



**Gachanja Muhoro & Sons Limited t/a Easy Mart Supermarket v Kamau
& 2 others (Environment and Land Case Civil Suit 497 of 2016)
[2023] KEELC 20269 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20269 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 497 OF 2016
SO OKONG'O, J
SEPTEMBER 28, 2023**

BETWEEN

**GACHANJA MUHORO & SONS LIMITED T/A EASY MART
SUPERMARKET PLAINTIFF**

AND

MARTIN NGANGA KAMAU 1ST DEFENDANT

JANE WANJIRU NGANGA 2ND DEFENDANT

DAVID WANDERI T/A TAIFA AUCTIONEERS 3RD DEFENDANT

JUDGMENT

1. The Plaintiff brought this suit through a plaint dated 9th May 2016. The plaint was amended on 7th November 2017. In its amended plaint filed on 10th November 2017, the Plaintiff averred that the 1st and 2nd Defendants were at all material times, the proprietors of all those parcels of land known as Plot Nos. 239, 240, and 241 on LR No 6845/149 situated at Utawala, Nairobi together with the developments thereon (hereinafter referred to as “the suit property”). The Plaintiff averred that the 3rd Defendant was at all material times an auctioneer registered under the [Auctioneers Act](#) and carrying out business within the Republic of Kenya.
2. The Plaintiff averred that at all material times, it was a tenant of the 1st and 2nd Defendants on the suit property paying a monthly rent of Kshs 440,000/-. The Plaintiff averred that on 30th April 2015, it served the 1st and 2nd Defendants with a notice of its intention to vacate the suit property on 31st July 2015. The Plaintiff averred that a deposit of Kshs 2,640,000/- together with a banker’s cheque for Kshs 535,920/- making a total of Kshs 3,175,920/- was to be utilised as rent during the notice period. The Plaintiff averred that instead of acknowledging and accepting the Plaintiff’s notice, the 1st and 2nd Defendants instructed the 3rd Defendant to levy distress against the Plaintiff allegedly for the recovery



of rent arrears. The Plaintiff averred that the 3rd Defendant had advertised the goods he was using for its business that he had attached according to the said instructions from the 1st and 2nd Defendants for sale by public auction on 14th May 2016. The Plaintiff averred that it owed no rent to the 1st and 2nd Defendants since it had paid rent in full up to the date when it issued a notice to vacate the suit property. The Plaintiff averred that the distress for rent against it was unjustified.

3. The Plaintiff averred that the goods that were attached by the 3rd Defendant on the instructions of the 1st and 2nd Defendants did not belong to the Plaintiff but to its various suppliers. The Plaintiff averred that following the said distress for rent, the 1st and 2nd Defendants proceeded to take possession of the suit property without due process. The Plaintiff averred that due to the illegal repossession of the suit property by the 1st and 2nd Defendants, it had suffered loss and damage of assets valued at Kshs 46,656,790/- and stocks valued at Kshs 19, 065,325.08/- totaling Kshs 65,722,115.08/-.
4. The Plaintiff sought judgment against the Defendants for;
 1. A declaration that the Plaintiff did not owe the 1st and 2nd Defendants any rent as at 31st July 2015.
 2. A mandatory injunction compelling the 3rd Defendant to immediately release to the Plaintiff its attached goods with the 1st and 2nd Defendants meeting storage charges if any.
 3. Damages for unlawful distress.
 4. General damages for loss of business and reputation.
 5. Special damages in the sum of Kshs 65,722,115.08/-.
 6. Costs of the suit.
 7. Interest on damages at court rates.
5. The 1st and 2nd Defendants filed an amended statement of defence and counter-claim on 30th November 2017. The 1st and 2nd Defendants admitted that they were the proprietors of the suit property and that the Plaintiff was their tenant. The 1st and 2nd Defendants averred that it was a term of tenancy agreement dated 17th January 2012 between them and the Plaintiff that the monthly rent was to be increased at the rate of 10% after every two years of the tenancy. The 1st and 2nd Defendants admitted that the Plaintiff served them with a notice of its intention to vacate the suit property by 31st July 2015. The 1st and 2nd Defendants averred that they did not agree with the Plaintiff that the deposit it had paid would be utilised as rent during the notice period. The 1st and 2nd Defendants averred that according to the tenancy agreement between the parties, the said deposit was not available for use or conversion to rent and that the sum of Kshs 535,920/- was paid by the Plaintiff to clear rent arrears. The 1st and 2nd Defendants averred that the Plaintiff failed to vacate the suit property by 31st July 2015 following its notice and also refused to pay rent in accordance with the tenancy agreement. The 1st and 2nd Defendants averred that they were left with no alternative but to levy distress to recover the outstanding rent.
6. The 1st and 2nd Defendants averred that as at 30th March 2016, the Plaintiff was in rent arrears to the tune of Kshs 7,133,440/- having failed to pay rent from April 2015. The 1st and 2nd Defendants averred that in the Tribunal Case No 658 of 2015, the Plaintiff was ordered to deposit with the Tribunal rent that was in arrears from April 2015 to April 2016 in default of which it was to vacate the suit property and its goods be auctioned. The 1st and 2nd Defendants averred that instead of complying with the orders of the Tribunal, the Plaintiff filed a fresh suit before this court for an injunction which was granted but



