Wambui & another v Frann Investment (Environment & Land Case 207 of 2019) [2023] KEELC 21781 (KLR) (28 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21781 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 207 OF 2019

LL NAIKUNI, J

NOVEMBER 28, 2023

BETWEEN

JAMES MWANGI WAMBUI .... 1ST PLAINTIFF

JAMES MWANGI WAMBUI .... 2ND PLAINTIFF

AND

FRANN INVESTMENT .... DEFENDANT

JUDGMENT

I. Introduction

1. This Amended Judgment is in respect to a Plaint dated 19th November, 2019, instituted by Mr. James Mwangi Wambui, the Plaintiff herein impleaded against the Frann Investment Limited, the Defendant herein in this suit. Upon service of the relevant pleadings, the Defendant herein entered appearance through a Memorandum of Appearance dated 13th December, 2019 and filed their Defence. Later on, the Defendant filed an Amended Statement of Defence and Counter Claim dated 5th February, 2020.

2. It is instructive to note that upon this court delivering its Judgment on 28th November, 2023 the Plaintiff herein filed a Notice of Motion dated 30th November, 2023 seeking for the court to review its judgment accordingly.

3. There after hearing all parties on 29th January, 2024 the Honorable Court delivered its Ruling on 18th March, 2024 which has necessitated the Amendment of this Judgment hereof.

4. On 30th September, 2021 upon all parties having fully complied with the provisions of Orders 6, 7 and 11 of the Civil Procedure Rules 2010 on the Pre - trial conference. Subsequently, on the 2nd December, 2021, it was fixed for full trial before this Honourable Court by Justice Sila Munyao. Whereby the matter proceeded on by way of adducing of “Viva Voce” evidence. The Plaintiff’s witness - PW 1 testified on the material date while the case by the PW - 2 was on 23rd February, 2023.

5. On 28th September, 2022, the Plaintiff filed an application where he sought to re - open the Plaintiff's case. Upon considering the application, on 9th December, 2022, the Court allowed it. Thereafter, on 23rd February, 2023, while the Plaintiff closed their case, the Defendant case ensued in earnest on the same date. They called one witness - DW 1. Thereafter, on 27th April, 2023, the Defendant closed their case on.

II. The Plaintiff's Case

6. Based on the filed pleadings, the Plaintiff is described as an adult male of sound mind residing and working for gain and having business operations in Nairobi and Mombasa. The brief facts of the case as per the filed Plaint are that by a Lease made on 31st December 2011, the Defendant demised to the Plaintiff a Restaurant Space on the First Floor comprised in the building erected on Sub - Division number 1696 (Original number 612/2) Section III, Mainland North, Kilifi district (Hereinafter referred to as "The Demised Premises") for a term of Ten (10) years commencing the 1st January 2012. Under the Tenth Schedule, Clause 5 of the Lease, the Defendant covenanted with the Plaintiff that the Plaintiff should have quiet enjoyment of the demised property as against the Defendant and all persons claiming under or in trust for the Defendant. The Plaintiff at the trial referred to the said Lease for its full terms and true effect.

7. The Plaintiff occupied the demised premises for the purpose of carrying out his restaurant business and averred that he had been a faithful and diligent tenant who had carried on business peacefully on the same premises. He held that since occupation, he had always performed his obligations under the Lease agreement, which obligations included but are not limited to paying rent as and when it fell due. This went on until sometimes when the peaceful occupation was widely interrupted as hereinafter detailed. Sometimes in December 2016, the Defendant through some directions all of a sudden began harassing the Plaintiff by demanding unreasonable amounts of rent which was not stipulated in the agreements. These demands included the payment for rent to be paid individually to the said directors and each was coming with his own demand. The Plaintiff declined to meet the said demands.

8. The harassment culminated into the Defendant with its agents, servants and/or persons acting on its behalf without any justifiable cause or excuse irregularly, forcefully and unlawfully invaded the suit property and constructively evicted the Plaintiff by restricting occupation thereof. The Defendant locked up the premises and detained the Plaintiffs tools of trade including but not limited to chairs, tables, TV screens, counter bars and gypsum ceiling. By so doing, the Defendant claimed that the Plaintiff was in rent arrears. The actions by the Defendant were carried out without due regard to the laid – down process and the law. The Defendant failed to issue and/or service the requisite notices and without procuring a Court order to authorize the eviction which was in breach of the covenant duly entered with the Defendant for peaceful occupation.

9. The Plaintiff approached the Defendant through sons of the Major Director when the premises were locked up. However, the Defendant ignored and/or neglected to give audience to the Plaintiff in order to address the issue at hand and the Plaintiff was disturbed and has never been able to regain his footing despite the massive investment he had undertaken on the premises. The Defendant had since then prevented the Plaintiff from gaining access to the premises for almost three (3) years and as a result of which the Plaintiff had suffered loss and damage, and all his efforts to retake possession peacefully never bore fruits.

10. Despite being on the wrong and the Plaintiff not been in occupation ever since, the Defendant through its advocates wrote a demand letter to the Plaintiff on 3rd October 2019 demanding the Plaintiff to pay rent arrears amounting to a sum of Kenya Shillings Fourteen Million Three Eighty Four Thousand

(Kshs. 14,384,000/=) within a period of 10 days from the date of the letter and which debt was unknown to the Plaintiff as he had been diligent in paying his rent as and when due. The Advocates had further warned that if the amount outstanding was not paid in full they would proceed to repossess the demised premises and levy of distress, but they admitted they closed the premises. The Plaintiff had always met his rent obligations promptly until the year 2016 when the Defendant interrupted and shut down the premises, and the Defendant now was threatening to repossess the demised premises, levy distress and attach its assets which action was without any lawful justification and amounted to a derogation from the grant.

11. The Plaintiff relied on the particulars of unlawfulness and breach of covenant and stated that:-

    a. Irregularly, forcefully and unlawfully invading and locking up the demised premises without any notice whatsoever to the Plaintiff.

    b. Demanding the unjustified payment of a sum of Kenya Shillings Fourteen Million Three Eighty Four Thousand (Kshs. 14,384,000/=) with no backing or proof whatsoever as to the genesis of the outrageous figures, after efforts by the Plaintiff to regain possession.

    c. Purporting to attach the Plaintiff property to recover unjustifiable rent arrears, when the Defendant itself locked the premises for the period it claims rent arrears, and shut out the Plaintiff from occupation.

    d. Otherwise declining to give free and full access of the demised premises to the Plaintiff.

12. By reason of the matters aforesaid, the Plaintiff was deprived of the opportunity to use the suit premises for the use intended and carry out his business of operating his restaurant and was forced to look for alternative premises at great loss, and no longer desired to occupy the premises, and prayed that he be allowed to value his goods and seek reparation for that. Despite demand being made and notice of intention to sue been issued, the Defendant had refused to make good the Plaintiff's claim.

13. The Plaintiff prayed for Judgement against the Defendant for:-

    a. A Permanent Injunction Order restraining the Defendant whether acting by themselves or through their agents, servants and/or workmen from doing any of the following acts, that is to say from further entering upon, interfering with, Evicting, levying Distress, Leasing out to any Third Party and/or otherwise Interfering with Plaintiffs/Applicant's possession, occupation and use of the Demised premises, being a Restaurant Space on the First Floor comprised in the building erected on Sub - Division Number 1696 (original Number 612/2) Section Iii,mainland North,kilifi District.

    b. General Damages for derogation from grant and Unlawful Constructive Eviction

    c. Claim for reimbursement of the value of the Goods Detained.

14. On 2nd December, 2021, the hearing for the Plaintiff commenced whereby he summoned two witnesses – the PW 1 and PW - 2. PW – 1 testified as follows:-

A. Examination in Chief of PW - 1 by Mr. Muchiri Advocate

15. He was sworn and testified in English language. He identified himself as Mr. James Mwangi Wambui. He was the Plaintiff, an environmentalist and a resident of Nyali estate of the County of Mombasa. He recorded a witness statement dated 19th November, 2019 filed in Court on 21st November, 2019. He adopted it as his evidence in chief and list of documents dated 19th November, 2019 produced as Plaintiff Exhibit Exhibits numbers 1 and 2. He had duly executed a tenancy - Lease with the Lessor

for 10 years, terms and conditions stipulated thereof. According to him, the Lease had not yet expired. However, in the course of time, a disagreement ensued between him and the son of the Lessor who subsequently closed down the business premises.

16. The Lessor was now deceased. PW – 1 had received a demand letter to vacate the suit premises. He never had a peaceful enjoyment of the suit property. The value of the goods detained were a sum of Kenya Shillings Fourty Million (Kshs. 40,000,000/-). The goods were detained.

B. Further Examination in chief of PW – 1 by Mr. Gachie Advocate

17. When PW – 1 was further examined, he stated that he had seen the documents which bore his signature and that of Mr. Edward Wahome. He had this case and another with the father. From the house which was in the suit property, he had vacated but there was another house situated at Port Reitz which he was still occupying. These payments were for the other premises. He was the one who demanded for the goods from his landlord. PW – 1 held that usually at Mombasa there was a lot bacteria in the air and good tend to get moisty and rusty when they were not in use.

C. Cross examination of PW - 1 by Mr. Njoroge Advocate

18. PW -1 informed Court that he occupied the entire floor of the demised premises. His Landlord was known as Frans Investment Limited. He had spent over a sum of Kenya Shillings Thirty Million (Kshs. 30, 000, 000.00/=) in renovations and other improvements of the premises. He would have tenants. There was also a financial institutions – the Family Bank Limited who were still tenants in the building. There was a Lease agreement dated 31st November, 2021. They had agreed that would be for the sale of the premises eventually but the Lessor later on declined and they proceeded with the 10 year lease effectively from 31st December, 2021. The Lease agreement was with Frann Investment Limited.

19. He reiterated that, there was a lot of harassment meted by the Lessor. He was in Nairobi, unwell. There was no letter on the harassment because he was the one who was demanding rent arrears. In the cause of time, he started getting a lot of harassment from the Landlord and someone started demanding for some money from him. He filed the case after receiving the demand letter for an outstanding rent arrears of a sum of Kenya Shillings Fourteen Million Three Eighty Three Thousand (Kshs 14,383, 000.00/) and there was no notice and that caused him to institute this case. From the pleadings, he prayed for permanent injunction until the case was heard and determined. He was interested in getting his goods from the premises. On 27th May, 2021, the ELC No. 1 directed that he enters the premises and obtain his goods from the premises. The good had been damaged. On 28th December, 2016, they entered into an agreement between them and the Landlord (evidenced in page 40). He went to look for another place. But he was not successful. The damaged property which he photographed.

20. PW – 1 told the Court that he was surprised to see a demand letter dated 11th September, 2019. He never replied. It was from there that he approached the Honourable Court. He denied the signature in the document was his. He told the court that from the property at Port Reitz in the County of Mombasa, he had owed an outstanding rent for a sum of Kenya Shillings Seven Million (Kshs 7,000,000/-). It was settled. He had seen the document dated 15th March, 2022 when he last testified, he had not paid the amount. The last time he testified on 2nd November, 2021.

D. Re - examination of PW - 1 by Mr. Muchiri Advocates

21. PW – 1 confirmed that from the demand letter, he had not been in occupation of the premises. There was registration of a restriction against the premises. He knew of the tenant who was unable to pay the Landlord. He had the right to levy distress to have retained the property but they never obliged.

He had always payed rent. He left all his goods in the premises. He was only able to access his goods through a court order. From the letter dated 28th December, 2016, all his sons died.

22. He was referred to page 40 where they all agreed and had the debt settled. By the time he testified in Court, he had fully paid up debt owed to the Landlord. That was all.

