August, 2019 to 31st July, 2025;
 - g. Lease dated 29th October, 2019 for Unit N33.06 for the period running from 1st January, 2020 to 31st December, 2025;
28. The Learned Counsel averred that despite variation in the dates for commencement of the term of the Lease agreements, the 1st Defendant was to take over possession of the demised premises for fixed terms of six (6) years and was expected to remain in possession thereof until the determination of the term of the respective Leases, when the Lease was to determine, thereafter, the 1st Defendant was to accordingly vacate and hand over vacant possession in the absence of a negotiated surrender of the remainder of terms of the Leases.
29. It was a term of the Lease agreements that rent and service charge in respect of the 7 Units of the demised premises was payable quarterly in advance as such the 2nd and 3rd Defendants in pursuant to a Deed of Guarantee executed on their parts on 2nd June, 2015 undertook to jointly and separately guarantee the Plaintiff as the Lessor to the extent that the 1st Defendant as the Lessee was at all times during the continuance of the Leases to pay rent reserved under the Leases and other sums as agreed to be paid by the 1st Defendant at the respective times and manner appointed under the Leases for payment of rentals and other charges and will also duly perform, observe and keep the several agreements and covenants provided under the Leases on the part of the 1st Defendant as the sureties or one of them will pay and make good to the Plaintiff the costs and expenses occasioned to the Plaintiff through the default of the 1st Defendant.
30. The Learned Counsel argued that on 12th October, 2022, the PW – 1 - Abdulkader Mohamed Sale Mohamed adopted his Witness Statement dated 2nd June, 2021 and also produced the documents listed on the Plaintiff's List and Copies of Documents filed on 4th June, 2021 as the Plaintiff's Exhibits No.1-10 respectively. PW - 1 testified that pursuant to taking possession and during the tenure of the Lease Agreements, the 1st Defendant severally and regularly breached the terms and conditions of the said Lease Agreements by failing to regularly discharge the rentals accruing under the Lease prompting the Plaintiff to levy distress for recovery of the accrued rentals without success as consequence of which interest has been accumulating.
31. The Learned Counsel opined that PW-1 further testified that the 1st Defendant had rent arrears even before the outbreak of the Covid-19 pandemic cannot put blame on the occurrence of the pandemic for its default in the remittance of the rent. PW-1 testified that the 1st Defendant as at 31st March, 2021 had accrued rentals amounting to a sum of Kenya Shillings Eighteen Million Four and Five Thousand Seven Sixty Three Hundred Seventy Eight cents (Kshs. 18,405,763.78) inclusive of interest as is stipulated at Paragraph 12 of the Plaintiff and the Statement of Accounts as at 31st March, 2021. See the Plaintiff's Exhibits No.9 which is a copy of the Statement of Account at 31st March, 2021 which appear at page 246 of the Plaintiff's List & Copies of documents. PW - 1 testified that the 1st Defendant



had on various occasions sought for more time to settle the accrued rentals which the Plaintiff agreed to by staggering the time, however, the 1st Defendant on numerous did not keep its promise which then necessitated the commencement of the distraint proceedings. The Plaintiff's Witness testified that nothing was recovered capable of settling the rent arrears as most of the time, the 1st Defendant would file suits and obtain orders of injunction as against the Plaintiff and the instructed Auctioneers as was the case in CMCC Civil Suit No.799 of 2020.

32. The Learned Counsel submitted that PW - 1 testified that Clause 3.1 of the Lease on Suspension of rent provides that the only conceivable option for suspension of rent was only when the demised premises or any part thereof was damaged and rendered unfit for occupation. Therefore, the occurrence of the Covid-19 pandemic does not fit the description of conceivable options for suspension of rent under the Leases executed by the Plaintiff and the 1st Defendant herein. PW-1 testified that the Plaintiff tried to stagger the time for payment of the rent in order to accommodate the tenants and that it was impossible to suspend the remittance of rent as the Plaintiff's expenses such as running costs, land rates, payment for license to operate and payment of taxes did not stop which the Plaintiff depends on the rental income in order to meet its obligations.
33. The Learned Counsel averred that PW-1 testified that the 1st Defendant on 30th March, 2021, without prior notification to the Plaintiff, stealthily vacated from the demised premises having neither remitted the accrued rentals nor conducted repairs and renovations aimed at restoring the demised premises into good and tenable state and condition. PW-1 testified that despite issuance of demand letter to the Defendants, see the Plaintiff's Exhibit No.7 which appears on pages 242 to 243 of the Plaintiff's List & Copies of Documents, the Defendants' have not made any effort to reach out to the Plaintiff with the aim of settling the accrued rentals nor negotiate of surrender of the remainder of the Lease and thereafter handover vacant possession.
34. The Learned Counsel asserted that PW - 1 stated that upon the Plaintiff taking possession of the demised premises was prompted to engage a contractor, Crib Builders Limited, to appropriately attend to the demised premises with the aim of repairing and restoring them into good and tenable state and condition to let to third party tenants. See the Plaintiff's Exhibit No.10 which is the Proposed Renovations & Alterations Works which appears on pages 247 to 249 of the Plaintiff's List & Copies of Documents.
35. The Learned Counsel contended that on 8th December, 2022, the DW - 1 - Daniel Wakaba Macharia adopted his witness statement filed in Court on 17th May, 2022 and produced the documents listed in the Defendants' List and Copies of documents dated 23rd June, 2021 which were marked at Defendant's Exhibits No.1-19. DW-1 confirmed that the 1st Defendant signed and executed 7 Lease agreements in respect of the 7 units let out to them by the Plaintiff. DW-1 as the director the 1st Defendant confirmed that he read out the terms of the Lease agreements and in particular understood the main duty of the 1st Defendant which was payment of rent as and when it was due. Additionally, DW-1 confirmed that the 1st Defendant obligation to remit rent was not subject to the 1st Defendant's students paying school fees.
36. DW-1 upon reading Clause 3.1 of the Lease, confirmed to have understood that suspension of rent could only occur when the demised premises was destroyed or damaged and upon being referred to the letter dated 18th August, 2020 which is a letter from the Landlord to the 1st Defendant confirmed that the Plaintiff was lenient and even proposed to stagger the rent for 12 to 15 months, confirming that the keys to the demised premises were handed over to the Plaintiff by the 1st Defendant's Advocate on 30th March, 2021. DW-1 confirmed that the Plaintiff never denied the 1st Defendant entry and at one occasion after vacating went back to the demised premises to collect files from the premises. The