- later discharged. A temporary stay of the orders of the Tribunal that the Plaintiff managed to obtain was also discharged. The 1st and 2nd Defendants denied that they unlawfully took possession of the suit property from the Plaintiff and that the Plaintiff suffered any loss or damage.
7. In their counter-claim, the 1st and 2nd Defendants reiterated the contents of their statement of defence. The 1st and 2nd Defendants averred that at the time they took possession of the suit property in accordance with the tenancy agreement between them and the Plaintiff, the Plaintiff was in rent arrears. The 1st and 2nd Defendants averred that a sum of Kshs 396,000/- was due from the Plaintiff on account of unpaid rent increment for 9 months between July 2014 and March 2015 at the rate of Kshs 44,000/- per month. The 1st and 2nd Defendants averred further that the Plaintiff was also in rent arrears for 15 months from April 2015 to June 2016 at the rate of Kshs 561,440/- per month making a total of Kshs 8,421,600/-. The 1st and 2nd Defendants averred that interest accrued on the rent in arrears at the rate of 18% per annum from the date of accrual until payment in full. The 1st and 2nd Defendants averred that the Plaintiff also left an electricity bill in the sum of Kshs 360,370/- unpaid which amount was due from the Plaintiff but was paid by the 1st and 2nd Defendants. The 1st and 2nd Defendants averred further that the Plaintiff left some of its items on the suit property which it failed to collect despite notice. The 1st and 2nd Defendants averred that they kept the said items in a store at a cost of Kshs 680,000/- per month. The 1st and 2nd Defendants averred that they also incurred a total sum of Kshs 33,936/- in pest control as the suit property had been infested with rats and mice which was a threat to the health and well-being of the neighbouring tenants. The 1st and 2nd Defendants averred that they also incurred a sum of Kshs 251,400/- in repairing the suit property and re-installing of electricity cables an undertaking that was supposed to be carried out by the Plaintiff under the tenancy agreement.
 8. The 1st and 2nd Defendants averred that arising from the foregoing, they had suffered loss and damage flowing from the Plaintiff's illegal and unlawful conduct. The 1st and 2nd Defendants sought judgment against the Plaintiff as pleaded in paragraphs 2, 3, 4, 5, and 6 of the counter-claim.
 9. The Plaintiff filed a reply to the 2nd and 3rd Defendants' defence and counter-claim on 22nd December 2017. The Plaintiff joined issue with the 2nd and 3rd Defendants in their statement of defence save where the same consisted of admissions. In its defence to the counter-claim, the Plaintiff averred that the rent arrears of Kshs 8,421,600/- was not due from the Plaintiff since the Plaintiff had already served the 1st and 2nd Defendants with a notice of its intention to vacate the suit property. The Plaintiff averred that the 1st and 2nd Defendants accepted the Plaintiff's notice but refused to allow the Plaintiff to vacate the suit property. About the repairs to the suit property, the Plaintiff averred that its obligation to repair the suit property was limited. The Plaintiff averred that the obligation to repair the suit property rested with the 1st and 2nd Defendants.
 10. The 1st and 2nd Defendants filed a reply to the Plaintiff's defence to counter-claim on 7th February 2018. The 1st and 2nd Defendants denied that they refused to allow the Plaintiff to vacate the suit property. The 1st and 2nd Defendants also denied that they forcefully took possession of the suit property together with the assorted items belonging to the Plaintiff that were therein. The 1st and 2nd Defendants averred that it was the obligation of the Plaintiff to maintain the interior of the suit property and upon termination of its tenancy, to repair and repaint the same. The 1st and 2nd Defendants prayed that the Plaintiff's suit be dismissed with costs and judgment be entered for the 1st and 2nd Defendants as prayed in the counter-claim.
 11. The 3rd Defendant filed a defence on 20th May 2016. The 3rd Defendant averred that he received valid instructions from the 1st and 2nd Defendants to levy distress for rent against the Plaintiff. The 3rd Defendant averred that he attached the goods in the Plaintiff's supermarket on the suit property and



issued an inventory of the attached goods together with their approximate values. The 3rd Defendant averred that the Plaintiff moved to the Business Premises Rent Tribunal (the Tribunal) to challenge the distress. The 3rd Defendant averred that the Plaintiff obtained an injunction stopping the sale of the attached goods. The 3rd Defendant averred that he had been wrongly sued since he was merely executing his statutory mandate. The 3rd Defendant prayed that the Plaintiff's suit be dismissed.

12. At the trial, PW1 Geoffrey Muiruri Gachanja(PW1) testified as follows: He was a businessman. In 2015, he was carrying out a business known as Easy Mart Supermarket. The business was at Utawala. He was running the business on the suit property owned by the 1st and 2nd Defendants. He had 5 years and 3 months lease with the 1st and 2nd Defendants. He adopted his witness statements filed on 11th May 2016 and 25th February 2019 as part of his evidence in chief. The lease he had with the 1st and 2nd Defendants did not run its full term. On 30th April 2015, he gave the 1st and 2nd Defendants 3 months' notice of his intention to vacate the suit property. In the notice, he asked the 1st and 2nd Defendants to use the security deposit to clear the rent arrears. The 1st and 2nd Defendants were holding onto his security deposit in the sum of Kshs 2,640,000/=. The 1st and 2nd Defendants accepted the notice. On 6th July 2015, before the expiry of the notice, the 1st and 2nd Defendants instructed the 3rd Defendant to levy distress against him to recover alleged rent arrears of Kshs 3,764,640/=. The said sum of Kshs 3,764,640/= was indicated in the order issued on 10th August 2015 in Milimani CMCC Misc. Application No 650/2015.
13. When the distress was levied, he was not in rent arrears. This can be seen from the letter dated 16th April 2015 from Kiai Nuthu & Associates Advocates who were acting for the Plaintiffs addressed to the 3rd Defendant in which he gave the breakdown of the rent that was allegedly in arrears. According to the letter, the rent arrears as at 16th April 2015 was Kshs 2,080,320. This amount was not due. Before the distress was levied, he had not received any rent payment demand. In the lease with the 1st and 2nd Defendants, there was a clause for rent review after two (2) years by 10%. He did not get any formal demand for the increased rent with regard to the rent for the 2nd quarter of 2015 (April, May, and June 2015). He had already given a notice to vacate the suit property. The notice was given on 30th April 2015. By 16th April 2015 when the said advocate's letter was written, the rent for the quarter commencing in April 2015 had not become payable. Although the 3rd Defendant was instructed to levy distress for Kshs 2,080,320/= plus costs, he obtained an order for the recovery of Kshs 3,764,640/=.
14. The 3rd Defendant proclaimed his goods on 6th July 2015. He was not in rent arrears at that time. On 28th July 2015, he issued a banker's cheque for Kshs 535,920/= to the 1st and 2nd Defendants. He made this payment after he had given a notice of his intention to vacate the suit property and a distress for rent had been levied against him. For the entire period of the tenancy, he paid a total of Kshs 17,353,600/- to the 1st and 2nd Defendants. This was as at July 2015. As at that date, the rent arrears were Kshs 1,741,945.81. He made a further payment of Kshs 535,920/-. The 1st and 2nd Defendants owed him Kshs 1,433,974.19 as at July 2015. This is after taking into account the security deposit, the cheque for Kshs 535,920/= that he paid and the arrears of Kshs 1,741,945.81 that he owed them. This was the status of the accounts as at the time the distress for rent was levied against him.
15. The 3rd Defendant carried away the proclaimed goods. He was operating a supermarket. He was getting goods from suppliers which he used to retail in the supermarket. The goods were new. The goods which he had at the supermarket were valued at Kshs 65,722,115.08. He had both stock and assets in the supermarket. The total value of the assets came to Kshs 46,656,790/- while stocks were valued at Kshs 19,065,325.80. The value of stocks and assets came to Kshs 65,722,115.80. The 3rd Defendant took the stock while the 1st and 2nd Defendants took the assets. He did not know where the 1st and 2nd Defendants took the assets. The 3rd Defendant claimed to have sold the stock. He had not been given



the accounts of the sale. The 3rd Defendant had not accounted for the items that he took. He urged the court to grant the prayers set out in the amended plaint save for prayer (b) which he said had been overtaken by events. He produced the documents in the Plaintiff's bundle of documents and further bundle of documents as Plaintiff's exhibits 1 and 2 respectively.