23. On 23rd February, 2023, the hearing for the PW – 2 proceeded in earnest. He testified as follows:-

A. Examination in chief of PW - 2 by Mr. Gachie Advocate

24. PW - 2 was sworn and testified in the English language. She informed Court that she was called Patricia Lillian Muthoni. She resided in Thika of the county of Kiambu. According to PW – 2, she was an Interior Designer by profession, She knew PW - 1 for a long duration being her client. She signed a witness statement on 16th February, 2023 and which she adopted as part of her evidence in chief. She was the one who designed she interior of a night club for the Plaintiff situated at Mtwapa of the County of Mombasa in the year 2010. She undertook the assignment to its completion in the year 2012. For that work, she charged the Plaintiff a sum of Kenya Shillings Twelve Million (Kshs. 12,000,000/-) or thereabout for the work done. The assignment to its completion took her two (2) years instead of the one (1) year they had agreed on. When she started the project, there was an agreement and an expectation by the owner to have completed the construction. The agreement had a penalty clause. It was duly entered between the owner of the club and the son on one hand and herself.

25. She told the court that the building was bear when they engaged. They were to start with the pillars but they had problems with the sewage line. She had been engaged to design the floor, the gypsum ceiling and the disco floor lightings to detail, the installation of the kitchen and a bar which could hold alcohol and other non – alcoholic drinks all worth a sum of Kenya Shillings Five Million (Kshs. 5,000,000/-) and the installation of a power back - up generator. For all tasks, she was referred to the Supplementary List of documents. In particular, to an invoice for 28th May, 2022 and the Supplementary list of documents dated 16th February, 2023. She produced all these documents and were marked as Plaintiff Exhibits.

26. She informed Court that, occasionally the roof water would pour down the roof and pillars and would spoil the gypsum. From the best of her knowledge, subsequently, the club was subsequently closed.

B. Cross examination of PW - 2 by Mr. Njoroge Advocate

27. PW – 2 told the court that the document she had presented in court was not a Valuation report. She had not presented a contract that they had duly entered with James Mwangi in Court but she stressed that they had it. Thus, they may not have the benefit of perusing the Penalty Clause that she referred to. She emphasized that the contracted sum was for a sum of Kenya Shillings Twelve Million Eight Fourty Seven Thousand Three hundred and Fifty Hundred (Kshs. 12,847,350 which included labour, travelling and the profit they made. What she presented in Court were invoices to the client but not receipt for payment. But they issued Electronic Transfer Receipts (ETR) receipts to the clients. She did not have them as the ink had faded off. She may prove that she paid VAT; the VAT payable was not shown from the receipts.

28. She told the court that she had done this type of work for many years. She was experienced. Mr. Mwangi was a tenant; Mr. Wahome and Mr. Mwangi had an interesting relationship. When she met them she was not introduced to them as Land Lord – Tenant. Infact she thought they were partners. They never had a Lease agreement. She clarified that they were more like father and son. In other words, they had a deep and mutual relationship of friendship. Her work entailed the design drawings but they were all part of a contract. On the issue of watering and sewage leakage, they had no written complaint made

to the Land Lord. She stated that the way Mr. Mwangi handled the Landlord was with soft (velvet) gloves. She was aware Mr. Mwangi made the claim. They did not have the invoices for these expenses. From her statement, she stated that she was not privy to the cause of the dispute between them. From her statement it meant, She was in Court to state the dispute between the Landlord and his tenant. Just the bit of what she did as an Interior designer. She was not involved in the dispute.

29. She told the court that when, Mr. Mwangi vacated from the premises, she may not know what had been carried away out of the premises. She was referred to the invoices of 28th May, 2012. All these items mentioned there were carried away from the premises. The generator was bought by Mr. Mwangi and she fixed it.

C. Re - examination of PW - 2 by Mr. Gachie Advocate

30. She reiterated that the club was closed down by Victor. She never saw James Muchemi Munene carrying anything from the premises as he was not allowed to do so. That was all. It was the close of the Plaintiff's case.

III. The Defendant's Case

31. As indicated above, the Defendant filed a Statement of Defence and Counter Claim dated 5th February, 2020. From the pleadings, the Defendant is described as a Limited Liability Company duly incorporated and registered pursuant to the provisions of the Companies Act, Chapter 486 Laws of Kenya and having its registered office and principal place of business at Mombasa. It contended that it was "Frann Investments Limited" but wrongly sued as "Frann Investment".

32. The Defendant admitted the contents made out of Paragraphs 3 and 4 of the Plaint but denied the contents of Paragraphs 5, 6, 7,8,9, 10 and 13 of the Plaint.

33. Further and or in the alternative and without prejudice to the foregoing, the Defendant averred that the Plaintiff was a poor rent payer, who was persistently in rent arrears and finally stopped paying rent altogether, though he remained in occupation. The Plaintiff and the Defendant agreed to have one James Muchemi Munene who was well known to both parties, to mediate on the rent arrears claim by the Defendant. The Plaintiff claimed to have either paid rent directly to Mr. Francis Githui Wahome or advances monies to him on account of rent, as a Director of the Defendant, which claim was denied by the Defendant and Mr. Francis Githui Wahome.

34. The Plaintiff and the Defendant with the help of Mr. James Muchemi Munene resolved the issue on the outstanding rent arrears amicably in writing on 28th December, 2016. It was resolved that the Plaintiff would vacate the suit premises by 31st January, 2017 and remove a Caveat that he had unlawfully placed on the Defendant's Title without the consent of the Defendant. That the final accounts was also agreed upon. It was agreed that the Plaintiff was to recover any amounts owed to him by Mr. Francis Githui Wahome from rent for a period of Eight (8) months. The Plaintiff commenced paying rent from September 2017. The Plaintiff expressed his desire to terminate the lease for Fan Fun premises, being the suit premises. However, despite of this agreement, the Plaintiff never honoured his part of the settlement.

35. The Plaintiff out of his own volition and without any threats and or intimidation, , sometimes in April, 2017, removed all his valuable equipment from the suit premises, which was a Bar and Restaurant. The Plaintiff informed the Defendant that he needed time until after the General Elections of the year 2017 (as he was a candidate) when he would thereafter come and remove the remaining goods as well as hand over vacant possession to the Defendant. The Plaintiff removed the equipment using his own employees at the Bar and Restaurant and carried the same away using his own transport. The goods

were not removed by an Auctioneer or anyone sent by the Defendant. The Defendant never met the Plaintiff until the year 2018 when a meeting was held at the offices of M/s Muriu Mungai & Company Advocates who represented the Plaintiff.

36. At the said meeting, the Plaintiff in the presence of his Advocates agreed to remove all his goods and equipment from the leased premises, and give vacant possession to the Defendant. The Plaintiff also agreed to remove a Caveat, unlawfully and wrongfully placed on the title to the suit premises by the Plaintiff, without the Defendant's consent. The Defendant averred that it had only locked the suit premises for aimless access and security purposes to avoid vandalism. As a result, the Defendant was unable to regain possession or make use of the suit premises as the Plaintiffs goods and equipment are still in it.

37. The Defendant further averred that the Plaintiff had full access to the suit premises through a Caretaker who managed the entire building a portion/part of, which was leased by the Plaintiff, full particulars whereof were well within the Plaintiff's knowledge. The Plaintiff had neither been denied access, nor had he ever written seeking or demanding access to the suit premises, to remove the remaining goods or equipment or at all. As to Paragraph 11 of the Plaint, save as to issuing a letter of demand dated 3rd November, 2019 for rent arrears of a sum of Kenya Shillings Fourteen Million Three Eighty Three Thousand (Kshs.14,383,000/-) which was admitted, the Defendant denied the rest of the contents of the said Paragraph. The Defendant denied the contents of Paragraph 12 of the Plaint and or all the allegations set out herein verbatim and specifically traversed seriatim.

38. Further or in the alternative and without prejudice to the foregoing, the Defendant denied the allegations of:-

    a. Irregularly, forcefully and unlawfully invading and locking up the demised premises without any notice whatsoever to the Plaintiff. The Defendant averred that it was the Plaintiff who ceased operating his Bar and Restaurant and removed some of his valuable equipment leaving some in situ, without handing over vacant possession to the Defendant.

    b. Demanding the unjustified payment of a sum of Kenya Shillings Fourteen Million Three Eighty Three Thousand (Kshs. 14,384,000/=) with no backing or proof whatsoever as to the genesis of the outrageous figures after efforts by the Plaintiff to regain possession. The Defendant averred that Plaintiff ceased paying rent and had fallen into default, having failed to validly terminate his lease and or hand over vacant possession to the Defendant. The Plaintiff in this suit sought an injunction against "inter alia' from being evicted from the suit premises for purposes of maintaining its lease.

    c. Purporting to attach the Plaintiffs property to recover unjustifiable rent arrears, when the Defendant itself locked the premises for the period it claimed rent arrears and shut out the Plaintiff from occupation. The Defendant averred that no one had denied the Plaintiff access to the suit premises, the same having been secured for security purposes and to prevent vandalism as the Plaintiff ceased operations, but never removed all his goods or deliver vacant possession.

    d. Otherwise declining to give free and full access of the demised premises to the Plaintiff. The Defendant averred that the Plaintiff had full and unfettered access to the suit premises and had not been denied the same.

39. Paragraph 14 of the Plaint was denied and the Defendant averred that the Plaintiff was not entitled to any costs even if he were to succeed in this suit for want of a formal letter of demand before action. Save what was herein expressly admitted, the Defendant denied each and every allegation of fact contained

in the Plaint as if the same were expressly set out herein verbatim and specifically traversed seriatim. Paragraphs 15 and 16 of the Plaint were admitted.

40. In its Counter Claim, the Defendant repeated and reiterated the contents of Paragraphs 1 to 23 of the Defence above and Counter - Claims against the Plaintiff as follows:-

41. By a Lease agreement dated 31st December, 2011, the Defendant leased to the Plaintiff all that premises described at the First Schedule of the said Lease, being a Bar and Restaurant space on the 1st Floor of the Defendant's building erected on Sub-division No. 1696 (Original Number 612/2) Section III Mainland North, Kilifi County, being the Bar and Restaurant commonly known as Fun Fan, at Mtwapa Shopping Centre - the demised premises).

42. It was an express term and or condition of the said lease as follows:-

    a. The term would be Ten (10) years effective 1st January, 2002 and expiring on 31st December, 2009 as per the Sixth Schedule of the said Lease.

    b. The rent the rent per month payable monthly on every 5th day of the month would be:-

        i. Kenya Shillings Two Hundred and Fifty Thousand (Kshs. 250,000/=) plus VAT at 16% for the First and Second year.

        ii. Kenya Shillings Three Hundred Thousand (Kshs.300,000/=) plus VAT at 16% for the Third and Fourth year.

        iii. Kenya Shillings Three Hundred and Fifty Thousand (Kshs. 350,000/=) plus VAT at 16% for the Fifth and Sixth year.

        iv. Kenya Shillings Four Hundred Thousand (Kshs.400,000/=) plus VAT at 16% for the Seventh and Eighth year.

        v. Kenya Shillings Four Hundred and Fifty Thousand (Kshs.450,000/=) plus VAT at 16% for the Ninth and Tenth year.

    c. The Plaintiff would pay a rent deposit of a sum of Kenya Shillings Seven Hundred and Fifty Thousand (Kshs. 750,000/-) which amount could be utilized by the Defendant in satisfaction or discharge of the Plaintiffs obligations as per the lease, pursuant to the Fifth schedule of the lease.

    d. The determination of the lease and handing over would be in terms of Clause 7 of the Lease.

43. The Plaintiff had breached the express terms and or conditions of the said lease as particularized. The Defendant relied on the particulars of breach of the said terms and or conditions of the lease as follows:

    i. Failing to pay rent as expressly provided for in the lease agreement, i.e. every month in advance on or before the 5th of every month.

    ii. Paying rent irregularly or not at all.

    iii. Failing into and accumulating rent arrears.

    iv. Removing part of the goods from the leased premises but failing to hand over the leased premises as provided for in Clause 7 of the lease document.

    v. Leaving the leased premises exposed and unsecure, thus exposing the Defendant's property as well as adjoining Lessees/tenants to a risk of vandalism or theft.

vi. Failing to give any formal notice or any notice of his intentions to vacate the leased premises.

vii. Failing to formally hand over the leased premises to the Defendant.

viii. Failing to vacate and remove all his items from the leased premises.