- 1st Defendant resumed normal operation in January, 2021 and that no efforts had been made to pay the accrued rentals.
37. The Learned Counsel submitted that DW-1 confirmed that he had not provided any proof to show how much was incurred by the 1st Defendant in the partitioning of the demised premises and there were no receipts to show the alleged value of the equipment's the auctioneers allegedly took away from his premises. He further confirmed that he has never made any efforts to request for the partitions nor the security deposit. DW-1 further confirmed that the Lease agreements were forwarded to their chambers and the same were signed and executed by the 2nd and 3rd Defendant before an Advocate who explained and clarified the terms of the Lease agreements.
38. The Learned Counsel's contention was that on the issues for determination by the Honourable Court:-
- a. Whether the 1st Defendant was liable to pay accrued rentals and interest for the period running from 1st April, 2020 to 30th March, 2021?
 - b. Whether the Plaintiff was entitled to claim for the rentals accruing for the remainder terms of the Leases for the demised premises?
 - c. Whether the Plaintiff was entitled to the claim for costs of repair and renovation of the demised premises.
 - d. What were the orders as to costs?
39. On whether the 1st Defendant was liable to pay accrued rentals and interest for the period running from 1st April, 2020 to 30th March, 2021, the Learned Counsel submitted that DW-1 testified that the 1st Defendant voluntarily signed and executed the Letters of Offer of Lease on diverse dates in respect to each of the seven (7) units and took possession of the demised premises. See the Defendant's Exhibit's No.19 which are copies of the Letters of Offer signed and executed by the Plaintiff and the Defendants herein. Term 24 of the Letters of Offer provided that upon accepting the terms of the letter of offer, the tenant is deemed to have approved the standard form of Lease which the Plaintiff's Advocates prepared and forwarded to the 1st Defendant for signing and execution.
40. DW-1 in his testimony confirmed to have signed and executed Lease agreements and Deeds of Guarantee on 29th October, 2019 before an Advocate one, Thomas Thuku Ng'ang'a. He further confirmed that as the director of the 1st Defendant, he is aware that having voluntarily signed and executed the Leases and the Deeds of Guarantee, the Defendants' are contractually bound by the terms of these Leases. The Court in the case of Alton Homes Limited & Another – Versus - Davis Nathan Chelogoi & 2 others (2018) eKLR which cited with approval the findings in Total Kenya Limited – Versus - Joseph Ojiem, Nairobi HCCC no.1243 of 1999, where the Court held as follows in determining the duties and obligation of parties to a contract:-
- “Parties to a contract that they have entered into voluntarily are bound by its terms and conditions.....”
- The 1st Plaintiff and 1st Defendant entered into a sale agreement dated 4th August 2009, and they are bound by the terms therein...”
41. The Learned Counsel submitted that in the instant case, the Fifth and Six schedule of the Lease agreements clearly stated the rent and service charge payable for each of the seven (7) units during the tenure of the Leases. Additionally, it was term of the Leases that the rent and service charge are payable quarterly in advance on the first day of each quarter.



42. Term 1.1 of the Lease provided as follows:-

“ 1.

1 Rent

To pay the rent hereby reserved at the times and in the manner aforesaid free of exchange and free and clear of any deductions or withholdings at Mombasa in cash or banker's order or other terms as the Lessor shall in its sole discretion nominate and not to exercise any right or claim to withhold rent or any right of claim to legal or equitable set-off counter claim.”

43. The Plaintiff submitted that pursuant to taking possession and during the tenure of the lease Agreements in regards to the 7 Units, the 1st Defendant severally and regularly breached the terms and conditions of the said lease by failing to regularly discharge the rentals accruing under the lease prompting the Plaintiff to levy distress for recovery of the accrued rentals without success as consequence of which interest has been accumulating. The Plaintiff at paragraph 12 (i) to (vii) of the Plaint clearly stipulates the accrued rentals by the Defendant's at 31st March, 2021 for each of the 7 units which amounted to Kshs. 16,665,219.80. Additionally, during the hearing, the Plaintiff produced the Statement of Accounts for the 1st Defendant as at 31st March, 2021 in support of this claim.

44. The Learned Counsel submitted that during the hearing, DW-1 confirmed that the 1st Defendant had been in possession of the demised premises until sometime on 30th March, 2021 when 1st Defendant vacated from the demised premises. Additionally, DW-1 confirmed to having not remitted rent despite being served Invoices for the same to be paid by the Plaintiff. Further, DW-1 did not produce any evidence to prove that the accrued rentals had been paid by the 1st Defendant or the 2nd and 3rd Defendants as the guarantors.

45. DW-1 confirmed that the 1st Defendant's obligation to remit rent as and when required was not subject to the student's paying the school fees to the 1st Defendant and as such, the 1st Defendant was required to pay rent as agreed in the Lease. The Court in the case of “Tecno Holdings Limited & 4 Others vs National Social Security Fund Board of Trustees (2018) eKLR stated as follows:

“ A tenant first and main obligation is to pay rent as and when it becomes due for the landlord has a right to an income from his investment.....A tenant who is in arrears is underserving of the Courts discretion. The Court cannot be the refuge of a tenant who fails to meet his principal obligation of paying rent as and when it becomes due.”

46. Similarly, in Samuel Kipkorir Ngeno and Another vs Local Authorities Pension Trust (Registered Trustees) and Another (2013) eKLR the Court held as follows:-

“ A tenant's first and main obligation is to pay rent as and when it becomes due for the landlord has the right to an income from his investment. Why would a tenant allow himself to fall into such huge arrears of rent?

47. The Learned Counsel submitted that the 1st Defendant having been in possession of the Demised premises until the 30th day of March, 2021 is liable to pay the carried rent amounting to



Kshs.16,665,219.80. Term 3.3 of the Leases on Recovery of Monies Due at Clause 3.3.1 provides as follows:-

“3.

3 Recovery of Monies Due

3.

3.

1 in the event that the Lessee shall fail to effect payment of rent or other moneys payable hereunder on their respective due dates then without prejudice to the Lessor's rights and remedies hereunder or otherwise the Lessor shall at its sole option be entitled to charge interest and administration charges at the Lessor's then ruling and applicable rates and In accordance with the Lessor's Rules and Regulations for the time being enforce.....”

48. Term 4 on Definitions and Interpretations defines Interest as follows:- “Interest” means rates of 7 % per annum above the commercial lending rates of Barclays Bank of Kenya Limited applicable from time to time.”
49. The Learned Counsel submitted that from the above-quoted terms of the Lease, the interest rate applicable is 7% per annum above the commercial lending rates of Barclays Bank of Kenya Limited (now Absa Bank) and which rate applied herein is 20% per annum. The Plaintiff at paragraph 12 (i) to (vii) of the Plaint clearly stipulates the interest chargeable for the accrued rentals for each of the seven (7) units which amounts to Kshs.1,740,543.98. Additionally, during the hearing, the Plaintiff produced the Statement of Accounts for the 1st Defendant as at 31st March, 2021 in support of this claim. They prayed that the Honourable Court finds the Defendants liable jointly and severally to settle the outstanding rentals and interest amounting to Kshs.18,405,763.78.
50. On whether the Plaintiff is entitled to claim for the rentals accruing for the remainder terms of the Leases for the demised premises, the Learned Counsel submitted that it is clear that the Leases being for fixed terms of 6 years, the 1st Defendant was in the event of vacating from the demised premises prior to the determination of the term of the Leases and in the absence of a negotiated surrender of the remainder of the term of the Leases to pay all the rentals accruing until the determination of the term of the Leases until such a time that the demised premises would be let out to alternative tenants.
51. The Learned Counsel submitted that on or about the 30th day of March, 2021, 1st Defendant in complete breach of the material terms the Leases enjoyed by it and without any bona fide attempt having been made on its part to negotiate a surrender of the Leases proceeded in haste vacated from premises and abandoned the demised premises and to that extent failed to handover vacant possession of the premises thereby breaching the material terms of the Leases. It was PW-1's testimony that the 1st Defendant vacated the Demised premises without any notice to the Plaintiff. He testified that the 1st Defendant vacated without having carried out repairs and renovations of the demised premises. PW-1



testified that there was no hope of the Defendant repossessing the demised premises and as such opted to engage a contractor for purposes of restoring the demised premises into good and tenable state and condition.