16. On cross-examination, PW1 admitted that his relationship with the 1st and 2nd Defendants was premised on the lease agreement dated 17th January 2012. He admitted that the lease provided for a rent increment of 10% after every two-year term of the lease. He stated that the first rent increment was to be in 2014. PW1 stated that the security deposit that he paid at the commencement of the lease was refundable at the termination of the lease. He admitted that the lease did not provide that the deposit would be used as rent. He stated that the deposit was to secure the repair costs. He admitted that he had carried out alterations to the suit property and that at the expiry of the lease, he was to remove what he had put in the premises after which he was to carry out repairs. He stated that that was the exercise that was secured by the deposit. He stated that rent was payable quarterly in advance. He stated that he received the notice of distress on 16th April 2015 by which time he had not paid the quarterly rent for 1st April 2015 to 30th June 2015. He stated that he gave the lease termination notice on 30th April 15. He admitted that as at 29th April 2015, he had not paid the quarterly rent that was payable on 1st April 2015. He admitted that the lease provided a penalty of 18% for late payment of rent. He stated that the lease commenced on 1st July 2012 and that the rent increment was supposed to be on 1st August 2014. He admitted that he did not pay the additional rent that became due in 2014.
17. He stated that he was supposed to give 6 months' notice before terminating the lease. He stated that he gave 3 months' notice instead of 6 months' notice because his business was not doing well. He stated that he was facing hard economic times. He stated that the situation was made worse by unfair competition from their competitors. He stated that he did not vacate the suit property by 31st July 2015 because the 3rd Defendant distained for rent against him on 6th July 2015. He stated that he was unable to move out because of this distress although the 3rd Defendant did not carry away the distrained goods on 6th July 2015. He stated that he was operating a supermarket. He stated that he closed down the supermarket in September 2015. He stated that he did not ask for more time to remain on the suit property. PW1 reiterated that the rent deposit was to cover the rent arrears. He stated that the deposit was Kshs 2,640,000/-. He admitted that he had not paid rent for two (2) quarters, April 2015 to September 2015.
18. PW1 stated that the 3rd defendant carried away the goods on 3rd September 2015. He stated that as at 3rd September 2015, he was still operating the business. He admitted that he had not closed down the supermarket. He stated that he closed down the business in October 2015 but he did not move out of the suit property because there was an ongoing court case. He stated that he did not pay the rent for October 2015 and did not move his goods from the premises although he was not paying rent to the 1st and 2nd Defendants. He stated that he did not move his goods from the suit property because he had filed a suit against the Defendants and obtained an order stopping the distress and sale of his goods. He stated that even with the said order, he did not open the supermarket again. He stated that the Tribunal dismissed his claim and allowed the 1st and 2nd Defendants to take over the suit property. He stated that when his claim was dismissed by the Tribunal, he was neither paying rent nor using the suit property. He stated that he had not received the assets that were in the suit property. He admitted that before the 1st and 2nd Defendants took over the suit property, a letter was written to his advocates requesting that he avail himself when the premises were being taken over. He stated that he was not in town. He stated that the 1st and 2nd Defendants did not follow the procedure for taking over the leased premises.



19. He stated that his advocates informed him that he was required to be present when the 1st and 2nd Defendants were taking over the suit property. He stated that at the time the 1st and 2nd Defendants took over the suit property, the supermarket was closed and locked. He stated that he was not carrying out business. He stated that he was told by the security company guarding the premises that the 1st and 2nd Defendants had broken into the suit property and taken over the same. He stated that there was an assortment of items on the premises. He stated that the 1st and 2nd Defendants wrote to his advocates that he should go and collect the said items. He stated that he did not respond to the request. He stated that the 1st and 2nd Defendants applied for him to be ordered to go and collect the said items. He stated that he objected to the application.
20. He stated that he was willing to collect the said items but only at the right time. He stated that that was not the right time to collect the items. He stated that the goods that were carried away by the 3rd Defendant on 3rd September 2015 were valued at Kshs 19,065,325.80. He stated that there were other goods that were new which were in the supermarket. He stated that the same were not included in the 3rd Defendant's inventory. He stated that the said goods were also taken away by the 3rd Defendant. He stated that he had another supermarket at Kayole which he closed and moved the goods to the supermarket on the suit property. He stated that he closed the Kayole supermarket because the business was not good. He stated that when the 3rd Defendant distrained the goods and carried the same away, he gave him an inventory. He stated that the inventory did not contain all the goods that were carried away by the 3rd Defendant. He stated that he did not complain against the 3rd Defendant to the Auctioneers' Licensing Board. He stated that he had an inventory and the invoices for the assets that were inside the supermarket valued at Kshs 46,656,790/-. He stated that the value of the assets was arrived at based on invoices for the same. He stated that the business was not doing well and he was facing unfair competition. He stated that he fell into financial difficulties and was unable to pay suppliers. He stated that some of the suppliers had not been paid since 2014. He stated that in 2014, he made a profit of Kshs 3,206,554/- which he used to pay salaries, electricity, and rent. He stated that in 2015, he made a profit of Kshs 2,790,993/-. He stated that in 2015, he traded for about 9 months only.
21. PW1 stated that he did not hand over the suit property to the 1st and 2nd Defendants because his goods had been proclaimed following the distress and as such he was unable to remove the same from the premises. He admitted that he was not paying rent for the period that his goods remained on the suit property. He stated that the last rent payment he made was in July 2015. He stated that the quarterly rent was Kshs 1,531,200/- and that he paid Kshs 535,920/- in July 2015 as a top-up to the deposit to cover rent up to the end of July 2015. He stated that he did not pay rent for August and September 2015. He stated that he did not make any further payments. He stated that he could not pay rent because there was a proclamation on his goods. PW1 stated that he did not remove the goods that remained on the suit property after the 3rd Defendant removed the proclaimed goods on 3rd September 2015 because there was a dispute in court. He stated that that also explained why he was not paying rent. He stated that when he came back and found the premises occupied, he did not ask the 1st and 2nd defendants about the whereabouts of his goods.
22. PW1 was re-called and gave further evidence in chief, and was further cross-examined and re-examined. In his evidence upon re-call, PW1 told the court that he had filed four sets of further list of documents all dated 25th February 2021. The lists and bundles of documents were referred to as Landlord Nos. 1, 2 and 3, and Taifa No1. PW1 told the court that the documents were in support of the Plaintiff's special damages claim in the sum of Kshs 65,722,115.80. He produced the same in evidence as P. Exh. 3 (a), 3 (b), 3 (c) and 3 (d) respectively.