44. The Defendant's claim as against the Plaintiff was for the arrears of rent due and owing from the Plaintiff to the Defendant, as particularized and the Defendant Counter-claims for the same.

Particulars of rent arrears

i. 1st January, 2017 to 31st December, 2017 - 12 months

@ Kshs. 350,000/= per month Kshs.4,200,000

ii. 1/1/2018 to 31/12/2018 12 months

@ Kshs. 400,000/= per month Kshs. 4,800,000

iii. 1/1/2019 to 31/12/2019 11 month

@ Kshs 400,000 per month Kshs. 4,800,000

iv. VAT@16% Kshs.13,800,000

Kshs. 2,208,000

Kshs.16,008,000

45. The Defendant also sought an order of eviction against the Plaintiff from the demised premises. The Defendant sought Mense profits against the Plaintiff being double the monthly rent from the date when the Plaintiff was notified to quit, vacate and hand over the demised premises to the Defendant, being a sum of Kenya Shillings Nine Hundred Thousand (Kshs.900,000/=) per month with effect from 1st January, 2020, until the Plaintiff handed over vacant possession to the Defendant. The Defendant sought an order that the Plaintiff does remove the Caveat placed on the Defendant's Title forthwith and in default, the Honourable Court to direct the Land Registrar at the Mombasa Lands Registry to remove the said Caveat, at the Plaintiffs costs.

46. The Defendant sought general damages arising out of the wrongly placed Caveat as contemplated for by the provision of Section 75 of the Land Registration Act No. 3 of 2012 of the Laws of Kenya. Despite demand made and notice of intention to sue having been given, the Plaintiff had failed, refused and or neglected to settle the Defendant's claims or any part thereof or at all therefore rendering this suit necessary. The Defendant averred that there was no other suit pending and that there had been no other or previous proceedings in any Honourable Court between the Defendant and the Plaintiff over the same subject matter and that the cause of action disclosed in the Counter Claim related to the Defendant named. The cause of action contained in the Counter - Claim arose in Mombasa within the jurisdiction of this Honourable Court.

47. In the long run, the Defendant prayed that the Plaintiff's suit be dismissed with costs and the Defendant's Counter Claim be allowed as prayed with costs to the Defendant as follows:-

a. A sum of Kenya Shillings Sixteen Million and Eight Thousand (Kshs. 16,008,000/=) being the rent arrears.

b. An order that the Plaintiff does quit, vacate and hand over forthwith the demised premises to the Defendant and in default an order of eviction of the Plaintiff from the Defendant's

property namely; Sub-division No. 1696 (Original Number 612/2) Section III Mainland North, Kilifi County does issue.

c. Mense profits at a sum of Kenya Nine Hundred Thousand (Kshs. 900,000/=) per month from 1st January, 2020 until the Plaintiff quits, vacates and hands over vacant possession of the demised premises to the Defendant.

d. An Order directing the Plaintiff to remove forthwith the Caveat placed on the Defendant's Title for Plot Sub-division No. 1696 (Original Number 612/2) Section III Mainland North, Kilifi County and in default, an order do issue directing the Land Registrar at the Mombasa Land Registry to remove the Caveat aforesaid, at the Plaintiffs cost.

e. General damages arising from the said Caveat, as contemplated by Section 75 of the Land Registration Act No 3 of 2012 of the Laws of Kenya.

f. Costs.

g. Interest on (a) at Court rates from 14th November, 2019 being the date of formal demand, and on (c) and (e) and (f) at Court rates from the date of Judgement until payment in full.

h. Any other or further relief(s) that this Honourable Court may deem just and fit to grant.

IV. Reply to the Statement of Defence and Counter Claim by the Plaintiff

48. The Plaintiff responded to the Statement of Defense on 19th February, 2020. He averred that:-

a. The Plaintiff joined issues with the Defendant in its Statement of Defence save where the same consist of admissions.

b. In answer to the contents of Paragraph 3 of the Statement of Defence, the Plaintiff reiterated the contents of Paragraph 5 of the Plaint.

c. The Plaintiff denied in toto the allegations made in Paragraph 4 of the Statement of Defence and averred that he diligently honored his obligation to pay rent and was in complete shock of the Defendant's unjustified claims.

d. In answer to Paragraph 5 of the Statement of Defence, the Plaintiff reiterated the contents of Paragraphs 6, 7, 8, 9 and 10 of the Plaint.

e. In further response to the contents made out under Paragraph 5 of the Statement of Defence, the Plaintiff stated that the unlawful actions of the Defendant with its agents, servants and/or persons acting on his behalf have been detrimental to his business operations and have denied him peaceful enjoyment and occupation of the lease property.

f. The Plaintiff denied the contents of Paragraph 6 of the Statement of Defence and reiterated that he had never been in rent arrears at any time during his occupation of the lease property.

g. The Plaintiff in response to the allegations made in Paragraphs 7, 8, 9 and 10 averred that he was not privy to any mediation on rent arrears that took place. Further, the Plaintiff denied entering into any agreement with the Defendant, agents, servants and/or persons acting on his behalf for payment of the alleged rent arrears.

h. In answer to Paragraphs 11, 12 and 13 of the Statement of Defence, the Plaintiff reiterated the contents of Paragraphs 7 and 10 of the Plaint and further averred that the Defendant's actions to withhold his tools of trade had occasioned his business severe loss and damage.

i. In response to the allegations in Paragraphs 14 of the Statement of Defence reiterated the contents of Paragraph 9 of the Plaint that the Defendant has declined and/or refused to grant the Plaintiff audience to address the issues at hand.

j. The Plaintiff in response to the allegations made in Paragraphs15 and 16 reiterated the contents of Paragraph 7 above.

k. In answer to the contents Paragraphs 17, 18 and 10 of the Statement of Defense, the Plaintiff reiterated the contents of Paragraphs 9 and 10 of the Plaint and further states that the Defendant had frustrated and/or thwarted the Plaintiff's efforts to peacefully gain access and retake possession of the lease property.

l. In response to Paragraph 20 of the Statement of Defence, the Plaintiff reiterated the contents of Paragraph 11 of the Plaint.

m. The Plaintiff in response to the contents of Paragraphs 21 and 22 reiterated the contents of Paragraph 12 of the Plaint and shall prove so.

n. In answer to Paragraph 23 of the Statement of Defence, the Plaintiff reiterated the contents of Paragraph 13 of the Plaint.

49. The Plaintiff also filed a Defence to the Counter Claim dated 26th February, 2020 where he averred that:

a. Save what was hereinafter expressly stated to have been admitted, the Plaintiff denied each and every allegation of fact and of law contained in the Counter Claim as if the same were expressly set out herein verbatim and specifically traversed seriatim.

b. The Plaintiff admitted the contents of Paragraphs 29 and 30 of the Counter Claim being express terms in the Lease Agreement save for the contents of Paragraph 30 (a) and stated that the Lease Agreement was effective from 31st December 2011.

c. The Plaintiff denied in toto the allegations of breach made and particularized in Paragraph 31 of the Counterclaim.

d. In response to Paragraph 32 of the Counterclaim, the Plaintiff denied the allegations made and averred that the Defendant's Counter Claim was baseless and an afterthought since the Plaintiff faithfully performed his obligations under the Lease Agreement which included but not limited to paying rent as and when it fell due, and shall so prove.

e. The Plaintiff in answer to the averments made out under Paragraphs 33 and 34 of the Counterclaim averred that he had not been in occupation of the suit premises since he was illegally evicted by the Defendant and reiterated in full the averments made in Paragraphs 7 and 8 of the Plaint.

f. The Plaintiff averred that he was a stranger to the allegations made in Paragraphs 35 and 36 of the Counterclaim.

g. The Plaintiff reiterated that this Court had the jurisdiction to deal and dispose of with the matter.

V. The testimonial evidence by the Defendant

50. On 23rd February, 2023, the hearing for the Defendant commenced whereby he summoned two witnesses – the DW 1 and DW – 2. DW – 1 was stood down to testify on 27th April, 2023. He testified as follows:-

A. Examination in Chief of DW - 1 by Mr. Njoroge Advocate

51. DW -1 was sworn and testified in English language. He identified himself as Dr. David Mwangi Wahome. He told the court that he was born on 28th April, 1977. He lived in the County of Nairobi, the estate of South C. He was a business man. He recorded a witness statement dated 5th February, 2020. He also filed a Supplementary statement and list of documents dated 16th January, 2023 which he produced as Defendant Exhibit No. 1 to 11 dated 5th February, 2020 and Defendant Exhibit No. 12 dated 16th January, 2023. He was one of the directors of Frann Investments Limited.

52. He reiterated that he was testifying on behalf of the Defendant based on the Board Resolution, signed on 29th July, 2019 by the three (3) directors; Francis Wahome (deceased), David Mwangi Wahome and Edward Wahome. The company had a tenancy agreement with James Mwangi Wambui. He referred to page 4 and stated that on 31st December, 2021 which was an executed lease and registered. Pages 4 to 38 were terms and conditions stipulated thereof. There was non- payment of rent from 1st January, 2017 to 1st December, 2019; prior to that he had defaulted and they brought mediation.

53. He told the court that on 28th December, 2016, they entered into an agreement with the tenant. It was done by a mediator (page 40). His claim was for a sum of Kenya Shillings Ten Million Four Hundred and Fifty Thousand (Kshs, 10,450,000/-) i.e. to have paid his father, Francis Wahome and rent claimed was for a sum of Kenya Shillings Eight Million Seven Sixty Six Thousand Eight Hundred (Kshs. 8,766,800/-). By now his father had started having dementia.

    There were two properties:-

    a. Mtwapa and Port Reitz; he had opted to terminate the lease on his business and was not doing well. This was captured in the mediation agreement.

54. DW – 1 stated that as of December 2016, the issue had been resolved. The debt of a sum of Kenya Shillings One Million Six Eighty Three Thousand Two Hundred (Kshs. 1,683,200/-) was recovered from the property situated at Port Reitz within the County of Mombasa. The mediation agreement was signed by his brother. After this date, he was supposed to have vacated. There was no harassment by him. They wrote to the Plaintiff through their advocate; they expected him to vacate but he never vacated. He declined to do so compelling him to instruct their the lawyers to do the letter. He still stayed on. He held that the lawyers Mungai Muiru Advocate were on vacation. In January 2022 he continued with the tenancy allegedly it was still to expire. It was in May 2022 after he received a court order that the Plaintiff purportedly vacated the premises.

55. He told the court that they had never sent any auctioneers to harass the Plaintiff. They had never been summoned by the police nor a letter that they used to harass him. They had never harassed him. The matter had been subjected to mediation; they would agree then the Plaintiff would go back on his word. When referred to the Counter Claim at page 51 the Defendant stated that from January 2017 to December 2019 they were claiming a sum of Kenya Shillings Sixteen Million Eight Thousand (Kshs 16,008,000/-). They never had any payment receipt for the amount owed. They never locked the premises, the Plaintiff only removed the items out in April 2017. They got a tenant, a bank, they stated complaining of the misuse of the premise. People were helping themselves for short and long

calls. During the period, they were not able to use the premises. There were huge canopies and gypsum until the court ordered the Plaintiff to remove them. He recalled that the matter was in court on 16th February, 2021 before Hon. Justice Munyao Sila.

56. He told the court that on a later date it was agreed that the tenant removes the fixtures. He was to ask his people to remove them. But the Plaintiff failed to do so until the year 2021. The tenant vacated the premises in May 2022; on 15th March, 2022 the previous day the Plaintiff got them to meditate the matter. They met at Acacia Hotel, deliberated on the matter and the Plaintiff indicated that they should resolve the matter. The deliberated on the arrears. They agreed on a sum of Kenya Shillings Seven Million (Kshs. 7,000,000/-) as the gave him a discount. The Plaintiff offered to pay in monthly installments of a sum of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/-) and the last amount of a sum of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000/-). The Plaintiff wanted them to pay the lawyer; they drew up a consent. It was to be filed in Court but they could not agree. He agreed that he owed them rent and that is why they came to court. They asked for the payment of mense profits as he continued to stay in the premises even after he had been ordered to vacate.