52. DW-1 alleged that the demised premises were let out by the Plaintiff to alternative tenants immediately after the 1st Defendant vacated the demised premises. The Defendant did not however, produce any evidence to prove this allegation. The Plaintiff submits as per the Proposal for Renovations and Alteration Works Quotation dated 26th May, 2021 which is produced as Plaintiff's Exhibit No. 10, it is clear that as at 26th May, 2021 the demised premises had not been restored into a good and tenable state and condition in order to let out to alternative tenants. DW-1's claim that the demised premises were let out to alternative tenants immediately after the 1st Defendant therefore fails.
53. Additionally, had the demised premises been let out to alternative tenants, the Plaintiff would have produced Letters of offer on the same, however, this is not the case as the demised premises are yet to be let out to any alternative tenant. The Court of Appeal in the case of "Kenya Commercial Bank Limited – Versus - Popatial Madhavji & Another (2019) eKLR while discussing a party's decision to terminate a fixed term Lease held as follows:-

“But having found as we have above that an agreement to lease for a period of 5 years and 3 months had resulted from the terms outlined in the letter of 23rd December 1998 and the ensuing correspondence, the appellant was bound to a lease term of a period exceeding five years, which removed it from the ambit of Cap 301. This meant that termination of the lease mid-term was not available to the appellant. The consequence of this was that the notice of termination of 25th March 2002 could not validly terminate the lease, with the result, we find that, the appellant was obligated to continue to occupy the suit premises for the entire period of the lease, and to pay the agreed rent and service charge for the period up to the date of expiry, that being the 31st December 2003.”

54. In *Jomo Kenyatta University of Agriculture and Technology vs Kwanza Estates Limited* [2022] eKLR which was a matter involving parties to a fixed term lease of six (6) which commenced on 1st May, 2016 the Court held as follows in respect to the rent payable for the remainder of the term:-

“49. As regards the claim for Kshs 97,817,231 being rent for the period up to 30th April 2022, the plaintiff's witness testified that the plaintiff paid rent up to 31st January 2021 in accordance with the invoice that was presented to it. The defence witness confirmed that the defendant received rent for the said period. Consequently, the only rent due is for the period 1st February 2021 to 30th April 2022.

50. In terms of the lease dated 1st May 2016, the plaintiff was liable to pay an annual rent of Kshs. 55,357,799 for the period 1st day of May 2020 to the 30th day of April 2021 and an annual rent of Kshs. 58,125,689 for the period 1st day of May 2021 to the 30th day of April 2022. Thus, the sum of Kshs 13,839,449.70 is due for the period 1st February 2021 to 30th April 2021 while the entire sum of Kshs 58,125,689 for the period 1st day of May 2021 to the 30th day of April 2022. In total, the plaintiff owes Kshs 71,965,138.0 for the period 1st February 2021 to 30th April 2022. I will award the said sum.”

55. From the above-captioned case law, the 1st Defendant was obliged to occupy the demised premises, pay the rent and service charge payable to the date of determination of the respective terms of the Leases as



stipulated at paragraph 5 of the Plaintiff. We therefore urge this Court to declare the 1st Defendant liable for the rentals accruing for the remainder of the term Leases for each of the seven (7) units as stated at Paragraph 12 (viii) of the Plaintiff.

56. On whether, the Plaintiff was entitled to the claim for costs of repair and renovation of the demised premises, the Learned Counsel submitted that term 1.19.1 of the Lease clearly states the costs for repair and renovation of the demised premises immediately prior to the expiration or sooner determination of the term of the Lease was to be borne by the Lessee who in this case was the 1st Defendant. PW-1 testified that the 1st Defendant vacated the demises premises having not carried out any repairs and/ or renovations of the demised premises so as to restore the demised premises into a good and tenable condition. PW-1 testified that the Plaintiff had to voluntarily engage a contractor to carry out the repairs and renovations at the demised premises. The Plaintiff produced a copy of the proposed renovations & alteration works quotation dated 26th May, 2021 as Plaintiff's Exhibit No.10 to show all the works and the estimated costs of a sum of Kenya Shillings Two Million Three Thirty Thousand Seven Ninety hundred and thirty eight cents (Kshs.2,330,790.38/=) for the said works that the Plaintiff incurred.
57. The Learned Counsel argued that additionally, PW-1 confirmed that to date the Defendants had not made any initiative to reimburse the Plaintiff for the costs incurred to repair the demised premises. During cross - examination, DW-1 confirmed that the 1st Defendant did not conduct repairs and/ or renovations of the demised premises nor reimburse the Plaintiff for the costs incurred to repair and restore the demised premises into good and tenable state and condition. In the case of Douglas Odhiambo Apel & Another – Versus - Telkom (K) Ltd (2014) eKLR the Court of Appeal held that:
- “.....a plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or submissions. Cases are decided on actual evidence that is tendered before the court.....Unless a consent is entered into for a special sum, then it behooves the claiming party to produce evidence to prove the special damages claimed. Submissions, as he correctly observed, are not evidence.....”
58. In the case of “Nkuene Dairy Farmers Cooperative Society Ltd & Another – Versus - Ngacha Ndeiya (2010) eKLR, the court rendered itself thus:
- “In our view special damages in a material damage claim need not be shown to have been actually incurred. The claimant is only required to show the extent of the damages and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of.
59. The Learned Counsel opined that the Plaintiff should be granted the costs as it was a matter of law that costs follow the event. They shall be guided by the provisions of Sections 26 and 27 of the Civil Procedure Act, Cap 21. The Learned Counsel concluded that on the preponderance of evidence adduced it has established its entire claim for the aggregated sum of Kenya Shillings Sixty Nine Million Nine and Five Thousand Three Seventy Four Hundred Sixteen Cents (Kshs. 69,905,374.16/=) plus costs and interest as prayed in the Plaintiff.

b. The Written Submissions by the 1st, 2nd & 3rd Defendants

60. On 20th February, 2023 the 1st, 2nd & 3rd Defendants through the Law firm of Messrs. Chokaa & Company Advocates filed written submissions dated 17th February, 2023. Mr. Chokaa Advocate commenced his submissions by stating that the suit was initiated by the Plaintiff through a Plaintiff dated



2nd June, 2021 and filed in Court on 4th June, 2023, the Plaintiff made the following claims against the 1st, 2nd & 3rd Defendants:-

- “ a) A sum of Kshs.69,590,374.16;
- b) A Declaration that the 1st Defendant having vacated the 7 demised suit premises prior to the determination of the terms of the separate Leases executed as between the Plaintiff and the Defendants continues being liable for rentals accruing until the dates of determination of the several terms of the various Leases or until such earlier date that any of the demised suit premises could be let out to alternative third-party tenants (emphasis added)
- c) Costs of and incidental to this suit
- d) Interest on (a) and (b) above at the rate of 20% per annum from the date when the separate amounts fell due and became payable until payment thereof in full”.