23. On further cross-examination, PW1 stated that P. Exh. 3(d) contained the invoices for the goods which were proclaimed by the auctioneer and carried away on 3rd September 2015. He stated that the invoices related to the goods which were in the supermarket as at 3rd September 2015. PW1 admitted that items 3, 4, 5, and 6 in the list of invoices were issued after the auctioneer had carried away the goods and that they did not relate to what the auctioneer carried away. PW1 stated that he closed the supermarket in October 2015 and that he continued operating the supermarket until that month. He stated that P. Exh. 3(d) contained invoices and receipts but what he produced were invoices only. He stated that he had not produced the receipts. He stated that they were not getting receipts from suppliers after making payment. He stated that suppliers only issued invoices. He stated that they made payments against invoices.
24. He stated that when the auctioneers carried away the goods, they did stock-taking immediately. He admitted that there were some wrong invoices in the bundle. He stated that he relied on his stock-taking although he also considered the auctioneers' inventory. He reiterated that the auctioneers carried more goods than they declared in the inventory. He stated that he was not present when the auctioneers carried away the goods and that he did not report to the police the fact the auctioneers carried more goods than they had proclaimed.
25. He stated that the claim in P.Exh. 3(d) was Kshs 11,600,000/=. He stated that P.Exh. 3 (d) had some invoices for 2012, 2013, and 2014. He stated that some of the goods such as cookers and bicycles were still in the supermarket as they were not fast-moving goods. He stated that after the auctioneers carried the goods away, he went to the Tribunal but he did not complain to the Tribunal that the auctioneers carried goods that they did not declare in their inventory.
26. PW1 stated that the other goods the subject of P.Exh 3 (a), (b), and (c) were taken by the 1st and 2nd Defendants. He stated that the value of the goods taken by the 1st and 2nd Defendant was Kshs 65,722,115.80. He stated that this consisted of the value of stocks and assets. He stated the value of the entire stock taken by the 3rd Defendant and 1st and 3rd Defendants was over Kshs 76,000,000/-. He stated that after the 3rd Defendant took away the proclaimed goods, he brought more goods from other shops to store in the supermarket. He stated that the goods were from a shop he had closed. He stated that he closed the supermarket on the suit property on 28th October 2015 because the business was not doing well.
27. He reiterated that the 1st and 2nd Defendants wrote to him to be present when they were taking possession of the suit property and that he did not turn up. He stated that after the 1st and 2nd Defendants removed the goods from the suit property he did not go to the place where the goods had been kept. He stated that he opposed the 1st and 2nd Defendants' application seeking to force him to collect the goods that had remained in the suit property because he did not want to collect the goods. He stated that he had never bothered to know where the goods were kept. He admitted that there were no receipts in P.Exh. 3 (a), (b), and (c) in support of the payments.
28. The 2nd Defendant, Jane Wanjiru Nganga(DW1) gave evidence on her behalf and on behalf of the 1st Defendant whom she told the court was her husband. DW1 adopted her witness statement dated 4th March 2019 filed in court on 6th March 2019 as part of her evidence in chief. She also produced the 1st and 2nd Defendants' bundle of documents dated 4th March 2019 as D. Exh. 1. DW1 stated that in their counter-claim, they were claiming the sums set out in paragraph 9 of her witness statement. She stated that the rent increment was due from July 2014 up to March 2015 according to the lease agreement which provided for rent increase after every two years. She stated that the plaintiff did not pay the increased rent. She stated that the plaintiff was supposed to pay Kshs 440,000/- per month plus 16% VAT before the increment which was 10%. She stated that with effect from July 2014, the monthly



rent was supposed to be Kshs 561,440/-. She stated that the difference was Kshs 44,000/- which was not paid for the entire period, July 2015 to March 2015(9 months). She stated that that was the basis of their claim for Kshs 396,000/- on account of the unpaid rent increment. She stated that they were also claiming from the Plaintiff rent arrears for 15 months from April 2015 to June 2016 at the rate of Kshs 561,440/- making a total of Kshs 8,421,600/-. She stated that the monthly rent was inclusive of VAT. DW1 stated that they got possession of the suit property in June 2016. She stated that they were also claiming interest on the rent arrears which was provided for in the lease. DW1 stated that they were in addition to rent also claiming Kshs 36,370/- being the electricity bill that the plaintiff left unpaid and was paid by them.

29. DW1 stated that after taking possession, they found some goods on the premises which the Plaintiff refused to collect. She stated that they were forced to store the same at a cost of Kshs 680,000/- per month. She stated that she owned the premises where the goods were stored and that she was claiming the said amount as storage charges. She stated that she was also claiming Kshs 33,936/- that they incurred for pest control after the neighbors complained that the suit property was attracting pests. She stated that their other claim was for Kshs 251,400/- which they used to carry out repairs and re-wiring on the suit property.
30. DW1 stated that at the time they instructed the 3rd Defendant to levy distress against the Plaintiff on 16th April 2015, the Plaintiff had not paid rent increment for 9 months amounting to Kshs 396,000/-. She stated that there was also the rent for the second quarter that was due in April 2015 in the sum of Kshs 1,684,320/-. She stated that rent was payable in advance as provided in clause 15 of the lease. She stated that as at 16th April 2015, the plaintiff had not paid the quarterly rent that was due in April 2015. She stated that after receipt of the 3rd Defendant's notice of distress for rent, the Plaintiff gave a notice dated 30th April 2015 of its intention to vacate the suit property by 31st July 2015. She stated that the plaintiff requested that the deposit be utilised as rent a request that was not accepted.
31. DW1 stated that the plaintiff was supposed to give them 6 months' notice of termination of the lease. She stated that the Plaintiff's notice was not in accordance with the terms of the lease. She stated that the plaintiff did not vacate the suit property by 31st July 2015 and that the 3rd Defendant removed the proclaimed goods from the suit property on 3rd September 2015. DW1 stated that the Plaintiff was not operating on the suit property when they took possession of the property. She stated that before taking possession, they wrote to the Plaintiff through their advocates to be present when they were taking possession. She stated that the Plaintiff had never come to take the goods that it left in the suit property. She stated that the Plaintiff's claim had no basis. She stated that the goods which they removed from the suit property were stored and were still intact. She urged the court to dismiss the Plaintiff's claim and to enter judgment in their favour as prayed in the counter-claim.
32. On cross-examination, DW1 stated that the lease between the parties was for 5 years and 3 months with effect from 1st July 2012 and that the Plaintiff paid rent without any problem during the 1st and 2nd years of the lease. She stated that the 1st rent increment of 10% was to take effect in July 2014 and that it was not necessary to remind the plaintiff of the rent increase. She stated that they sent to the Plaintiff an invoice for the increased rent. DW1 stated that as at 31st March 2015, the Plaintiff was in arrears in respect of the rent increment in the sum of Kshs 396,000/-. She stated that they had no problem with the Plaintiff vacating the suit property and that the only objection they had concerned the request by the Plaintiff that the deposit be used as rent. She stated that as at 6th July 2015 when the 3rd Defendant levied distress against the Plaintiff, the Plaintiff owed Kshs 2,080,320/- in rent arrears plus the rent for the quarter that was due in July 2015. She stated that they did not respond to the Plaintiff's notice to vacate because they could not force the plaintiff to continue occupying the suit property.