57. He told the court that they were praying for the removal of the caveat which he put without their knowledge which was yet to be removed. He was also claiming the costs and interest. Family bank are on the first floor while the Plaintiff was on the ground floor. They were co-existing.

B. Cross examination of DW - 1 by Mr. Gachie Advocate

58. He reiterated that he did not know when the company was incorporated. He did not have any document to show that he was a director in the Defendant company although he had authority to testify by the other directors through a resolution. The dispute arose from failure to pay rent by the Plaintiff. The lease agreement was signed between his father and the Plaintiff; he had a chance to read the lease agreement. The lease agreement was for a period of 10 years. It did not contain a termination clause. At paragraph 20, it was correct to say that the amount in arrears was a sum of Kenya Shillings Fourteen Million Three Eight Three Thousand (Kshs 14,383,000/-), the Plaintiff had not paid. They had brought some receipts; his father out of his age asked them to forego the amount hence they were not claiming the entire amount. They had stated that he had overpaid.

59. He stated that its correct in December 2016, when he alleged he was in rent arrears but the Plaintiff had actually overpaid. It's his father that had received the rent (Page 40). Technically he was paying rent together with the VAT; they issued him receipts upon the payment of the rent. They were claiming a sum of Kenya Shillings Eight Million Seven Sixty Six Thousand Eight Hundred (Kshs. 8,766,800/-) for him to claim VAT the tenant would require receipts. They sat down and confirmed that they holding his a sum of Kenya Shillings One Million Six Eighty Three Thousand Two Hundred (Kshs. 1,683,200/-) as he had over paid.

60. He told the court that at page 40 of the Defendant's documents ; the Plaintiff was not just a tenant at Mtwapa but also at the Port Reitz premises. It had been expressed desire to terminate lease pertaining to the FAN FUN premises subject to lease condition which was a fixed lease. From page 40, it never stated when the lease would terminate. After they left the Court and (they) FAN FUN Investment closed the premises, by his late brother. He was the one who locked the premises which was later removed by an order from Justice Munyao Sila.

61. He told the court that the removal of the lock was by the Court so that the items could be removed from the premises; he had knowledge that the Plaintiff complained of interference of his tenants by the landlord. There was no truth in that aversion and that they placed the lock. He removed his items,

tables, chairs, crates from the premises. When all this was happening he was not there. The Plaintiff had vacated the premises/ moved his movables; he agreed that the removal of these items; never amounted to the termination of the lease.

62. When referred to the lease at page 11, he stated that it did not provide for termination of lease. It was a clause of repossession. Under Clause 9, was a provision for forceable efforts to claim rent through writing correspondence. He mentioned the caveat was registered; he did not know whether registered to secure his 10-year lease or not. They never frustrated him because of the caveat registered. In his Counter Claim, he was claiming a sum of Kenya Shillings Sixteen Million Eight Thousand (Kshs. 16,008,000/-) being the rent arrears.

63. He told the court that the agreement never stated or admitted with the Counter Claim. The Plaintiff was a tenant in some other premises but which the lease never made reference to this. According to him based on the order by Justice Munyao, the Plaintiff went and removed all the items from the premises. In May 2021 the Plaintiff removed the counter, kitchen hoover and few other items but left the gypsum. He was not there when the Plaintiff was removing the items. He would agree that these items were subject for wear and tear. He was aware some of these items would be subject to wear and tear.

64. The Plaintiff left the kitchen gypsum, which he removed; they considered it as his property. They never levied for distress they would only do it if there were rent arrears.

C. Re - examination of DW - 1 by the Mr. Njoroge Advocate

65. He told the court that at page 40 they were claiming a sum of Kenya Shillings Eight Million Seven Sixty Six Thousand Eight hundred (Kshs. 8,766,800/-). There was an advanced loan of a sum of Kenya Shillings Ten Million Four Fifty Thousand (Kshs. 10,450,000/-). It was money given to the Plaintiff by DW – 1's father. The tenant was being given credit of a sum of Kenya Shillings One Million Six Eighty Three Thousand Two Hundred (Kshs. 1,683,200/-). From there would be no more rent arrears; they agreed to offset these amount for rent for the premises situated at Port Reitz rent of a sum of Kenya Shillings One Ninety Nine Thousand Six Sixty Hundred (Kshs. 199,660/-) subject to confirmation. The tenant wanted the order for injunction; there was no order for opening the premises. The effect of the notices was that they shall not be renewing the lease agreement. The Defendant closed his case on 27th April, 2023.

VI. Submissions

66. On 27th April, 2023 after the closure of both the Plaintiff's case and the Defendant's case, in the presence of all parties, the Honourable Court directed that there be written submissions within a stringent timeframes. On 3rd July, 2023 after the Honourable Court confirmed compliance of this direction, it reserved delivery of Judgment on notice accordingly.

A. The Written Submission by the Plaintiff

67. The Plaintiff through the Law firm of Messrs. Gachie Mwanza & Co. Advocates filed their written submissions dated 23rd May, 2023. Mr. Gachie Advocate commenced his submission by providing the Court with an introduction and brief facts of the case initiated by the Plaintiff herein, He informed Court that the suit was brought by the Plaintiff vide a Plaint dated 19th November 2019 seeking for the orders in a nutshell to wit:-

    a. Spent.

b. General damages for derogation from grant and Unlawful Constructive Eviction.

c. Claim for reimbursement of the value of Goods Detained.

68. The Learned Counsel stated that the cause of action herein arose from a breach of covenant whereby vide a Lease made on 31st December 2011, the Defendant demised to the Plaintiff a Restaurant Space on the first floor comprised in the building erected on the suit demised property for a term of Ten (10) years commencing the 1st January 2012 and which Lease was prematurely terminated.

69. Under the Tenth Schedule, Clause 5 of the lease,(Page 35 of the Plaintiff's Bundle) the Defendant covenanted with the Plaintiff ensuring that he shall have quiet enjoyment of the demised property as against the Defendant and all persons claiming under or in trust for the Defendant provided he observed his covenant which he did and so confirmed at the trial. The Plaintiff occupied the demised premises for the purpose of his restaurant and bar/club business and had been a faithful and diligent tenant who had carried on business peacefully on the same since occupation and had always performed his rental obligations and other covenants under the Lease Agreement, which obligations included but were not limited to paying rent as and when it fell due. In the course of time, the Plaintiff incurred a substantial amount in terms of extensive renovation of the premises. However, sometimes the said peaceful occupation was widely interrupted due to conflicts between the directors of the Defendant (Father and sons),who each wanted to control the rent.

70. The Learned Counsel submitted that the harassment culminated into the Defendant with its agents, servants and/or persons acting on its behalf without any justifiable cause or excuse irregularly, forcefully and unlawfully invading the suit property on various occasions demanding money, failing to issue receipts and eventually constructively evicted the Plaintiff by restricting occupation thereof and locked up the premises and detained the Plaintiffs tools of trade including but not limited to chairs, tables, TV Screens, counter bars and gypsum ceiling, claiming that the Plaintiff was in rent arrears, which turned out at trial that was never the case and indeed the Plaintiff had by that time of closure overpaid rent to the tune of a sum of Kenya Shillings One Million Six Eighty Three Thousand Two Hundred (Kshs.1,683,200/-).

71. The Defendant through its Advocates, wrote a Demand Letter to the Plaintiff on 3rd October 2019 demanding the Plaintiff to pay ret arrears amounting to a sum of Kenya Shillings Fourteen Million Three Eighty Four Thousand (Kshs.14,384,00/=) within 10 days which debt is unknown to the Plaintiff as he had been diligent in paying his rent as and when due and had not been in occupation since the year 2016 and the rent been claimed was for the years 2017-2019 and which provoked the filing of this suit as all efforts to reason with the Defendant to reopen had failed. The Plaintiff was deprived of the opportunity to use the suit premises for the use intended and carry out his business of operating the restaurant and was forced to look for alternative premises at a great loss, and he no longer desires to occupy the premises and by the year 2021,by consent in court, an order was made for him to remove his items. Therefore, in the circumstances, the Plaintiff sought for reparation in form of 'inter alia' General Damages from Derogation of Grant and Unlawful Constructive Eviction as pleaded in the Plaint. Though a court order made on 16th February 2021, the Plaintiff was allowed to collect his goods but which had been damaged and were beyond repair and they all went to waste as a matter of fact. That was all on facts.

72. On the main submissions, the Learned Counsel framed the following two (2) broad issues of the determination by the Honourable Court. These are:-

73. Firstly, on the issue of whether the Defendant's actions amount to Unlawful Constructive Eviction, the Learned Counsel averred that the facts giving rise to this suit was to a large extent not disputed and

also fairly straight forward. The parties herein entered into a Lease Agreement on the 31st December 2011 which was to run for a period of ten (10) years from 31st December 2011 to 31st December 2021. The Plaintiff had always met his rent obligations inclusive of VAT promptly until 2016, which was undisputed from the documents produced by the Plaintiff as exhibits, when the Defendant with its agents, servants and/or persons acting on its behalf without any justifiable cause or excuse irregularly, forcefully and unlawfully invading the suit property and constructively evicted the Plaintiff by restriction of his occupation thereof and locked up the premises detaining the Plaintiffs tools of trade. They admitted this in evidence and further admitted at this time the Plaintiff had overpaid rent. As such the landlord acted unlawfully.

74. To buttress on this point, the Learned Counsel relied on the case of:- "Gusii Mwalimu Investment Co. Limited – Versus - Muahimu Hotel Kisii Ltd [1996]eKLR" where the Court of Appeal while addressing the right of a landlord to re-entry had this to say:-

> " To obtain possession by carrying out illegal distress is per se wrong....if what the landlord did in the case is allowed to happen we will reach a situation where the landlord will simply walk into the diminished premises exercising his right of re-entry and obtaining possession extra-judicially. A court of law cannot allow such state of affairs whereby the law of the jungle takes over. It is a trite law that unless a tenant consents or agrees to give possessions, the landlord has to obtain all orders from a competent court or statutory tribunal (as appreciate) to obtain an order for possession".

75. Further, the Leraned Counsel cited the case of "'Teresia Irungu – Versus - Jackton Ocharo & 2 others [2013] eKLR" the court held that where a tenant does give up possession or agrees to leave the premises, the landlord ought to obtain a court order for possession of the premises by stating that;

> " I am in agreement with the Plaintiffs advocate's submission that the Plaintiffs tenancy could only be terminated after following the due process. It was not open to the proprietors of the suit premises to evict the Plaintiff from the suit premises through the levying of distress. Even if the Plaintiff had sub - let the suit property to Wambui Maina who had in turn sub-let the same to other persons which is very likely in the circumstances of this case, the proprietors of the suit property had to take appropriate legal proceedings for the eviction of the said Wambui Maina and her sub-tenants.... In the circumstances, I am inclined to agree with the Plaintiff and Wambui Maina that the Plaintiff was actually evicted from the suit premises. Since the proprietors of the suit premises did not obtain a court order for possession, the Plaintiff's eviction from the suit premises was illegal."

76. From the above cited authorities, the Learned Counsel contended that a Landlord, as the Defendant did, could not forcefully take possession of its premises without first obtaining a court order from a competent court or tribunal and it was pertinent to note that that the Defendant herein never obtained a Court order prior to evicting the Plaintiff. In the absence of a court order, the Defendant actions were blatantly illegal, a criminal activity and in total disregard of the law thereby depriving the Plaintiff of his possession and disrupted his business leading to its eventual death. It was the Learned Counsel's submission that the Plaintiff indeed was unlawfully evicted the Plaintiff and suffered massively.