61. The Plaintiff's claim against the Defendants arose out of several Lease agreements executed between the Plaintiff and the 1st Defendant by which the Plaintiff leased premises on the Plaintiff's property Plot No. Mombasa/Block XXV/100 known as Mombasa Trade Centre in the year 2019 and for which the 2nd and 3rd Defendants were guarantors. Those Leases were referred to at paragraph 5 of the Plaintiff and were of periods of six (6) years. The Leases had no termination clause but for the purposes of these Submissions, the following provisions of the Leases are important:-

- a. the tenant was required to pay a deposit at the commencement of the tenancy as security for the payment of rent (clause 1.2).
- b. the permitted use of the premises was as a college and rental business and for no other purpose (clause 1.25).
- c. it was lawful for the tenant to partition, fashion, equip and let the premises for the Tenant's business (clause 3.10.1)
- d. the provisions of Sections 65 and 66 of the Land Act 2012 should not apply to the Leases.
- e. If rent due fell in arrears, the Tenant would pay interest on such rent at the rate of 7% per annum above the commercial lending rate of Barclays Bank of Kenya Ltd. applicable from time to time.

62. The Learned Counsel submitted that in the year 2020, the Covid-19 Pandemic set in and in order to contain the Pandemic, the Government closed all places of education and learning, forcing the 1st Defendant to also close the premises. The inevitable consequence was that the 1st Defendant fell in arrears and could not pay rent. Between March 2020 and October 2020, the Defendant pleaded for moratorium on the payment of rent but the Plaintiff refused. In a letter dated 19th March, 2020 from the 1st Defendant to the Plaintiff, the 1st Defendant stated:-

“As a result of the Presidential Decree to suspend learning in all institutions as a way of containing spread of Corona Virus, which we fully support, our business has been severely affected as we directly rely on students for our revenue. This has exposed us to financial constraints and so unable to meet our financial obligations. It is due to this reason that the



college requests for a temporary postponement of rent payment awaiting containment of the global pandemic and thereafter resumption of our normal operations”.

63. The letter of 19th March, 2020 was followed by another letter from the 1st Defendant dated 20th April, 2020 to which the Plaintiff, vide a letter dated 16th April, 2020 replied as follows:-

“We regret that we will not be able to postpone rent payment as we have costs to pay of running the building, commitments to fulfill, pay rates and taxes which the Government has instructed that we pay”.

64. And despite the rejection for the plea for waiver of rent by the Plaintiff, the 1st Defendant followed up on the request for waiver in letters dated 12th May, 2020 and 9th June, 2020 to the Plaintiff which were summarily rejected forcing them to give a Notice dated 14th August, 2020 to terminate the Leases which termination was rejected by the Plaintiffs.

65. The Learned Counsel argued that it was clear what happened to the distress for rent on the Defendant's properties by M/s Kithemu Auctioneers as the Plaintiff's Witness Mr. Abdulkadir Mohamed Sale Muhamed told the Court that he did not know what happened to them. According to the values put by the Auctioneers on the property distrained as contained in the Defendant's List of Documents, the value of the properties distrained upon was a sum of Kenya Shillings One Million Eight Thousand (Kshs. 1,008,000/=) though the Plaintiff's Witness wished to put the value at a sum of Kenya Shillings Three Thousand (Kshs. 3,000,000/=).

66. The DW – 1, Daniel Wakaba Macharia, the 2nd Defendant and a Director of the Defendant, in his evidence, stated that following the distress by the Auctioneers, the 1st Defendant was in fact evicted from the premises. He said he tried to access the premises after the distress but was not allowed to do so. What he was allowed to collect were only files. He said in fact there was a Notice for re-letting the premises. This was confirmed by the Plaintiff's witness who stated that the Plaintiffs could not let the premises stay unoccupied but had to re - let them.

67. The Learned Counsel submitted that the DW – 1 further told the Court that on occupation of the premises, the Defendant had paid deposits. These were not refunded. The 1st Defendant also had done fittings and partitions in the premises and was not allowed to take these partitions. The Plaintiff's claim against the Defendants fell into several segments namely:-

- a. Rents up to 30th March, 2021, when it was claimed the Defendant vacated.
- b. Rent up to the period of the expiry of the Leases.
- c. Interest on the rents up to 30th March, 2021.

68. The Leases of the several premises let by the Plaintiff to the Defendant were at various times and different rents. In the claim of rent up to 31st March, 2021, the Plaintiff had not given any account as to how these rents are made up. There were no accounts filed in these proceedings as to how the amounts claimed are made and how much the 1st Defendant was in arrears for each space let. These were specific claims and they must be proved by evidence. In the cases of China Overseas Engineering Company Limited – Versus - Isaaq Kichwen Kijo [2019] e KLR the Court stated as follows:-

“I am fully in agreement with the Appellant that where breach of contract is proved, the Court ought to award special damages and not general damages. I agree too that such an



award of special damages can only be awarded where the same had been specifically pleaded in the pleadings and additionally, where the same had been specifically proceed during trial”.