33. DW1 stated that the sale of the Plaintiff's goods by the 3rd Defendant realised Kshs 500,000/= half of which went to storage. She stated that after the storage fees were settled the balance was shared between them and the 3rd Defendant. She stated that she could not remember the exact amount that they were paid by the 3rd Defendant following the auction that was held on 1st July 2017. She stated that when they took possession, they found some goods on the suit property. She stated that they did not take inventory of the goods they found on the premises. She stated that they removed the goods to different premises owned by them next to the suit property. She stated that when they were taking possession, the plaintiff was represented by a security officer, Lydia Oyiera Opunde. She stated that the goods were taken to a commercial store that belonged to her. She stated that they were claiming interest on rent arrears up to June 2016 and that the invoice for pest control services was addressed to the company on whose premises the goods were stored. She admitted that the invoice that she produced was only for the electrical work. She stated that they did not charge the plaintiff for repairing the suit property because they did not let the premises as a supermarket. She stated that they renovated the premises and let it to several tenants. She stated that that was part of the reason why they did the re-wiring. She stated that there was no dispute that they received Kshs 2,640,000/- from the Plaintiff as a deposit.
34. On re-examination, DW1 stated that when the 3rd Defendant levied distress for rent, the Plaintiff was in rent arrears for two quarters. She stated that they did not break into the suit property. She stated that they were allowed by the Tribunal to take possession. She stated that the premises had been closed for 8 months at the time they took possession. She stated that for the entire period, the plaintiff was not paying rent. She reiterated that they did not take inventory of the goods that they found on the property and that what remained on the property were junk items that they removed to a store. She stated that they asked the plaintiff to come and collect the goods from the store but it did not respond.
35. The last witness was the 3rd Defendant, David Wanderi Wamutu(DW2). DW2 adopted his witness statement dated 8th March 2019 as part of his evidence in chief and produced the supplementary list of documents dated 12th March 2019 as D.Exh. 2. He stated that after he sold the goods that were proclaimed, he swore a replying affidavit that was filed in court on 15th September 2017. On cross-examination, DW2 stated that he was instructed to levy distress against the Plaintiff to recover rent arrears of Kshs 2,080,320 together with costs. He admitted that according to the court order dated 10th August 2015 that was issued in Milimani CMC. Misc. No 650/2015 the outstanding rent was indicated as Kshs 3,764,640/-. He stated that he received two letters of instruction. The first one was in April 2015 in which the rent arrears were given as Kshs 2,080,320/-, and the second letter of instruction was on 2nd July 2015 in which the rent arrears were given as Kshs 3,764,640/-. He stated that he was the one who prepared the notification of sale and indicated the estimated values against the items that were proclaimed. He stated that he got the values from the market. He stated that he removed the goods from a supermarket and that the same had had prices indicated against them. He stated that in his notification, there was the last item number 103 which had various items. He stated that the said items were not removed from the supermarket. He stated that he collected the proclaimed goods on 3rd September 2015 and took them to Leakey Storage. He stated that the auction was held on 1st July 2017, one year and ten months later. He stated that Leakey Storage charged about Kshs 900,000/= as storage fees. He admitted that he had not produced an invoice for storage. He stated that he had produced some communication that he had with Leakey Storage. He stated that the receipt for Kshs 3,480/- was for auction fees and not storage charges. He stated that all the goods were sold together as one lot. He stated that the winning bid was from Geoffrey Rimbere who placed a bid of Kshs 500,000/=. He stated that the sale had no reserve price. He stated that he accepted the highest bid. He stated that he paid the 1st and 2nd Defendants a sum of Kshs 150,000/- in cash. He stated that he agreed with the 1st and 2nd Defendants that he would take Kshs 100,000/=: the 1st and 2nd Defendants would take



Kshs 150,000/= and Leakey Storage would take Kshs 250,000/=. He stated that he had a letter from Leakey Storage acknowledging receipt of Kshs 250,000/=.

36. On re-examination, DW2 stated that the goods were removed from the supermarket in 2015 and sold almost 3 years later in 2017. He stated that the goods were sold where they were in an open storage yard. He stated that some of the goods had deteriorated and as such the goods could not be sold per piece. On examination by the court, DW2 stated that the sale of the goods was delayed by the numerous orders that the Plaintiff had obtained stopping the sale. He stated that some orders were issued by this court while others were issued by the Tribunal. He stated that he conducted the sale after all the orders had been discharged.

Submissions

37. After the close of evidence, the parties were directed to make the closing submissions in writing. The Plaintiff filed submissions and supplementary submissions dated 16th September 2022 and 21st November 2022 respectively while the Defendants filed submissions dated 8th November 2022. In its submissions, the Plaintiff framed three issues for determination by the court namely, whether the 1st and 2nd Defendants were justified in levying distress for rent against the Plaintiff, whether the Plaintiff is entitled to the reliefs sought and whether the 1st and 2nd Defendants are entitled to the reliefs sought in their counter-claim. On the first issue, the Plaintiff submitted that as at the time distress for rent was levied against it, there was no rent due and outstanding from it to the 1st and 2nd Defendants. The Plaintiff submitted that in the circumstances, the distress that was levied against it was unlawful, and as such it was entitled to damages. In support of these submissions, the Plaintiff relied on *Cyo Owaya v George Hannington Zephania Aduda t/a Aduda Auctioneers & another* [2007]eKLR, *Peter Nthenge v Daniel Itumo & another*[1976]eKLR, and *Gusii Mwalimu Investment Co. Ltd. v Mwalimu Hotel Kisii Ltd.* [1996]eKLR.
38. On the issue of whether the Plaintiff is entitled to the reliefs sought, the Plaintiff submitted that as a result of the illegal distress, it lost assets and stock valued at a total of Kshs 65,722,115.08. The Plaintiff submitted that this loss was proved at the trial. The Plaintiff submitted that it had demonstrated on a balance of probabilities that it was entitled to the reliefs sought. About the 1st and 2nd Defendant's counter-claim, the Plaintiff submitted that rent arrears for the period April 2015 to June 2016 in the sum of Kshs 8,421,600/- claimed by the 1st and 2nd Defendants was not due since the Plaintiff had served a notice of its intention to vacate the suit property by 31st July 2015. The Plaintiff submitted that the 1st and 2nd Defendants accepted the notice but refused to allow the Plaintiff to move out of the suit property. The Plaintiff submitted that allowing the 1st and 2nd Defendants' claim for rent after the notice of termination would amount to unjust enrichment. The Plaintiff termed the claim an abuse of the process of the court. The Plaintiff submitted that the 1st and 2nd Defendants were not entitled to rent for the period after the termination of the lease. The Plaintiff submitted further that the 1st and 2nd Defendants were not entitled to the annual rent increment since they did not serve the Plaintiff with a notice in respect thereof. The Plaintiff submitted that it was a term of the lease that the 1st and 2nd Defendants would serve the Plaintiff with 30 days' notice before effecting the rent increment. About the repair costs, the Plaintiff submitted that the obligation to carry out repairs was on the 1st and 2nd Defendants and that its duty to carry out repairs was very limited. The Plaintiff submitted that in the circumstances, it was not liable for the repair costs claimed in the sum of Kshs 251,400/-. About the pest control costs, the Plaintiff submitted that the infestation of the suit property by rats and mice if any took place after the 1st and 2nd Defendant had taken over the premises and denied the Plaintiff access to remove its goods from the property. The Plaintiff submitted that it was only fair that the 1st