77. Secondly, on whether the Plaintiff was entitled to general damages for derogation from grant, the Learned Counsel submitted that it was common ground that the parties herein had entered into a Lease Agreement dated 31st December 2011.The said Lease Agreement was duly executed by both the

Plaintiff and the Defendant. That Lease Agreement having been entered into voluntarily bound the two parties. The Tenth Schedule, Clause 5.1 of the Lease Agreement provided as follows:

> 5. Quiet Enjoyment
>
> 5.1 To permit the Lessee paying the rent hereby reserved and performing and observing the covenants agreements conditions restrictions stipulations and provisions herein contained or implied and on its part to be performed and observed peaceably and quietly to possess and enjoy the Demised Premises during the Term without any interruption from or by the Lessor or any person rightfully claiming from or under it.

78. The Learned Counsel argued that this was the provision that guaranteed the Plaintiffs quiet and peaceful possession of the demised premises for the duration of the lease. However, the Defendant on or about December 2016 initiated a campaign of harassment against the Plaintiff by making requests for rental payments that were not specified in the Lease Agreement. Despite the Plaintiffs refusal to comply with these demands, the Defendant persisted in making unreasonable demands for rent payments to be made directly to the individual directors, each of whom had their own separate demands and neither was willing to issue receipts, which in turn would have entitled the Plaintiff to seek VAT Refund and the taxman was on his neck.

79. The harassment culminated in the Defendant, with its agents, servants, and/or persons acting on its behalf, irregularly, forcefully, and unlawfully invading the suit property and constructively evicting the Plaintiff by restricting occupation thereof and locking up the premises and detaining the Plaintiff's tools of trade, including but not limited to chairs, tables, TV screens, counter bars, and gypsum ceiling, without any justifiable cause or excuse at a time when he had paid all his rent even in advance to the tune of over a sum of Kenya Shillings One Million (Kshs. 1,000,000/-). Vide a court order made on 16th February 2021, the Plaintiff was allowed to take possession of his goods. Regrettably, upon inspection the Plaintiff discovered that the aforementioned goods had sustained irreparable damage. Further it was pertinent to note that the Lease Agreement herein did not contain a Termination Clause and as such the Defendant could not unilaterally terminate the said lease mid-term and it was meant to expire on time lapse.

80. The Learned Counsel's assertion was supported by the case of:- "Kenya Commercial Bank Limited – Versus - Popatial Madhavji & Another [2019] eKLR", where the Court of Appeal held that:-

> "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 ambits 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."

81. Likewise, he referred Court to the case of:- "Chimanlal Meghji Naya Shah & Another – Versus - Oxford University Press (EA) Limited [2007] eKLR", Hon Warsame (as he was then) held as follows;

> "...In my view where there is no termination clause and the lease is terminated before its period of expiry, the situation that obtains is a breach of a contract. Where the parties are not regulated by their lease agreement as to the nature and mode of notice, if the lease is

terminated by either party, then the party offended is entitled to damages for breach of contract. In essence my position is that a lease agreement properly registered is a form of a contract and therefore when there is a default, the terms of breach of a contract aptly apply."

82. Further, the Learned Counsel submitted that it was clear from the facts of this suit that the Plaintiff failed to get quiet enjoyment of the demised premises as the Defendant unlawfully evicted him from the demised premises which amounts to derogation from the terms of the Lease Agreement herein. At no time did he offer to vacate outside the contract. On this issue, the Learned Counsel placed reliance on the case of: "Hort Limited – Versus - Attorney General [2016] eKLR", where the court awarded a sum of Kenya Shillings Five Million (Kshs. 5,000,000.00/=) for general damages and held thus:

> " Damages are pecuniary recompense given by process of law to a person for the actionable wrong that another has done to him."
>
> 96. Having established an actionable wrong by the defendant as against plaintiff, it then follows that the plaintiff is entitled to recompense for the damage, loss or injury that it suffered. In the case of Stroms - Versus - Hutchinson [1905] AC 515 it was held that general damages are such as the law will presume to be the direct, natural or probable consequence of the act complained of.
>
> 97. To add to this, it is noteworthy that general damages are compensatory in nature in that they should offer some satisfaction to the injured Plaintiff. Given the totality of evidence in this case and the fact that the Plaintiff was able to illustrate that there was breach of contract due to the conduct of the defendant, I am of the opinion that the award of Kshs 5,000,000/- would be sufficient as an award for general damages to adequately compensate the plaintiff for the breach of the lease agreement.

83. Further, the Counsel cited the case of:- "Mattarella Limited – Versus - Michael Bell & another [2018] eKLR" the Court awarded the Plaintiff damages in the sum of Kenya Shillings Two (2) Million (Kshs. 2,000,000/-) and held as follows:

> " While the Defendants were not specifically levying distress for rent, what they sought to do and actually did was to take possession by use of the law of the jungle. That must be, as has always been, frowned upon by the courts. Not only frowned upon but equally remedied by award of damages so that everybody seeking to live within the territory of Kenya, a county whose citizens have chosen to be led by the rule of law, gets to know, if one be otherwise under some illusion, that arbitrariness and or just impunity is not a virtue but a vice. Vice cannot be countenanced but must be curtailed and discouraged…"

84. Additionally, the Learned Counsel argued that it was on the above persuasive argument that we urge this Honourable Court to award the Plaintiff General Damages as prayed in the Plaint. Therefore, the Counsel submitted that the wheels of justice tilted in the favor of the Plaintiff and this Honourable Court be guided by the persuasive authorities cited herein and award the Plaintiff General Damages for derogation from grant and Unlawful Constructive Eviction and the assessment of the same would be, such as the law will presume to be direct, natural or probable consequence of the ac complained of. The act complained of was premature termination of lease and the loss of business. If the Plaintiff was capable of paying the rent amount comfortably, it would in essence mean the business was doing well and earning him more as to retain profit and to raise the rent. As such, at the lowest, the rental amount for the unexpired term of lease would be a good measure of general damages. The lease was terminated

while the Plaintiff still had five (5) more years to go and within which period he would have paid a total of sum of Kenya Shillings Twenty Four Million Six Hundred Thousand (Kshs. 24,600,000/-) as per clause 1(c),(d) and (c) of the third schedule on rent at page 30 of the Lease. This was a loss the law would presume as stated in the case of "Hort Limited (supra)".

85. Further, the Learned Counsel argued that the business was disrupted, property detained and became of no use and the Plaintiff suffered loss of business. A business that was generating rent on time to afford the Plaintiff paying in advance over a sum of Kenya Shillings One Million Six Eighty Three Thousand (Kshs. 1,683,000.00/=) was to say the least, a successful business. The Learned Counsel urged the court to award damages for the lost items to the tune of the value of the development made in the premises which as testified by PW - 2 was the sum of Kenya Shillings Twelve Million Eight Fourty Seven Thousand Three (Kshs. 12,847,350/-). On the profit lost by disruption of the business, the Learned Counsel submitted that the rental amount as basis for calculation of expected profits thus submit for an award of a sum of Kenya Shillings Sixty Two Million Fourty Seven Thousand Three Fifty Hundred (Kshs. 62,047,350/-) in general damages made up as follows:

   i. General Damages for derogation from grant - Kenya Shillings Twenty-Four Million Six Hundred Thousand (Kshs. 24,600,000/-).

   ii. Damages for unlawful constructive eviction - Kenya Shillings Twenty Four Million Six Hundred Thousand (Kshs. 24,600,000/-).

   iii. Reimbursement of the value of Goods detained – Kenya Shillings Twelve Million Eight Fourty Seven Thousand Three Fifty Hundred (Kshs. 12,847,350/-).

B. The Written submission by the Defendant

86. The Defendant herein through the Law firm of Messrs. Njoroge and Katisya Advocates filed their written submissions dated 21st July, 2023. Mr. Njoroge Advocate commenced his submissions by providing a an introduction and a brief background of the case. He stated that a tenant in occupation could not escape from the obligations to pay contractual rent. The Defendant's response to the Plaintiffs suit was to Counter-claim for rent arrears of a sum of Kenya Shillings Sixteen Million Eight Thousand (Kshs.16,008,000/-). The Defendant maintained that so long as the Plaintiff was a Tenant in occupation of its premises, he ought to pay the rent stipulated in the lease. The Defendant denied evicting the Plaintiff from the leased premises, constructively or otherwise. As the Plaintiff was not paying any rent, the Defendant served him with a notice to terminate the lease. Therefore the Defendant Counter - Claims for mense profits. The Defendant also sought for an order of eviction, which was overtaken by orders issued within the suit by Honourable Justice Sila Munyao on 16th February, 2021. An order for removal of a caveat placed on the title as well as damages arising thereof is also sought. The stated that the Waswahili had a saying that went thus:- 'dawa ya deni ni kulipa'. Thus, according to him, the Plaintiff could not run away from this obligation, to pay rent which is a debt due. The Plaintiffs claim was made up of smoke and mirrors and contains no valid claim against the Defendant.

87. The Learned Counsel submitted that on the Defendant' case, the Defendant entered an appearance to the suit and filed an Amended Statement of Defence and Counter - Claim Amended on 5th February, 2020. At the trial, the Defendant relied on the witness Statement of one David Mwangi Wahome dated 5th February,2020 and the Supplementary Statement dated 16th January, 2023. The Defendant produced the documents set out in the Defendant's list of documents dated 5th February, 2020 as exhibit No.1 to 11. The Defendant also relied upon the document attached to the Supplementary Statement of David Mwangi Wahome dated 16th January, 2023 as exhibit No. 12.

88. According to the Learned Counsel, the brief facts of the case were that the Plaintiff and the Defendant enjoyed the relationship of a Lessee and a Lessor in respect of a business premises situate at the Defendant's property in – demised suit premises. The Plaintiff had opened and was running a Bar and Restaurant known as Fun Fun, at the suit premises. The Plaintiff came to Court with grievances that he had been locked out by the Defendant.

89. The Defendant's response was that the Plaintiff had closed down it's Bar business and partially removed some of its goods. The Plaintiff had refused to either pay rent or hand over vacant possession of the premises. The net effect was that the Lessor could not gain any income by way of rent from the Lessee. The Lessor could not let out the premises to any person. This was the situation that prevailed from January 2017 until October 2019 when a demand letter was sent to the Lessee. It was this demand letter which was in effect a termination notice as well as a demand for rent arrears, that triggered the Plaintiff to file this suit on 21st November, 2019. The Honourable Court was therefore called upon to determine either that the Plaintiff was evicted and was entitled to damages, or that he simply failed to comply with the lease and ought to settle the rent arrears claimed.

90. For his submissions, the Learned Counsel raised the following (8) issues to be considered for its determination by the Honourable Court. These were:-

91. Firstly, on whether the Plaintiff was evicted from the leased premises by the Defendant. The Learned Counsel averred that the starting point was the lease document dated 31st December, 2011 which provided for a term of Ten (10) years commencing 1st January, 2012 and expiring on 31st December, 2022. The Plaintiff was operating a Bar and Restaurant in what was described as a Lounge Bar and a fairly upmarket establishment. The Plaintiff complained of harassment that led to the premises being locked up by sons of the Director of the Defendant. There was not even an iota of evidence, by way of demand letter, cease and desist letter from a lawyer or a police abstract from Mtwapa Police Station, regarding any form of harassment. There was not even one independent eye witness to the harassment be either the Bar Manager, the supervisor, waitress, security guard or a patron. The Plaintiff would want the Honourable Court to believe that he was locked out of his multi million shillings investment and he took no action from December 2016, until he filed this suit on 21st November, 2019, a period of about Three (3) years later.