69. As to the claim for up to the time the Leases were to expire, the Plaintiff had correctly prayed in the alternative “or until such earlier date that any of the demised suit premises could be let out to alternative third-party tenants”. The Plaintiff’s witness, Mr. Mohamed admitted that the suit premises were let out by the Plaintiff after the Defendants vacated though he did not say when. It was submitted on behalf of the Plaintiff that the onus was on the Defendant to prove that the premises were let out. This could not be the true legal position. Once the Plaintiff admitted that the premises were let to other tenants after the Defendants moved out, there was nothing the Defendants were required to prove. The evidential burden shifted to the Plaintiff to prove any period for which the premises were vacant and for which it could be compensated. It was the Plaintiff who wanted to be compensated and it was for it to produce evidence on which it could be compensated (See the provision of Section 108 of the [Evidence Act](#)).
70. The Learned Counsel submitted that included in the Plaintiff’s Claim was a claim for a sum of Kenya Shillings Two Million Three Thirty Thousand Seven Ninety Hundred and Eighty cents (Kshs. 2,330,790/80) allegedly for costs of repairs and renovations. It was claimed that after the Defendants vacated, the premises were renovated and redecorated in order to be let to new tenants. Again this was a specific claim. But where was the evidence to support the claim? Included in the Plaintiff’s List of Documents at pages 247 of 249 were what was referred to as “Proposed Renovations & Alterations Works at Ambalal House, Town Centre/mombasa County”. This document was alleged to be from Crib Builders Limited. It was unsigned, undated and uncertified. And as stated on the face of the document, it was for proposed renovations: it was not for renovations done. It was not therefore proof that the Plaintiffs incurred an expense of a sum of Kenya Shillings Two Million Three Thirty Thousand Seven Ninety Hundred and Thirty eight cents (Kshs. 2,330,790.38 for which it seeks a refund from the Defendants.
71. A total of Kshs. 1,740,493/= is made on interest on arrears of rent. As already stated, the accounts for arrears for each space let by the Plaintiff to the Defendant and how these are made up have not been given. Clause 4.1 of the Leases required the Plaintiffs to charge interest on rent in arrears at 7% per annum above the commercial lending rate of Barclays Bank of Kenya Ltd. applicable from time to time.
72. They did not know what interest was applied on the alleged arrears of rent and the onus was on the Plaintiff to exhibit the Barclays Bank of Kenya lending rate at the time the alleged arrears arose. This the Plaintiff did not do and hence the claim should fail. The reasons as to why the Defendants could not pay rent and why the rent fell in arrears are because of the Covid-19 Pandemic and the measures taken by the Government to contain it including closing schools and places of learning such as the premises in this case.
73. The Learned Counsel submitted that Clause 3.1 of the Lease provided that if the premises are damaged or destroyed by fire or are rendered unfit for occupation, the Lessor would allow the Lessee and abatement of rent or proportion thereof until the premises are rendered fit for occupation. This Lease excluded Section 65 which exempts a tenant from the obligation to pay rent in cases of force majeure. But is this exclusion lawful? First, these are an attempt to exclude implied covenants in a Lease provided in the Law under Section 65 (1) of the Land Ach which reads:-

“In every Lease there shall be implied covenants by the Lessor with the Lessee, binding the Lessor:-

- a)(not relevant)
- b)(not relevant)



- c)(not relevant)
- d)(not relevant)
- e)(partly relevant)
- f) If it is an express or implied term of the Lease that the leased land or a building on it may be used for one specific purpose or purposes, the Lessee may terminate the Lease, on giving one month's notice to the Lessor, if the land or building cannot be, or can no longer lawfully be used for any of the purposes;"

74. The Section did not give any party the option to contract out of the implied terms hence the use of the term "shall". Secondly, Courts allow parties to limit liability but not to exclude the same and clauses limiting liability are not subject to strict principles of construction as applicable to clauses excluding liability. In the case of "Securicor Courier (K) Ltd – Versus - Benson David Onyango & Another [2008] eKLR, the Court of Appeal quoting the decision of Lord Wilberforce in Ailsa Craig Fishing Co. Ltd – Versus - Malvern Fishing Co. Ltd [1983] I AU ER 101 stated:-

“Whether conditions limiting liability is effective or not is a question of construction of the condition in the context of the contract as a whole. If it is to exclude liability for negligence, it must be most clearly and unambiguously expresses, and in such a contract as this, must be construed contra proferentum..... Clauses of limitation are not regarded by the Courts with the same hostility as clauses of exclusion; this is because they must be related to other contractual terms, in particular the risks to which the Defending party may be exposed, the remuneration which he receives and possibly also the opportunity of the other to insure.....”

75. The contention by the Learned Counsel was that in this case, the Landlord (Plaintiff) had tried to exclude clauses intended for the protection of the Tenant such as the suspension of the obligation to pay rent in the case of force majeure when the Law did not allow it to do so. In fact under the provision of Section 65 (1)(f) of the Land Act, the Tenant was given the right to terminate a tenancy if the premises can no longer be used for the purpose for which they were let. In this case, the Tenant (1st Defendant) gave notice of termination but the Plaintiff refused to accept it; probably relying on the fact that there was a clause in the Leases excluding the application of Section 65 and 66 of the Land Act to these Leases. They submitted that the exclusion of this clause intended for the protection of the Tenant was against the law, inequitable and is inapplicable in the circumstances and the Covid-19 Pandemic, a natural and unexpected disaster, excused the Defendants from paying rent and gave them a right to terminate the tenancy as they did. In the circumstances, because of this natural disaster, the Defendants were freed and discharged from paying any rent.

76. As stated, the 1st Defendant paid deposit at the commencement of the tenancies. On leaving the premises, these deposits were not refunded to the Defendants. The deposits were as follows:-

- i. 3rd Floor(North Tower) Kshs. 691,600/=
- ii. Terrace Floor (Unit F C07) Kshs 160,000/=
- iii. 1st Floor(North Tower) Kshs 412,160/=
- iv. Terrace Floor (ST 02) Kshs 720,000/=
- v. 3rd Floor, North Tower (N 3-06) Kshs 440,000/=



- vi. Terrace Floor (ST 01) Kshs 460,000/=
 - vii. 1st Floor, North Tower Kshs. 616,000/=
- Total Kshs. 3,499,760/=

77. The Defendants were entitled to a refund of these deposits by the Plaintiff. The Learned Counsel submitted that under Section 65 (e) of the *Land Act*, a Tenant was excused and not obligated to pay rent in the events of force majeure occurring. These include fire, explosion, civil commotion, lighting, storm, earthquake, volcanic activity or other natural disasters. Though the act does not define what the natural disasters are, it is our submission that the Covid-19 pandemic was an unexpected natural disaster not in contemplation of either parties and for which the tenant should be excused and discharged from paying rent.
78. In conclusion, the Learned Counsel held that the Plaintiff had not proved the claim for a sum of Kenya Shillings Sixty Nine Million Five Ninety Thousand Three Seventy Four Hundred and Sixteen Cents (Kshs. 69,590,374.16/=) against the 1st, 2nd & 3rd Defendants herein on a balance of probabilities and in any event it mitigated its loss by re-letting the premises. And if in any event the Court were to find on any of the claims against the Defendant, the sum of Kenya Shillings One Million Eight Thousand (Kshs. 1,008,000/=) being the value of the properties distrained upon by the Auctioneers and a sum of Kenya Shillings Three Million Four Ninety Nine Thousand Seven Sixty Hundred (Kshs. 3,499,760/=) for the rent deposits should be offset against any such claim. In the event, they submitted that the Plaintiff claim should be dismissed with costs to the Defendants.

c. The Supplementary Submissions by the Plaintiff.