and 2nd Defendants meet such expenses. The Plaintiff urged the court to allow its claim and dismiss the 1st and 2nd Defendant's counter-claim.

39. In their submissions, the Defendants submitted that at the time distress for rent was levied against the Plaintiff, the Plaintiff was in rent arrears to the tune of Kshs 3,764,640/-. The Defendants submitted that the 1st and 2nd Defendants had a statutory and common law right to levy distress for the recovery of the said rent. The Defendants submitted that the security deposit was only available to the Plaintiff upon the termination of the tenancy. The Defendants submitted that the same could not be used by the Plaintiff to pay its rent during the subsistence of the tenancy. The Defendants submitted that there was no evidence placed before the court by the Plaintiff in proof of its allegation that it was prevented from vacating the suit property. The Defendants submitted that the Plaintiff having served the 1st and 2nd Defendants with a notice of its intention to vacate the suit property by 31st July 2015 and having failed to do so, was liable under section 14 of the *Distress for Rent Act*, Chapter 293 Laws of Kenya to pay to the 1st and 2nd Defendants double rent between August 2015 and June 2016 when the 1st and 2nd Defendants took possession of the suit property.
40. The Defendants submitted that the 1st and 2nd Defendants took possession of the suit property lawfully after an order was made in its favour by the Tribunal for possession. The Defendants submitted that the Plaintiff never resisted the taking over of the premises by the 1st and 2nd Defendants and as such there was no need for the 1st and 2nd Defendants to apply to court for further orders.
41. About the Plaintiff's claim for special damages in the sum of Kshs 65,772,115.08 for alleged loss of assets and stock, the 1st and 2nd Defendants submitted that there was no evidence placed before the court by the Plaintiff in proof of the fact that the alleged assets and stock were on the suit property when the 1st and 2nd Defendants took possession. The Defendants submitted that the Plaintiff's goods were carried away by the 3rd Defendant following the distress for rent that was levied against the Plaintiff and what remained on the suit property were moved by the 1st and 2nd Defendants to a store and were available for collection by the Plaintiff upon payment of storage charges.
42. The Defendants submitted that special damages must not only be pleaded but must also be strictly proved. The Defendants cited several cases in support of this submission. The Defendants submitted that the sum of Kshs 65,722,115.08 claimed by the Plaintiff as special damages was not proved. The Defendants submitted further that the Plaintiff having refused to be present when the 1st and 2nd Defendants were taking possession of the suit property and having refused to collect the goods that were on the suit property was estopped from claiming the value of the said goods from the 1st and 2nd Defendants.
43. About their counter-claim, the Defendants submitted that the same was proved on a balance of probabilities. The Defendants urged the court to dismiss the Plaintiff's suit and to enter judgment for the 1st and 2nd Defendants as prayed in the counter-claim together with costs and interest.

Analysis and determination:

44. I have considered the pleadings, the evidence tendered and the submissions by the advocates for the parties. In my view, the issues arising for determination in this suit are the following;
 1. Whether the distress for rent that was levied against the Plaintiff by the 1st and 2nd Defendants was unlawful.
 2. Whether the 1st and 2nd Defendants took possession of the suit property unlawfully.
 3. Whether the Plaintiff is entitled to the reliefs sought in its amended plaint.



4. Whether the Plaintiff owed the 1st and 2nd Defendants rent to the tune of Kshs 8,421,600/- and underpaid rent to the tune of Kshs 396,000/- at the time the 1st and 2nd Defendants took possession of the suit property from the Plaintiff.
5. Whether the Plaintiff is liable to pay to the 1st and 2nd Defendants the sum of Kshs 360,370/- for unpaid electricity bill.
6. Whether the Plaintiff is liable to pay the 1st and 2nd Defendants the sum of Kshs 680,000/- per month for storage charges.
7. Whether the Plaintiff is liable to pay to the 1st and 2nd Defendants the sum of Kshs 33,936/- for the expenses incurred in pest control.
8. Whether the Plaintiff is liable to pay to the 1st and 2nd Defendants the sum of Kshs 251,400/- for repairing and re-wiring the suit property.
9. Whether the 1st and 2nd Defendants are entitled to the reliefs sought in the counter-claim.
10. Who is liable for the costs of the suit?

Whether the distress for rent that was levied against the Plaintiff by the 1st and 2nd Defendants was unlawful.

45. Section 3(1) of the *Distress for Rent Act*, Chapter 293 Laws of Kenya provides as follows:
 - “3. Subject to the provisions of this Act and any other written law, any person
 - (1) having any rent or rent service in arrear and due upon a grant, lease, demise or contract shall have the same remedy by distress for the recovery of that rent or rent service as is given by the common law of England in a similar case.”
46. In *Halsbury’s Laws of England*, 4th Edition, Volume 13, page 107, paragraph 202, distress for rent as a common law remedy is explained as follows:

“Right of the landlord to distrain for arrears of rent arises at common law need not be expressly reserved. It enables the landlord to secure the payment of rent by seizing goods and chattels found upon the premises in respect of which the rent or obligations are due...”
47. The Plaintiff has not challenged the 1st and 2nd Defendants’ right to levy distress to recover rent in arrears. The Plaintiff has contended that as at 6th July 2015 when the 1st and 2nd Defendants distrained for rent against it, it had paid its rent in full and as such, it had no rent arrears that would have entitled the 1st and 2nd Defendants to levy distress against it. The Plaintiff has contended that on 30th April 2015, it served the 1st and 2nd Defendants with a notice terminating the lease it had with the 1st and 2nd Defendants with effect from 31st July 2015. The Plaintiff has averred that it issued the 1st and 2nd Defendants with a cheque for Kshs 535,920/- dated 28th July 2015 which together with its security deposit of Kshs 2,640,000/- were to cover the rent that was due from the Plaintiff to the 1st and 2nd Defendants for the notice period of 1st May 2015 to 31st July 2015.
48. On their part, the 1st and 2nd Defendants have contended that according to the lease agreement between the Plaintiff and the 1st and 2nd Defendants, the 1st and 2nd Defendants leased the suit property to the Plaintiff for a term of 5 years and 3 months with effect from 1st July 2012 at a monthly rent of Kshs 440,000/- per month plus 16% VAT revisable upwards every 2 years at the rate of 10%. The 1st and 2nd Defendants have contended that the Plaintiff’s rent was due for review on 1st July 2014. The 1st and 2nd



Defendants have contended that from July 2014, the Plaintiff was supposed to pay an additional sum of Kshs 44,000/- per month being the 10% rent increment. The 1st and 2nd Defendants have contended that despite this rent increment, the Plaintiff continued to pay the old rent of Kshs 440,000/- per month. The 1st and 2nd Defendants have contended that as at April 2015 when the Plaintiff served them with a notice to terminate the lease, the Plaintiff was in arrears of Kshs 396,000/- being rent underpaid for a period of 9 months, July 2014 to March 2015. The 1st and 2nd Defendants have averred further that the rent for the 2nd quarter of the year 2015 in the sum of Kshs 1,684,320/- became due on April 2015. The 1st and 2nd Defendants have contended that the rent for the 3rd quarter of the year 2015 (July, August, and September 2015) in the sum of Kshs 1,684,320/- became due on 1st July 2015. The 1st and 2nd Defendants have averred that as at 6th July 2015 when distress was levied against the Plaintiff, the Plaintiff was in rent arrears to the tune of Kshs 3,764,640/- comprising of the underpaid rent of Kshs 396,000/- and the rent for two quarters (April 2015 to September 2015). The 1st and 2nd Defendants have contended that the security deposit of Kshs 2,640,000/- could not be used to pay the Plaintiff's rent arrears and that the sum of Kshs 535,920/- paid on 29th July 2015 was paid after the distress had been levied and went to reduce the rent arrears that were outstanding.

49. The Plaintiff has contended that it was not liable to pay the rent increment because the same had not been demanded by the 1st and 2nd Defendants. The Plaintiff has also contended that he was not liable to pay rent for the period after 31st July 2015. I have looked at the lease dated 17th January 2012 between the Plaintiff and the 1st and 2nd Defendants. The same provided that the Plaintiff was to pay a monthly rent of Kshs 440,000/- plus 16% VAT quarterly. The lease provided further that the rent was reviewable upwards at the rate of 10% every two years. The lease also provided that the Plaintiff was to pay a security deposit of Kshs 2,640,000/- refundable on termination of the lease. The lease gave the Plaintiff a right to terminate the same before the end of the term by giving the 1st and 2nd Defendants 6 months' notice. There is no provision in the lease requiring the 1st and 2nd Defendants to give the Plaintiff any notice before the 10% rent increase after every two years took effect. There is also no provision in the lease allowing the Plaintiff to utilise the security deposit to settle rent arrears. The lease does not also provide for a 3-month notice before termination thereof.
50. From the evidence on record, I am satisfied that as at 6th July 2015 when the 1st and 2nd Defendants levied distress against the Plaintiff through the 3rd Defendant, the Plaintiff had rent arrears amounting to Kshs 3,764,640/-. It follows therefore that the said distress for rent was lawful and I so find.

Whether the 1st and 2nd Defendants took possession of the suit property unlawfully.

51. It is not in dispute that the Plaintiff did not vacate the suit property at the expiry of its notice to terminate the lease on 31st July 2015. It is also not in dispute that the goods that were distrained for rent were removed from the suit property on 3rd September 2015. It is also not in dispute that upon the removal of the said goods, the Plaintiff challenged the distress that was levied against it at the Business Premises Rent Tribunal, in Nairobi Tribunal Case No 658 of 2015. It is also not disputed that on 29th April 2016, the Business Premises Rent Tribunal ("the Tribunal") struck out the Plaintiff's reference and application challenging the distress and granted the 1st and 2nd Defendants an order for possession of the suit property. It is common ground that the Plaintiff challenged the Tribunal's order of possession before this court in ELC Appeal No 48 of 2016 and that the Plaintiff's application for a stay of the Tribunal's order for possession was dismissed by this court on 24th June 2016. It follows therefore that the Tribunal's order granting the 1st and 2nd Defendants possession of the suit property was neither stayed nor set aside. Following the dismissal of the Plaintiff's application for stay by this court as aforesaid, the 1st and 2nd Defendants took possession of the suit property in June 2016 in



accordance with the order made by the Tribunal. It is my finding therefore that the possession of the suit property was taken by the 1st and 2nd Defendant according to an order from the Tribunal which had neither been stayed nor set aside. The 1st and 2nd Defendants therefore took possession of the suit property lawfully.

Whether the Plaintiff is entitled to the reliefs sought in its amended plaint.

52. I have made a finding that the Plaintiff was in rent arrears to the tune of Kshs 3,764,640/- as at 6th July 2015. I have also made a finding that the distress for rent that was levied against the Plaintiff by the 1st and 2nd Defendants was lawful. I have made a finding also that the 1st and 2nd Defendants took possession of the suit property lawfully. In the circumstances, the Plaintiff is not entitled to the declaration sought in prayer (a) of the amended plaint. Since the distrained goods had been removed from the suit property and sold, prayer (b) of the amended plaint is also not available to the Plaintiff. In any event, there is no basis for granting the same given the findings by the court above. Since the distress for rent and the taking of possession of the suit property by the 1st and 2nd Defendants were lawful, the Plaintiff is not entitled to damages special or otherwise for illegal distress and unlawful eviction. I wish to add that in any event, the Plaintiff's claim for special damages in the sum of Kshs 65,722,115.08 was not proved. The Plaintiff did not prove that the goods that were distrained for rent and sold by the 3rd Defendant were valued at Kshs 19,065,325.08 and that, what he referred to as "assets" that remained on the suit property and which it refused to collect even after being called upon to do so were valued at Kshs 46,656,790/-. These figures were not supported by the Plaintiff's "purported" Annual Statements of Accounts for 2014 and 2015 that were produced in evidence. I say "purported" because the reports and accounts for 2014 and 2015 that were produced in evidence were for an entity known as "Easy Mart Supermarket Limited". That is not the Plaintiff herein. The documents produced as Plaintiff's exhibits 3(a), (b), (c), and (d) were to me also mere pieces of paper. The Plaintiff did not relate them to any inventory that was taken in respect of the goods and "assets" that were on the suit property at the material time. My perusal of the invoices revealed that some of the goods the subject thereof were not received while some of the invoices related to the goods that were delivered at the Plaintiff's other supermarket at Komarock that had nothing to do with the suit property.
53. It is therefore my finding that the Plaintiff has failed to prove its case and as such it is not entitled to any of the reliefs sought in its amended plaint.