92. The Learned Counsel argued that the Plaintiff closed down Fun Fun Bar and Restaurant. The Defendant's version of the story was credible and aligned with the reality. DW - 1 testified that the Plaintiff was vying in the General election of 2017 and hence he closed down the bar. There was a mediation that had taken place on 28th December, 2016 whereby the Plaintiff had agreed to terminate the lease. See page 40 of the Defendant's List of documents. The Plaintiff partially removed some of his goods voluntarily, but left other items. As for the Family Bank, Mtwapa Branch was leasing the premises downstairs (Fun Fun was upstairs) the Bank complained of insecurity, as the Plaintiff had ceased operations and disappeared. The doors were locked for safety, but the Plaintiff all along had access to the premises, through the caretaker to the premises. It was instructive that the Plaintiff did not have to get a Court order to gain access to the premises to remove the rest of his goods, meaning all along he had access to the premises. Had the Defendant kicked out the Plaintiff, it was doubtful that the Plaintiff would have kept quiet for three (3) good years. The Honourable Court had a chance to see the two parties in Court and weigh on their demeanor. The most probable story was that the Plaintiff wanted to vacate, remove some of his goods after closing the Bar business, but left a lot of other things in the premises. Then the Plaintiff shifted his focus to politics and the general election of 2017, and never given vacant possession. The Learned Counsel humbly submitted that there was no evidence that the Plaintiff was evicted, constructively or otherwise.

93. Secondly, on whether the Defendant was in breach of the lease as pleaded in the Plaint, the Learned Counsel submitted that the Plaintiff had not addressed or framed this issue in his closing submissions. Nevertheless, the Learned Counsel submitted that there was no proof that the Defendant irregularly, or by use of force, invaded and locked up the premises. The arrears of rent demanded by the Defendant as a Lessor were justified and subject to proof in this suit. As the lease document provided for payment of rent, demanding such rent arrears cannot be said to be a breach of the same lease. There was no proof that the Defendant by way of a distress for rent, attached or proclaimed, any of the Plaintiffs goods at any time and the intention to levy distress (which distress was never levied) was communicated by a lawful letter of demand from a Counsel. Distress for rent was a valid legal remedy availed to a landlord to recover rent arrears, it could not be said to be a breach of the lease. There was no evidence led to show the Defendant declined to give the Plaintiff free and full access to the suit premises. The Learned Counsel submitted that the Plaintiff had not proved any breach of the covenants contained in the lease, which breach had to be specifically pleaded and proved by way of evidence.

94. Thirdly, on whether the Plaintiff was entitled to damages for derogation from the grant and unlawful constructive eviction, the Learned Counsel submitted that since the Plaintiff was not evicted by the Defendant, the claim for damages could not succeeded. In any event the Plaintiff could not seek to quantify its claim on the basis of unpaid rent, for the remainder of the term, as the rent benefits the Defendant and not the Plaintiff. The assessment of a sum of Kenya Shillings Twenty Four Million Six Hundred Thousand (Kshs.24,600,000/=) for derogation from Grant and the said amount of a sum of Kenya Shillings Twenty Four Million Six Hundred Thousand (Kshs. 24,600,000/=) for damages for constructive eviction was double claims for one and the same head of damages, and in any event was exaggerated. The claim for reinstatement of the value of the goods detained could not succeed as there was no proof of any goods detained. In any event this was a special damages. It was a claim whose value would have been known at the time of filing the suit and could not be sprung at the submissions stage. As the same was not specifically pleaded, it ought not to be granted.

95. The Learned Counsel urged the Honourable Court to follow and adopt the decision of Honourable Justice E. C. Mwiti in the case of:- "Kenya Women Microfinance Ltd – Versus - Martha Wangari Kamau [2021] eKLR". At paragraphs 60 to 63 of the decision, the Honourable Court cited the current legal position as regards awards of general damages arising out of breach of contract as follows,(underlined emphasis ours);

> 60. The trial court awarded general damages for breach of obligation in relation to the Respondent's loan account and duty of care when the motor vehicles were sold. The law is that general damages are not awardable for breach of contract or breach of contractual obligations. A contract for performance of specific duties or obligations, if breached, would lead to compensation for the specific loss suffered as a result of the breach, but not general damages.
>
> 61. In Kenya Tourist Development Corporation – Versus - Sundowner Lodge Limited (supra), the appellant had agreed to give the respondent a loan of Kshs, 15,000,000 for construction of a hotel. However, the appellant unilaterally withdrew that offer. The respondent filed a suit claiming general damages of Kshs. 421,760,000 in the form of opportunity costs and loss of business following breach of contract. The High court awarded general damages of Kshs. 30,000,000 for breach of contract. On appeal, the Court of Appeal held that as a general rule, general damages are not recoverable in cases of alleged breach of contract. Damages for breach of contract are compensation to the aggrieved party and a restitution of what he has lost by the breach.

62. In Dharamshi – Versus - Karsan [1974] EA 41, it was held that general damages are not awardable for breach of contract in addition to the quantified damages as it would amount to a duplication. And Securicor Courier (K) Ltd – Versus - Benson David Onyango & another [2008] eKLR, the Court of Appeal reiterated that general damages are not awardable for breach of contract. (See also Provincial Insurance Co. EA Ltd – Versus - Mordechai Mwanga Nandwa, (KSM Civil Appeal No 179 of 1995,)

63. The above decisions affirm the position that what is suffered or is believed to have been suffered, the damage that is to be compensated by way of damages, can only be known by the party and it is claimed in specific terms which has to be proved.

96. The Learned Counsel submitted that similarly a claim for general damages arising out of an alleged breach of contract would not apply to this suit. The injunction could not be sustained when the Plaintiff had already vacated pursuant to the order of this Honourable Court made on 16th February, 2021 by Honourable Justice Sila Munyao, by consent. General damages could not issue for a party who holds onto a lease without payment of rent and falls into arrears thereof. The Plaintiff had not pleaded to be relieved of his obligations under the Lease. There existed a lease agreement which provided that the Plaintiff payed rent to the Defendant for the next Ten (10) years (see the Third Schedule to the Lease Clause 1(a) to (e) at page 33 of the Defendant's list of documents). The only way the Plaintiff could escape this obligation was to plead frustration and seek orders to be relieved from the obligations set out in the contract.

97. The Learned Counsel relied upon the case of:- “National Bank of Kenya Ltd – Versus - Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR” (copy highlighted and attached at pages 25 to 29 of these submissions). It was a unanimous decision of the Court of Appeal which stipulates that parties are bound by their own contracts, which they bargained for (underlined emphasis theirs);

> “ A Court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”

98. This has been adopted in “Pius Kimaiyo Langat – Versus - Co-operative Bank of Kenya Limited [2017] eKLR” (copy attached and highlighted at pages 30 to 44 of these submissions). The Court of Appeal restated this position once more as follows;

> “ We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved. See National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd [2002]2 EA 503. The primary task of the court is to construe the contract and any terms implied in it. See Megarry, J. in the case of Coco vs A. N. Clark (Engineers) Ltd. - [1969] RPC 41.”

99. This position has been adopted by Honourable Justice D.O Ohungo in “Jomo Kenyatta of Agriculture and Technology – Versus - Kwanza Estates Limited [2022] eKLR.”

100. The Plaintiffs claim was made up of smokes and mirrors. The Plaintiff called PW - 2 Patricia Muthoni Kangethe to show that it had spent a colossal amount Kenya Shillings Twelve Million Eight Hundred and Forty-Seven Thousand Three Hundred and Fifty (Kshs.12,847,350/=) in renovating the premises into an upmarket Lounge Bar. Yet there was no specific claim pleaded for the refund of this amount by way of special damages, in the Plaint. It remained a figure and evidence thrown before the Honourable Court, without a corresponding claim for special damages. There was no specific claim laid before the

Honourable Court for any losses that can be calculated, for the period when the Plaintiffs alleges the premises were closed. This was an upmarket Lounge Bar and Restaurant, so it must have been making sales. No audited accounts were presented or at least records of any sales. If the Plaintiff's claim was that its goods were withheld and kept away from him by the Defendant, there were no particulars of such detained goods pleaded. Therefore, the Plaintiffs claim was somewhat curious, he claimed to have moved to an alternative premises, but never provided proof of rental payments. The Plaintiff was triggered into action by the demand letter dated 3rd October, 2019 threatening distress for rent (see paragraph 9 of the Plaint). He rushed to Court seeking for an injunction, but no other specific reliefs that could be awarded.

101. Fourthly, on the issue of whether the Plaintiff was in breach of the lease agreement as pleaded in the Counter-claim. The Learned Counsel contended that this issue revolved around the facts whether the Plaintiff paid his rent to the Defendant as per the lease. There was no evidence of the Plaintiff terminating the lease or giving vacant possession to the Defendant. His obligation to pay rent hence remained. Clauses 3, 5.7, 5.8, 5.9,17.1 and the Third schedule of the lease stipulated the obligations to pay rent and any arrears thereof. (See pages 8,10,14 and 33 of the Defendant's List of documents). On the issue of handing over of the leased premises, clause 7 of the Second schedule of the lease is very elaborate. There had to be a formal inspection, repairs and renovations and handing over. (See pages 21 to 22 of the Defendant's List of documents). The Plaintiff never handed over the leased premises in strict compliance with the lease. The Learned Counsel submitted that the failure by the Plaintiff to act in strict compliance with the lease document, meant that he was in breach of the same.

102. Fifthly, on the issue of whether the Defendant had proved its claim for rent arrears of a sum of Kenya Shillings Sixteen Million Eight Thousand (Kshs. 16,008,000/=), the Learned Counsel submitted that DW - 1 explained that after the prior accounts were settled through a mediation on 28th December, 2016, there was no other rent paid by the Plaintiff. From 1st January, 2017, the Plaintiff as a Lessee was starting on a clean state on the issue of rent, but never paid any rent thereafter. The claim for rent arrears was from 1st January, 2017 to 1st December, 2019 as per the statement of accounts attached at page 51 of the Defendant's List of documents. The Plaintiff had no answer to this statement and never claimed that he had paid any rent to the Defendant during this period.

103. Sixthly, on whether the Plaintiff was still in occupation after January 2017. The Learned Counsel asserted that the evidence adduced was that the Plaintiff removed some of his items and retained others, such as the fixtures he had built into the premises, like the tiles, gypsum ceilings, kitchen hood canopy etc. The Defendant could not let or lease the premises while such goods belonging to the Plaintiff were still in situ. The Plaintiff failed to adhere to the terms of the lease and restore the premises to their original state when initially let.

104. Plaintiff sought an injunction to sustain his occupation. At paragraph 13 of the Plaint, the Plaintiff pleaded that he no longer desired to occupy the suit premises and pleaded as follows:-

> " By reason of the matters aforesaid the Plaintiff was deprived of the opportunity to use the suit premises for the use intended and carry out his business of operating bis restaurant and was forced to look for alternative premises at great loss and no longer desires to occupy the premises, and prays that be allowed to value bis goods and seek reparation for that".

105. However, the principal relief he sought in the same Plaint was a permanent injunction as follows:-

> " A permanent injunction order restraining the Defendant whether acting by themselves or thereafter their agents, servants and or workmen from doing any of the following acts, that is to say from further entering upon, interfering with, evicting, laying distress, leasing out

to any Third Party and or otherwise interfering with the Plaintiff/ Applicant's possession, occupation and use of the demised premises, being a Restaurant space on the First Floor comprised in the building erected on sub-division No. 1996 (Original number 612/2/ Section III, Mainland North, Kilifi District".

106. The Learned Counsel submitted that the Plaintiff behaved like the proverbial Dog in the manger. The dog would lie in the manger preventing the cows from approaching the salt (which the cows need and desire), which the dog neither licks nor needs. The Plaintiff had moved half way out, and had pleaded at paragraph 13 of the Plaint that he no longer needed the premises. He held onto the premises for about Three (3) years from 1st Januay,2017 to 21st November, 2019 when he filed this suit. When he filed suit, he manifested his intention to maintain possession by seeking a permanent injunction to restrain the landlord from entering the premises, evicting him or leasing the same. The question then posed to this Honourable Court, was who was to pay the landlord for all this period he was not receiving any rent? The Learned Counsel urged the Honourable Court to enforce the lease and allow the claim for rent arrears for a sum of Kenya Shillings Sixteen Million Eight Thousand (Kshs.16,008,000/=) as proved without any challenges by the Plaintiff.