79. On 27th February, 2023, the Plaintiff through their advocates on record the Law firm of Messrs. Sherman Nyongesa & Mutubia Advocates filed supplementary submissions dated 25th February, 2023. Mr. Mutubia Advocate submitted that the Plaintiff has proved its case on a balance of probabilities and prays for Judgment to be entered in its favour as prayed for in the Plaint dated 2nd June, 2021 and filed in Court on 4th June, 2021. In addition to the Plaintiff's submissions filed on 13th February, 2023 and in response to the Defendant's written submissions filed on 20th February, 2023, the Plaintiff submitted as follows:
80. Term 1.2 of the Leases executed between the Plaintiff and the 1st Defendant in respect of the seven (7) units provided as follows in respect to deposit:-

“ 1.

2 Deposit

On the execution hereof to pay to the Lessor a sum of (the agreed security deposit) as security for the payment of the amounts which may from time to time be owing from the Lessee to the Lessor for rent, rates, taxes and other charges payable hereunder or any other amounts due by the Lessee to the Lessor hereunder and otherwise for the due performance and observance of the Lessee's covenants and conditions the Bank Guarantee to subsist and remain in force throughout the Terms of the lease and to be discharged at the insurance of the Lessor on payment by the Lessee of all money then owing by the Lessee to the Lessor and the discharge by the Lessee of all its obligation hereunder And



It Is Hereby Agreed And Declared that the Lessor shall have an absolute right to appropriate all or any part of Deposit in such a manner as the Lessor may think fit without any right on part of the Lessee to object to such appropriation. For the purposes of clarification it was hereby agreed and declared that the Deposit was not to be utilized towards payment of rent for the last one month (or part thereof) of the Term but it was to be treated as security for the payment of rent and other charges herein mentioned and for the due performance and observance of the Lessee's covenants herein contained to the intent that the Lessee shall be required to pay rent up to and including the date of the termination of the Term hereby created and it is hereby further agreed that no interest will be payable by the Lessor to the Lessee for the Deposit.”

81. From the foregoing term of the Lease, it was clear that the security deposit could only be refundable upon the 1st Defendant duly observing and performing the Lessee's covenants such as payment of rent to the date of determination of the term of Lease, conducting of repairs and renovations and handover of vacant possession of the demised premises in good and tenable state and condition of repair.
82. The Learned Counsel asserted that the 1st Defendant made payment of the security deposit for each of the seven (7) units as follows:-
 - i. Lease dated 29th October,2019 for Unit N3.01 and N3.02 the security deposit was Kshs. 691,600/=;
 - ii. Lease dated 29th October,2019 for Unit N1.04 the security deposit was Kshs.412,160
 - iii. Lease dated 29th October,2019 for Unit N1.10 the security deposit was Kshs.616,000
 - iv. Lease dated 29th October, 2019 for Unit FC07 the security deposit was Kshs.160,000
 - v. Lease dated 29th October, 2019 for Unit ST01 the security deposit was Kshs.960,000
 - vi. Lease dated 29th October,2019 for Unit ST02 the security deposit was Kshs.720,000;
 - vii. Lease dated 29th October,2019 for Unit N3.06 the security deposit was Kshs.440,160
83. The Learned Counsel submitted that the 1st Defendant stealthily vacated from the demised premises sometime on 30th March,2021 having neither made payment of rent for the terms of the fixed leases nor repaired and renovated the demised premises. Additionally, despite being issued with a Demand for the accrued rentals and the costs of repairs, the 1st Defendant has to date not made payment of the same. This is clear breach of the terms of the Lease and in particular Term 1.2 of the Lease.PW-1 testified that the security deposit was still in the possession of the Landlord and that the 1st Defendant had never requested for a refund of the same. In any event the 1st Defendant was still in rental arrears and as such not entitled to the refund of the security deposit.
84. The Learned Counsel submitted that Term 1.2 of the Lease provides that the Lessor (the Plaintiff) had an absolute right to appropriate all or any part of the deposit in such a manner as the Lessor may think fit without any right on the part of the Lessee to object to such appropriation in order to make payment of any accrued charges. The Counsel therefore urged this Honourable Court to uphold the agreed terms of the Lease and allow for the Plaintiff to utilize the security deposit in order to settle some of the accrued charges such as the rent as was provided for under paragraph 12 of the Plaintiff.



85. Term 3.1 of the Lease provides as follows:-

“3.

1 Suspension of Rent

In the event of the Demised Premises or any part thereof being damaged or destroyed by fire during the continuance of the Term so as to render them unfit for occupation the Lessor will unless such damage or destruction shall have been due to the act or neglect of the Lessee or of any servant employee agent licensee or visitor of the Lessee allow to the Lessee a total or proportionate abatement of the rent hereby reserved as the case may be but so that the Lessee shall only have right of determination if such damage or default shall not have been due to any such act or neglect as aforesaid and if the Demised Premises or any part thereof shall have suffered such destruction or substantial damage as cannot reasonably be expected to be repaired within six calendar months Provided Always that if any dispute under this sub-clause shall arise between the parties hereto the matter shall be referred to an arbitrator to be appointed by the Chairman for the time being of the Law Society of Kenya whose award shall be final and binding upon the parties hereto and such reference shall be an arbitration within the meaning of the Arbitration Act 1995 or of any Act or Acts amending or replacing the same.”

86. On 12th October, 2022, PW-1 testified that that the Lease provided for suspension of rent where the premises were damaged or destroyed hence in capable of being occupied by the Tenants. PW-1 further testified this was because the premises will need to be renovated and as such during such a period the rent shall be suspended. PW-1 testified that it was impossible to suspend the rent as costs payable by the Landlord such as land rates, licenses, taxes among other costs did not stop. On cross examination, DW-1 upon reading Term 3.1 on Suspension of rent confirmed that the only forceable option for rent to be suspended was in the case where the premises were damaged or destroyed.
87. The Learned Counsel submitted that the occurrence of Covid-19 pandemic did not in any way lead to destruction or damage of the demised premises and as such the demised premises were capable of being utilized by the 1st Defendant subject to the adherence of directives issued by the Government i.e. social distancing. Via a letter dated 18th August, 2020, the Plaintiff expressed its willingness to grant the 1st Defendant a discount on the accrued rent and also stagger the payment of the accrued rent for 12 to 15 months on condition that the 1st Defendant would be settled all of the accrued rent by end of the year 2021. The 1st Defendant did not respond to the said offer hence leading to the Plaintiff issuing a demand for the accrued rentals on 2nd October, 2020. See the Defendants’ Exhibits No.6 and 8 which were copies of the Letters dated 18th August, 2020 and 2nd October, 2020.
88. During cross examination, DW-1 confirmed that the offer provided for in the letter dated 18th August, 2020 was a reasonable proposal. Additionally, despite resuming normal operation in January, 2021, the 1st Defendant never made attempts of settling the accrued rentals to date.