Whether the Plaintiff owed the 1st and 2nd Defendants rent to the tune of Kshs 8,421,600/- and underpaid rent to the tune of Kshs 396,000/- at the time the 1st and 2nd Defendants took possession of the suit property from the Plaintiff.

54. From the evidence on record, the Plaintiff held on to the suit property until June 2016 when the 1st and 2nd Defendants took possession following the dismissal of the Plaintiff's application for stay by this court. The Plaintiff was liable to continue paying the agreed rent to the 1st and 2nd Defendants for the entire duration that it remained in possession. I find the 1st and 2nd Defendants' claim for rent arrears in the sum of Kshs 8,421,600/- for the period April 2015 to June 2016 proved. I had made a finding earlier that the Plaintiff had an obligation to pay the increased rent with effect from July 2014 and that a sum of Kshs 396,000/- was due to the 1st and 2nd Defendants on that account as at March 2015. This claim has also been proved. These amounts would however be reduced by a sum of Kshs 535,920.00 that was paid by the Plaintiff on 29th July 2015 and a further sum of Kshs 150,000/- that the 1st and 2nd Defendants recovered from the auction sale according to the evidence of the 3rd Defendant. The total rent due to the 1st and 2nd Defendants from the Plaintiff is therefore Kshs 8,131,680/-.



Whether the Plaintiff is liable to pay to the 1st and 2nd Defendants the sum of Kshs 360,370/- for unpaid electricity bill.

55. This claim is in the nature of special damages. Special damages must be pleaded and strictly proved. The 1st and 2nd Defendants did not produce an electricity bill from Kenya Power & Lighting Co. Limited for Kshs 360,370/- to prove the period during which the bill accrued and the premises from which the electricity was consumed. There was also no evidence that the payment was received by Kenya Power & Lighting Co. Limited. It is my finding therefore that this claim was not proved to the required standard.

Whether the Plaintiff is liable to pay to the 1st and 2nd Defendants the sum of Kshs 33,936/- for the expenses incurred in pest control.

56. This claim was also not proved. At the time the expense in the sum of Kshs 33,936/- was incurred, there was no landlord and tenant relationship between the Plaintiff and the 1st and 2nd Defendants. The 1st and 2nd Defendants had taken possession of the suit property. The expense appears also not to have been incurred on the suit property. The same was incurred on another property where the 1st and 2nd Defendants had stored the Plaintiff's goods. Again the goods were not stored at the Plaintiff's request. It is my finding that the Plaintiff is not liable to settle this claim which was also incurred by a stranger, Maja East Africa Company Limited.

Whether the Plaintiff is liable to pay to the 1st and 2nd Defendants the sum of Kshs 680,000/- for storage charges.

57. The tenant/landlord relationship between the Plaintiff and the 1st and 2nd Defendants came to an end when the 1st and 2nd Defendants took back possession of the suit property in June 2016. There is evidence that upon taking possession of the suit property, the 1st and 2nd Defendants found some goods belonging to the Plaintiff on the property. There is also evidence that the 1st and 2nd Defendants requested the Plaintiff to come and collect the said goods and that the Plaintiff refused to do so. I am of the view that the 1st and 2nd Defendants had no obligation to store the said goods for the Plaintiff. The goods should have been dealt with as uncollected goods under the *Disposal of Uncollected Goods Act*, Chapter 38 Laws of Kenya. The Plaintiff is in the circumstances not liable to pay to the 1st and 2nd Defendants the claimed sum of Kshs 680,000/- per month for storage. In any event, no evidence was placed before the court in proof of how the said sum of Kshs 680,000/- per month was arrived at. Neither the inventory of the goods stored nor the particulars of the store were given to the court. I find this claim not proved.

Whether the Plaintiff is liable to pay to the 1st and 2nd Defendants the sum of Kshs 251,400/- for repairing and re-wiring the suit property.

58. The only documentary evidence that was presented to the court in proof of this claim is a cash sale receipt dated 17th March 2017 for Kshs 251,400/- issued by Sheymaga Electrical Services. The receipt was issued to Maja E.A Hardware. The 1st and 2nd Defendants did not lay a basis for this claim. First, the court was not told that the Plaintiff had interfered with the electrical installation on the suit property. The court was told that the 1st and 2nd Defendants converted the suit property into stalls and that was the reason why it was necessary to carry out re-wiring on the premises. I am not persuaded that the Plaintiff was liable for such expenses under the lease. The same did not fall under repairs and re-decoration. I find the claim not proved.



Whether the 1st and 2nd Defendants are entitled to the reliefs sought in the counter-claim.

59. The 1st and 2nd Defendants have proved that the Plaintiff owes them a sum of Kshs 8,131,680/- being the outstanding rent as at June 2016. The 1st and 2nd Defendants have also proved that they are entitled to interest on the said amount at the rate of 18% per annum until payment in full. This is provided for in the lease dated 17th January 2012. The other claims by the 1st and 2nd Defendants have not been proved. The interest shall accrue from 30th November 2017 when the 1st and 2nd Defendants filed their counter-claim until payment in full.

Who is liable for the costs of the suit?

60. As a general rule, costs follow the event unless the court for good reason orders otherwise. In the present suit, the 1st and 2nd Defendants have succeeded in their claim against the Plaintiff. The Plaintiff has not given any reason why the 1st and 2nd Defendants should be denied the costs of the suit and the counter-claim. Although I have found no wrongdoing on the part of the 3rd Defendant, I was not impressed with how he accounted for the proceeds of the auction sale. I will therefore deny him the costs of the suit. I will therefore award the costs of the suit and the counter-claim to the 1st and 2nd Defendants.

Conclusion

61. In conclusion, I hereby make the following orders;

1. The Plaintiff's suit is dismissed.
2. Judgement is entered for the 1st and 2nd Defendants against the Plaintiff for;
 - a. Kshs 8,131,680/- being the rent arrears together with interest at the rate of 18% per annum from 30th January 2017 until payment in full.
 - b. Costs of the suit and the counter-claim.

DELIVERED AND DATED AT KISUMU ON THIS 28TH DAY OF SEPTEMBER 2023

S. OKONG'O

JUDGE

Judgment delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Masinde h/b Mr. Mungai for the Plaintiff

Mr. Mwangi for the Defendants

Ms. J.Omondi-Court Assistant