107. Seventhly, on the issue of whether the Plaintiff had placed a caveat wrongfully against the Defendant's title. The Learned Counsel averred that the Plaintiff admitted in his evidence-in-chief that he registered a restriction on the title to protect the term of Ten (10) years given to him. It was not clear why he would register such if he already had a written lease. He never removed the restriction when he finally vacated, up to when he testified. The Learned Counsel prayed that this restriction was registered against the title without any justification.

108. Finally, on whether the Defendant was entitled to any of the reliefs prayed for in the Counter-claim. The Learned Counsel submitted that the Defendant had proved its Counter - Claim on a balance of probabilities and was entitled to the reliefs prayed for as follows:-Rent arrears - The claim for a sum of Kenya Shillings Sixteen Million Eight Thousand (Kshs. 16,008,000/=) rent arrears was pleaded as a special damage and specifically proved.Order of eviction - This one is spent as the Plaintiff has already vacated, pursuant to a Court Order issued on 16th February, 2021 when the Plaintiff finally vacated in May 2021.Mense profits - A notice to vacate was given upon the Plaintiff dated 14th November, 2019. As per that notice, the Plaintiff was to vacate and give owner vacant possession from 31st December, 2019,which he did not do. The Defendant claimed double the rent of Kshs.450,000/=, hence Kshs. 900,000/= from 1st January, 2020 until May 2021 when the Plaintiff vacated the suit premises.

109. This worked out as follows:-

1/1/2020 to 31/5/2021 which was 17 months x 900,000 which totals - Kshs.15,300,000/= (Kenya Shillings Fifteen Thousand Three Hundred Thousand).

110. He relied on the decision in the case of:- "Vincent E. Mukoko – Versus - Abdirahman Abdinur Harun, Onam Okal Okeyo (Interested Party) [2021] eKLR" (copy attached and big blighted at pages 54 to 59 of these submissions) is helpful on the issue of mense profits.

111. On the removal of caveat/ restriction, the Learned Counsel averred that having vacated the leased premises, the Plaintiff could not maintain the caveat or restriction on the suit premises and or the Defendant's title thereof under any pretext. To do so would be to spite or punish the Landlord. The order of such removal is justified.

112. On the general damages for wrongful caveat, the Learned Counsel submitted that they assessed the same at a sum of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=) Kenya Shillings Five Hundred Thousand). The Learned Counsel urged the Honourable Court to follow the decision in

"Vincent E. Mukoko (Supra)". An award of a sum of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=) for a wrongfully placed caveat was awarded in general damages.

113. The Learned Counsel urged the Honourable Court to award the costs of the dismissed Plaintiffs claim to the Defendant and also award the Defendant the costs of the Counter-claim. The Defendant has incurred considerable expenses in defending this suit and prosecuting its Counter-claim. The Defendant has also undergone a lot of anxieties and mental stress as a result of this litigation. The Honourable Court to exercise its discretion favorably and award costs. He urged the Honourable Court to award interest for the special rent arrears as well as the damages sought. Any payments awarded now would have been eroded by inflation and the passage of time, which could only be compensated for by way of interest.

114. In conclusion, the Learned Counsel submitted that this was not a claim for title or environmental use of land, but a fairly simple dispute between a Landlord and a Tenant. It's a reflection of what happened when a Lessee failed to Honour a tenancy document, which would otherwise had made his occupation as well as exit as smooth as possible. The Plaintiff as a Lessee entered into a formal lease and agreed to pay rent and to finally yield and hand over the property in accordance with that lease. Failure to comply with this lease strictly was what has caused him this litigation. The penance that he could pay to the landlord was rent arrears and settle all his accounts.

VII. Analysis and Determination

115. I have carefully read and analyzed all the pleadings herein, the oral and all the documentary evidence adduced in court, the written submissions, the myriad of cited authorities made by the Plaintiff and the Defendant, the appropriate and relevant provisions of the Constitution of Kenya, 2010 and the statutes.

116. The court is of the opinion that, for it to reach an informed, reasonable, just and fair decision it has crystalized the subject matter into the following four (4) salient issues for its determination herein. These are:-

    a. Whether the suit instituted by the Plaintiff herein through a Plaint dated 19th November, 2019 against the Defendant herein has any merit whatsoever.

    b. Whether the Amended Statement of Defence and Counter – Claim dated 5th February, 2020 instituted by the Defendant is awardable?

    c. Whether the parties herein are entitled to any of the reliefs prayed for from the filed pleadings.

    d. Who will the costs of the suit?

Issue No. a) Whether the suit instituted by the Plaintiff herein through a Plaint dated 19th November, 2019 against the Defendant herein has any merit whatsoever.

117. Under this sub – heading herein, the main substratum of this suit as deduced from the filed pleadings and the evidence adduced herein are in five (5) broad spectrum. These are:- a). On the validity of a contract ; b). on the breach of the covenant and its consequences c). on the reliefs sought by the parties as a result of the supposed breach of the covenants d). on granting of permanent injunctive orders and e). on the registration and removal of a Caveat against the property.

118. Thus, first and fore most it imperative to assess the meaning, nature and scope of a contract and its validity in law. Simply put, a contract is a legal agreement made between one or more people (offer and

acceptance) who undertake to do a certain thing or things in a transaction or transactions and where there is a consideration and which is enforceable in law.

119. According to "A Treaties on Law of Contract" 2nd Edition by Samwuel Wiliston holds that:-

> " A Contract is a promise, or a set of promise, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. This definition may not be satisfactory since it requires a subsequent definition of the circumstances under which the law does in fact attach legal obligation to the promises. But if a definition were attempted which should cover these operative facts, it would require compressing the entire law relating to formation of contracts into a single sentence."

120. In short, there are four ingredients for it to constitute a legal contract. These are namely:

a. An agreement or promise made between one or more people (offer and acceptance);

b. An agreement to undertake to do a certain thing or things in a transaction or transactions;

c. There is a consideration; and

d. The agreement is enforceable in law.

121. Validity of a contract is provided for in law. The provision of Section 3 (3) of the Law of Contract Act Cap. 23 read together with Section 38 of the Land Act, No. 6 of 2012 provide that no suit shall be brought upon a contract for the disposition of an interest in land unless; the contract upon which the suit is founded is in writing, signed by all the parties, and the signature of each party signing has been attested by a witness who is present when the contract was signed.

122. Specifically, the provision of Section 3 (3) of the Contract Act provides that:-

> " 3(3)No suit shall be brought upon a contract for the disposition of an interest in land unless —

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

This was supported in the decision of the Court in the case of: "Machakos District Co - operative Union – Versus - Philip Nzuki Kiilu CA No 112 of 1997".

123. It is on record and undisputed that the parties executed an lease agreement on 31st December, 2011 in respect to Sub - Division number 1696 (Original number 612/2) Section III, Mainland North, Kilifi District – the demised premises - for 10 years commencing 1st January, 2012. The parties covenants including the special conditions of sale, the warranties, the obligations of the parties, the default clauses and inter-alia general provisions which the parties agreed to bind themselves.

124. According to PW - 1 it was an express term and or condition of the said lease as follows, the term would be Ten (10) years effective 1st January, 2012 as per the Sixth schedule of the said lease. The rent the rent per month payable monthly on every 5th day of the month would be:-

i. Kenya Shillings Two Hundred and Fifty Thousand (Kshs. 250,000/=) plus VAT at 16% for the First and Second year.

ii. Kenya Shillings Three Hundred Thousand (Kshs. 300,000/=) plus VAT at 16% for the Third and Fourth year.

iii. Kenya Shillings Three Hundred and Fifty Thousand (Kshs. 350,000/=) plus VAT at 16% for the Fifth and Sixth year.

iv. Kenya Shillings Four Hundred Thousand (Kshs. 400,000/=) plus VAT at 16% for the Seventh and Eighth year.

v. Kenya Shillings Four Hundred and Fifty Thousand (Kshs. 450,000/=) plus VAT at 16% for the Ninth and Tenth year.

125. The Plaintiff would pay a rent deposit of Kenya Shillings Seven Hundred and Fifty Thousand (Kshs. 750,000/=) which amount could be utilized by the Defendant in satisfaction or discharge of the Plaintiffs obligations as per the lease, pursuant to the Fifth schedule of the lease.

126. Therefore, it is the holding of this Honourable Court that the existence of a valid agreement of sale has not been assailed. The law of contract gives effect to consensual agreements entered into by particular individuals in their own interests. Remedies granted by the courts are designed to give effect to what was voluntarily undertaken by the parties. Damages in contract are therefore intended to place the claimant in the same position as he would have been in if the contract had been performed. This position was appreciated as early as in 1848 in the case of:- "Robinson – Versus - Harman (1848) 1Exch 850" in which Parke B said "the rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

127. The above statement of the law has been endorsed in numerous judicial pronouncements in literally all jurisdictions of the world to the extent it can safely be said that it has acquired the singular distinction of the force of law.

128. The Court has carefully perused the sale agreement produced as Exhibit by the Plaintiff and noted that the same is in writing and is signed by the parties. It thus met the requirements of Section 3(3) of the Contract Act. Further the agreement for lease contains the names of the parties, the description of the property, the purchase price and the conditions thereto. A look at the said Lease agreement confirms that the same is a valid lease agreement which is enforceable by the parties.

129. To move forward, the other issue of importance is whether the Defendant is in breach of the lease as pleaded in the Plaint. In order to determine whether or not there was breach of the contract, this Court must first determine whether there was a valid contract in place. The Plaintiff has alleged that sometimes in December 2016, the Defendant through some directions all of a sudden began harassing the Plaintiff by demanding unreasonable amounts of rent which was not stipulated in the agreements and which demands the Plaintiff declined to meet and which included demands for rent to be paid individually to the said directors and each was coming with his own demand. Further that the same was reduced into writing and signed by all the parties as founded under the provisions of Sections 3 (3) of the Contract Act and 38 of the Land Act, No. 6 of 2012.

130. Ideally, the Black's Law Dictionary, 9th Edition, Page 213, defines a breach of Contract as:-

> "a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages."

131. It is trite law that courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of "Rufale – Versus - Umon Manufacturing Co. (Ramsboltom) (1918) L.R 1KB 592", Scrutton L.J. held as follows:

> "The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract."

132. Equally in the case of "Attorney General of Belize et al – Versus - Belize Telecom Ltd & Anoter (2009), 1WLR 1980 at page 1993, citing Lord Person in Trollope Colls Ltd Vs Northwest Metropolitan Regional Hospital Board (1973) I WLR 601 at 609", held as follows:

> "The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable."

133. Based on the above decisions, the starting point for this Honourable Court will on the facts giving rise to this suit are to a large extent not disputed and also fairly straight forward. The parties herein duly executed and entered into a Lease Agreement on the 31st December 2011 in writing which was to run for a period of ten (10) years from 31st December 2011 to 31st December 2021. According to the Plaintiff as PW 1 he had always met his rent obligations inclusive of VAT promptly until 2016,which is undisputed from the documents produced by the Plaintiff as exhibits, when the Defendant with its agents, servants and/or persons acting on its behalf without any justifiable cause or excuse irregularly, forcefully and unlawfully invading the suit property and constructively evicted the Plaintiff by restriction of his occupation thereof and locked up the premises detaining the Plaintiff's tools of trade. DW - 1 admitted this in evidence and further admitted at this time the Plaintiff had overpaid rent. As such the landlord acted unlawfully.

134. It is the Plaintiff's position that the Defendants breached the agreement and failed to meet the obligations set out in the agreement to wit; irregularly, forcefully and unlawfully invading and locking up the demised premises without any notice whatsoever to the Plaintiff. The Defendant demanded the unjustified payment of a sum of Kenya Shillings Fourteen Million Three Eighty-Four Thousand (Kshs. 14,384,000/=) with no backing or proof whatsoever as to the genesis of the outrageous figures, after efforts by the Plaintiff to regain possession. The purported to attach the Plaintiffs property to recover unjustifiable rent arrears, when the Defendant itself locked the premises for the period it claims rent arrears, and shut out the Plaintiff from occupation. The Defendant otherwise declining to give free and full access of the demised premises to the Plaintiff.