89. To buttress his point, the Learned Counsel relied on case of “Sunfunder Inc & Another – Versus - Astonifield Solesa Solar Kenya Limited (2021) eKLR where the court was of the following opinion:

“A party who relies on the defence of Force Majeure to avoid its contractual of Order 2 rule 4 of the Civil Procedure Rules which provides that, “A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality.” In addition, I would only reiterate what the court in Pankaj Transport PVT Limited – Versus - SDV Transami Kenya Limited ML HC Comm No. 162 of 2014 [2017] eKLR stated that:

102. As a general rule, a party pleading force majeure must prove that the failure was due to an impediment beyond his control; and that he could not reasonably be expected to have taken the impediment and its effects upon his ability to perform the contract into account at the time of the conclusion of the contract; and that he could not reasonably have avoided or overcome it or at least its effects.”

90. The Learned Counsel opined that DW - 1 testified that the 1st Defendant failed to remit rent due to the occurrence of the Covid - 19 pandemic. DW-1 confirmed that the 1st Defendant resorted to virtual learning and at no point was there suspension on payment of school fees by the students. DW-1 did not produce any evidence to show the suspension of students’ school fees which was the 1st Defendant’s income generating activity.

91. Additionally, the Learned Counsel averred that the Lease never provided that the payment of rent was subject to the 1st Defendants students remitting school fees. The 1st Defendant through its pleadings had not specifically proved how the occurrence of the Covid - 19 pandemic affected its obligation under the Leases and as such was undeserving of any protection by this Court. The Learned Counsel urged the Court to allow the Plaintiff’s claim with costs.

vii. Issues for Determination.

92. I have carefully read and analyzed all the pleadings herein, the tendered both the oral and the documentary evidence adduced in court, the written submission, the cited myriad of authorities made by the parties, the relevant provisions of *the Constitution* of Kenya 2010 and the statutes.

93. In order to arrive at an informed, just, reasonable and fair decision, this Honorable Court has condensed the subject matter into following three (3) salient issues for determination. These were:-

- a. Whether the suit instituted by the Plaintiff against the 1st, 2nd & 3rd Defendants herein has any merit.
- b. Whether the parties herein are entitled to the reliefs sought from the filed suit.
- c. Who will bear the costs of the suit?



viii. Analysis and Determination

Issue No. a). Whether the suit instituted by the Plaintiff against the 1st, 2nd & 3rd Defendants herein has any merit.

94. Under this Sub heading, the Honorable Court respectfully think that the true ramifications of the dispute between the Plaintiff and the Defendants stems from the lease agreement duly signed as an instrument to govern the relationship. Comparative decision in the cases of Routledge – Versus - Mckay {1954}, ALL ER, Duff & Ors – Versus - Newcastle United Football Ltd {2000} ALL ER. The Court held that:

“If contract is put down in writing, any statement appearing in that written agreement will usually be regarded as a term, and any prior oral statement that is not repeated in the written agreement will usually be regarded as a representation, due to the assumption that if a statement is left out of a written agreement, the parties did not view the statement as important.”

95. From the elaborate surrounding facts and inferences of this case, it was a term of the Lease agreements that rent and service charge in respect of the 7 Units of the demised premises was payable quarterly in advance as such the 2nd and 3rd Defendants in pursuant to a Deed of Guarantee executed on their parts on 2nd June, 2015 undertook to jointly and separately guarantee the Plaintiff as the Lessor to the extent that the 1st Defendant as the Lessee was at all times during the continuance of the Leases to pay rent reserved under the Leases and other sums as agreed to be paid by the 1st Defendant at the respective times and manner appointed under the Leases for payment of rentals and other charges and will also duly perform, observe and keep the several agreements and covenants provided under the Leases on the part of the 1st Defendant as the sureties or one of them will pay and make good to the Plaintiff the costs and expenses occasioned to the Plaintiff through the default of the 1st Defendant.

96. This has not been in dispute through out the case. The Parties had entered into lease agreements dated 29th October, 2019 for seven units at the Plaintiff's premises which lease was to run up to July, 2025. Be that as it may, it is clear that from the facts as stated before in this Judgment, there existed a lease relationship between the Plaintiff and the Defendants. DW1 confirmed as much in his evidence. The Defendants confirmed that they indeed paid a deposit and were tenants of the Plaintiff.

97. Hence having established that fact, the other critical issues for determination will be Whether the Defendants breached the terms of the lease relationship with the Plaintiff and if so and whether the Plaintiff was entitled the monies claimed? As stated above their existed a lease agreement between the Plaintiff and the Defendants and they were bound to the lease terms for a period of 7 years. Termination of the lease before the lapse of the time specified would not be available to the defendants.

98. Based on the evidence of PW - 1 and DW - 1, the Defendants took possession of the demised premises on 29th October, 2019 and vacated the premises on 30th March, 2021 prior to the determination of the terms of the Leases, in the absence of negotiated surrenders of the terms of Leases and was to that extent liable for the rentals accruing until the determination of the terms of the Lease or until such a time any of the demised suit premises could be let out earlier to alternative third party tenants. The 1st Defendant at the instance of vacating from the demised suit premises failed to undertake the necessary repairs and renovations to restore the demised suit premises to an acceptable tenantable state and condition of repair as the separate dates of taking over possession of the several demised suit premises. And the Plaintiff holds the Defendants liable for the incidental costs of repair and renovation of the demised



suit premises. From all the material placed before this Court, I hold that the suit by the Plaintiff has merit and it is meritorious as prayed.

Issue No. b). Whether the parties are entitled to the relief sought

99. It is instructive to note that the Defendants never contested the Plaintiff's assertion that the rent payable was a sum of Kenya Shillings Sixty Nine Million Five Ninety Thousand Three Seventy Four Hundred and Sixteen cents (Kshs 69,590,374.16) which was the amount payable less the deposit for all the unit inclusive. In his evidence, PW 1 testified that when the Defendants vacated the premises, they had accrued and unpaid rental arrears for the months of 1st April, 2020 to 30th March, 2021 was a sum of Kenya Shillings Eighteen Million Four and Five Thousand Seven Sixty Three Hundred and Seventy Eight Cents (Kshs. 18,405,763.78) inclusive of interest. Further, PW-1 testified that the 1st Defendant had on various occasions sought for more time to settle the accrued rentals which the Plaintiff agreed to by staggering the time, however, the 1st Defendant on numerous did not keep its promise which then necessitated the commencement of the distraint proceedings. The Plaintiff's Witness testified that nothing was recovered capable of settling the rent arrears as most of the time, the 1st Defendant would file suits and obtain orders of injunction as against the Plaintiff and the instructed Auctioneers as was the case in CMCC Civil Suit No.799 of 2020. PW-1 testified that Clause 3.1 of the Lease on Suspension of rent provides that the only conceivable option for suspension of rent was only when the demised premises or any part thereof is damaged and rendered unfit for occupation. Therefore, the occurrence of the Covid-19 pandemic does not fit the description of conceivable options for suspension of rent under the Leases executed by the Plaintiff and the 1st Defendant herein. PW-1 testified that the 1st Defendant on 30th March, 2021, without prior notification to the Plaintiff, stealthily vacated from the demised premises having neither remitted the accrued rentals nor conducted repairs and renovations aimed at restoring the demised premises into good and tenable state and condition.
100. On his part, DW - 1 stated that they never had any documents to prove the amount they owed the Plaintiff. It behoves one to seek the provision of Section 112 of the Evidence Act which provides that:-
- “In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
- Despite of this, none of the Defendant availed any evidence to counter the Plaintiff's tabulation of rent due it. Better still, the 1st Defendant failed to demonstrate to Court that indeed that it paid any money to settle the debt owing to the Plaintiff at the time it left the demised premises. In the given circumstances the Honourable Court is left with no alternative but to endorse the evidence adduced by the Plaintiff of being owed the rent arrears as claimed. However, the Court has noted that the Plaintiff never challenged the 1st Defendant's testimony that it paid a refundable deposit of one month's rent.
101. Consequently, I find that the Defendants were indebted to the Plaintiff in the sum of Kenya Shillings Eighteen Million Four and Five Thousand Seven Sixty Three Thousand and Seventy Eight (Kshs. 18,405,763.78/=) computed as follows:
- i. Rent arrears for the period of occupation between 1st April, 2020 to 30th March, 2021 - Kshs. 18,405,763.78/=
102. The Plaintiff sought interest in the rate of 20% on the outstanding sum with effect from 31st March 2021. Section 26 (1) of the Civil Procedure Act gives the court discretion to order interest at such rate



as the court deems reasonable. In the case of “National Bank of Kenya Ltd – Versus - Peter Nyakundi & Another [2006] eKLR the Court of Appeal held:-

“...This provision [Section 26] is understood to be applicable only where the parties to the dispute have not by their agreement, fixed the rate of interest payable. If by their agreement parties have fixed the rate of interest payable, then the court has no discretion in the matter and must enforce the agreed rate unless it is shown in the usual way either that the agreed rate is illegal or unconscionable or fraudulent...”

103. Term 4 on Definitions and Interpretations defines Interest as follows:-“Interest” means rates of 7% per annum above the commercial lending rates of Barclays Bank of Kenya Limited applicable from time to time.”From the above-quoted terms of the Lease, the interest rate applicable is 7% per annum above the commercial lending rates of Barclays Bank of Kenya Limited (now Absa Bank) and which rate applied herein is 20% per annum. The Plaintiff at paragraph 12 (i) to (vii) of the Plaint clearly stipulates the interest chargeable for the accrued rentals for each of the seven (7) units which amounts to a sum of Kenya Shillings One Million Seven Fourty Thousand Five Fourty Three Hundred and Ninety Cents (Kshs.1,740,543.98/=). Additionally, during the hearing, the Plaintiff produced the Statement of Accounts for the 1st Defendant as at 31st March, 2021 in support of this claim.
104. Having found that the rate of 7% in their lease agreement, it is applicable especially noting that this was a clause in the lease agreement, and the Suit was filed timely in 2021 when the breach occurred.
105. The Plaintiff has also raised an issue about the renovation of the demised premises. The Plaintiff submits as per the Proposal for Renovations and Alteration Works Quotation dated 26th May,2021 which is produced as Plaintiff’s Exhibit No. 10, it is clear that as at 26th May,2021 the demised premises had not been restored into a good and tentable state and condition in order to let out to alternative tenants. DW-1’s claim that the demised premises were let out to alternative tenants immediately after the 1st Defendant therefore fails.
106. PW-1 stated that upon the Plaintiff taking possession of the demised premises was prompted to engage a contractor, Crib Builders Limited, to appropriately attend to the demised premises with the aim of repairing and restoring them into good and tenable state and condition to let to third party tenants, this being evidenced by the Plaintiff’s Exhibit No.10 which is the Proposed Renovations & Alterations Works which appears on pages 247-249 of the Plaintiff’s List & Copies of Documents
107. By and large, and all factors remaining constant, I strongly find that the Plaintiff has well proved that they are entitled to the renovation as it was a clause in the lease agreement which as the Defendants have only disputed saying that the Plaintiff had rented someone else after their vacation. (See “Kipkai Enterprises – Versus - Maurine Louise Osembe [2017] eKLR).

Issue No. c) Who will bear the Costs of the Suit.

108. It is trite law that the issue of Costs is at the discretion of the Court. According to the Black Law Dictionary, Costs is defined “Costs” to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”
109. The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. By events it means the results or outcome of any legal action or proceeding in any litigation. See the Supreme Court case of “Jasbir Rai Singh – Versus Tarchalans Singh” (2014) eKLR; Rosemary Wambui



Munene – Versus Ihururu Dairy Cooperatives Society Lited (2014)eKLR and Kenya Sugar Board – Versus – Ndungu Gathini (2013) eKLR” Courts held that:-

“The basic rule on attributions of costs is that costs follow the event.....it is well recognized that the principles costs follow the events is not to be used to penalize the losing party rather it is for the compensating the successful party for the trouble taken in presenting or defending the case”

110. The events in this instant case are the result of the case whereby the Plaintiff herein has succeeded in his case. For that very fundamental reason, therefore, the costs of this suit will be made to the Plaintiff herein to be borne by the Defendants herein.

ix. Conclusion and Disposition

111. Consequently, after taking into consideration the natural justice, Conscience and Equity, the Honorable Court is satisfied that it ought to exercise its discretion in favour of the Plaintiff on the preponderance of probabilities. For avoidance of doubt, specifically the Honorable Court makes the following orders: -

- a. That Judgment be and is hereby entered that the suit filed by the Plaintiff through Plaint dated 2nd June, 2021 for Prayers (a), (c) and (d) respectively is found to have merit and is hereby entered in favour of the Plaintiff as against the 1st, 2nd & 3rd Defendants jointly and severally.
- b. That prayer (b) by the Plaintiff be and is hereby found to be unmeritorious and hence dismissed hereof.
- c. That payment of the sum of Kenya Shillings Sixty Nine Million Five Ninety Thousand Three Seventy Four Thousand Sixteen cents (Kshs 69,590,374.16/= on the account of the accrued rental arrears and the total sum for the renovations and interest accrued by the Plaintiff.
- d. That the Costs and interest at court rates from date of filing suit is awarded to the Plaintiff.

It is so orders accordingly.

JUDGMENT DELIEVERD THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED IN CHAMBERS AND DATED AT MOMBASA THIS 22ND DAY OF JUNE, 2023.

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HON. JUSTICE L. L. NAIKUNI (JUDGE)
ENVIRONMENT AND LAND COURT AT
MOMBASA

Judgement delivered in the presence of:-

- a. M/s. Yumna, the Court Assistant.
- b. M/s. Takah Advocate holding brief for Mr. Mutubia Advocate for the Plaintiff.
- c. No appearance for the 1st, 2nd & 3rd Defendants.