135. On the other hand the Defendant contended that the Plaintiff had serious arrears of a sum of Kenya Shillings Eight Million Seven Sixty Six Thousand Eight Hundred (Kshs. 8,766,800/=) and the Defendant demanded for the same, whereof a dispute arose some time in December 2016. The Plaintiff and the Defendant agreed to have one James Muchemi Munene who was well known to both parties, to mediate on the rent arrears claim by the Defendant. The Plaintiff claimed to have either paid rent directly to Mr. Francis Githui Wahome or advances monies to him on account of rent, as a Director of the Defendant, which claim was denied by the Defendant and Mr. Francis Githui Wahome. The Plaintiff and the Defendant with the help of Mr. James Muchemi Munene resolved the issue amicably in writing on 28th December, 2016 The Plaintiff did not honour his part of the settlement by vacating the suit premises by 31st January, 2017 and removing a Caveat that he had unlawfully placed on the Defendant's Title without the consent of the Defendant.

136. It is trite Law that, on matters such as this one, there is need to deal on the Doctrine of the "Burden of Proof". In particular, it lies on the party making the allegation. In law, the term is encapsulated for by the provision Sections 107 and 109 of the Evidence Act Cap 80 laws of Kenya which provides as follows:-

> " 107 Burden of Proof
>
> 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
> 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

137. Lord Denning J. in the case of "Miller – Versus - Minister of Pensions (1947) 2 ALL ER 372", discussing the burden of proof had this to say:-

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not.
>
> Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."
>
> The onus was on the Defendants to prove frustration of the contract by the Plaintiff. DW - 1 testified that at page 40 they were claiming a sum of Kenya Shillings Eight Million Seven Sixty Six Thousand Eight Hundred (Kshs. 8,766,800/-). Although in passing, the Court was informed that there was an advanced loan of a sum of Kenya Shillings Ten Million Four Fifty Thousand (Kshs 10,450,000/-) by the Lessee to the Lessor. The tenant was being given credit of a sum of Kenya Shillings One Million Six Eighty Three Thousand Two Hundred (Kshs. 1,683,200/-). From there would be no more rent arrears; they agreed to offset these amount for rent for a premises situated at Port Reitz rent of a sum of Kenya Shillings One Ninety Nine Thousand Six Sixty Hundred (Kshsz. 199,660/-) subject to confirmation. The

tenant wanted the order for injunction; there was no order for opening the premises. The effect of the notices was that they shall not be renewing the lease agreement.

138. In the Halsbury's Laws of England 4th Edition Vol. 27 at page 11 the authors opine that:-

> " Whilst the tenancy continues, a tenant is absolutely estopped from denying the title of the landlord by whom he was let into possession, whether or not he has notice of any defect in title."

139. A similar position was taken by the court in "E.H. Lewis & Son. -Versus - Morelli, (1948) 2 All ER 1021" and restated in the case of "Kasturi Limited – Versus - Nyeri Wholesalers Limited (2014) eKLR". As such the Plaintiff's position was that the Defendant could not unilaterally terminate the said lease mid-term and enter into another lease with a third party. I agree this position is supported by the case of the Plaintiff relied on the case of "Kenya Commercial Bank Limited (Supra)", where the Court of Appeal held that:-

> " 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 ambits 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."

140. In view of the foregoing, I find and strongly hold, that the Defendant out rightly breached the Lease agreement, terms and conditions stipulated thereof in asking the Plaintiff to leave the suit property when he was not behind on his rent and subsequently stopping him from accessing and enjoying his property in accordance with the terms of the duly executed Lease agreement.

141. On the other hand, and an issue for consideration herein is whether the Plaintiff is in breach of the lease agreement as pleaded in the Counter – Claim. According to the Defendant in the Counter Claim, the Plaintiff failed to pay rent as expressly provided for in the lease agreement, i.e. every month in advance on or before the 5th of every month; paying rent irregularly; falling into and accumulating rent arears; removing part of the goods from e leased premises but failing to hand over the leased premises as provided for in Clause 7 of the lease document; leaving the leased premises exposed and unsecure, thus exposing the Defendant's property as well as adjoining Lessees/tenants to a risk of vandalism or theft, failing to formally hand over the leased premises to the Defendant and to vacate and remove all his items from the leased premises.

142. From the evidence adduced by PW - 2 when contracted by the Plaintiff to undertake some renovations on the demised property, there were watering and sewage problems. According to her, water was sipping through the pillars, the roof and gypsum while she was doing the renovations. These caused some delay in completing the works and for them to incur extensively. Further, PW - 1 testified that in the cause of time, he was still a tenant, he started getting a lot of harassment from the landlord and someone started demanding for some money from him. He filed the case after receiving the demand letter for arrears of a sum of Kenya Shillings Fourteen Million Three Hundred and Eighty Three Thousand (Kshs. 14,383, 000./=) and there was a notice and that caused him to institute this case. From the pleading he prayed for permanent injunction until the case was heard and determined. He

was interested in getting his goods from the premises. On 28th December, 2016, they entered into an agreement between them and the landlord (evidenced in page 40).

143. The Defendant through DW - 1 told the Honourable Court that the Plaintiff has overpaid his rent therefore they were the ones owing him instead of him owing them rent arrears. Based on the evidence by DW - 1 and the Defendant's submissions, it was explained that after the prior accounts were settled through a mediation on 28th December, 2016, no other rent was paid by the Plaintiff. From 1st January, 2017,the Plaintiff as a Lessee was starting on a clean state on the issue of rent, but did not pay any rent thereafter. The claim for rent arrears was from 1st January, 2017 to 1st December, 2019 as per the statement of accounts attached at page 51 of the Defendant's List of documents. The Plaintiff in answer to this stated that he was not allowed into the suit property and until 16th January, 2021 when ELC No. 1 by my brother Justice Sila Munyao directed that he enters the premises and gets his goods from the premises but the entry was still frustrated by the Defendant until 27th May, 2021. Hence why he left. The Defendant alleges that the Plaintiff never removed his goods hence they understood the same to mean that he was still in occupation which allegation has been denied and proved by the Plaintiff to be a fault of the Defendant as to why he was not in the demised premises.

144. In the evidence led, there was no doubt that no termination nor distress for rent notice was ever issued by the Defendant to the Plaintiff to terminate the tenancy as required by law and the terms of the lease agreement. In saying so, I seek refuge from the case of:- "Caledonia Supermarket Ltd – Versus - Kenya National Examinations Council [2000] 2EA 351", the Court of Appeal held that in order to terminate a controlled tenancy, the landlord had to comply with the provision of Section 4 of the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act, Cap. 301. The said Court also considered that even if the tenant had lost its status as a protected tenant, the landlord (the council) was still obliged to give notice to the Appellant. The court expressed itself as follows:

> " But even assuming for the sake of argument only that the appellant had lost its status of a protected tenant...then even in that situation the council was obliged by law to issue a proper notice of termination in accordance with section 106 of the Law of property Act of 1882."

145. From these aversions, certainly and it is clear that the Plaintiff was not in breach of the lease agreement as particularized in the Amended Statement of Defence and Counter – Claim.

146. The other issue of significance whether the Caveat placed by the Plaintiff should be removed. The provision of Section 71 of the Land Registration Act, No. 3 of 2012 provides that:-

> " A person who claims the right, whether contractual or otherwise, to obtain an interest in any land lease or charge, capable of creation by an instrument registrable under the Act;
>
> (b).....
>
> (c).....
>
> may lodge a caution with the Registrar for bidding the registration of disposition of the land, lease or charge concerned and the making of entries effecting the lease or charge"

147. Section 73 (1) of the LRA, 2012 provides that:-

> " A caution may be withdrawn by the cautioner or removed by order of the court".

148. The Defendant alleges that the Plaintiff placed a caveat against the demised property and stated that efforts to have him remove the same have been fruitless. Ideally, the Plaintiff was compelled to register

the Caveat in order to preserve the demised premises and taking that the lease was registered. Its period had not expired when the alleged harassment by the Defendant began. Besides, the Plaintiff was the one paying VAT according to DW 1. Clearly, the Plaintiff was fully justified in taking that legal step.

149. From the given facts of the case, the situation has drastically changed. The Plaintiff is no longer in possession of the demised premises. Taking that the Court will be granting some of the reliefs to the Plaintiff, the most plausible thing to do would be for the Plaintiff to remove and/or lift the Caveat registered against the demised premises forthwith.

Issue No. b). Whether the Statement of Amended Defence and Counter Claim dated 5th February, 2020 by the Defendant is awardable.

150. As indicated above, on 5th February, 2020, the Defendant filed an Amended Statement of Defence and Counter – Claim. In a nutshell, the Defendant seeks to be paid rental outstanding arrears ostensibly incurred by the Plaintiff for being "in occupation and possession" for the period upto to May, 2021 of the demised suit premises. He sought for the orders as already indicated herein. Without belabouring the point herein, the Honourable Court has already made a pronouncement on the breach of Covenant of the lease Agreement entered between the Plaintiff and the Defendant. One of the fundamental obligations bestowed on the Plaintiff from the terms of the lease was on payment of rent. Ideally, rent is the consideration a tenant pays to the landlord for the enjoyment of the premises let. Rent is that due when the enjoyment persists. When possession is taken away the right to receive rent cannot be retained. That is what is envisaged under the provision of Section 77 of the Land Act, No. 6 of 2012. It provides as follows:-

> " Unlawful eviction
>
> A lessee who is evicted from the whole or a part of the leased land or buildings, contrary to the express or implied terms and conditions of a lease, shall be immediately relieved of all obligation to pay any rent or other monies due under the lease or perform any of the covenants and conditions on the part of the lessee expressed or implied in the lease in respect of the land or buildings or part thereof from which the lessee has been so evicted".

151. Having found that the Plaintiff was a controlled tenant who was constructively evicted it follows that the landlord cannot be entitled to rent for the duration the Plaintiff was deprived of possession. Thus, the Counter Claim by the Defendant being based on rent entitlement cannot in all fairness include rent for the period of unlawful dispossession. It must exclude the period of the dispossession from December 2016 being the time when the alleged eviction occurred to 19th November 2019 when this suit was filed. The Plaintiff is therefore relieved from the obligation for the payment of all the sums claimed as rent and service charge for the period of dispossession. Hence, in all fairness, therefore, the Counter Claim and all its prayers is not awardable.

Issue No. c). Whether the Plaintiff is entitled to any of the relief prayed for in the Plaint.

152. Under this Sub heading, the Plaintiff has sought for various Reliefs as contained at the foot of the Plaint, herein. The principal remedy under common law for breach of contract is an award of damages, with the purpose of damages being to compensate the injured party for the loss suffered as a result of the breach, rather than (except for very limited circumstances) to punish the breaching party. This general rule, which can be traced back to "Robinson – Versus - Harman (supra)" is to place the claimant in the same position as if the contract had been performed, with the guiding principle being that of restitution. The compensatory nature of damages for breach of contract, and the nature of the loss for

which they are designed to compensate, were explained by Lord Diplock in "Photo Production Ltd – Versus - Securicor Transport Ltd (1980) AC 827 – 849":-

> " The contract, however, is just as much the source of secondary obligations as it is of primary obligations … Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach …" (p 849)

153. On their part, the Defendant has impleaded that the Plaintiff breached the lease contract and is owing them a sum of Kenya Shillings Sixteen Million Eight Thousand (Kshs. 16,008,000/-). Nevertheless, while discussing the issues, I have already found and held that the Defendant did not sufficiently plead the circumstances and/or particulars constituted in the Counter Claim.

154. On the other hand, the Plaintiff pleaded for general damages for breach of contract. Damages for breach of contract are in that sense a substitute for performance. That is why they are generally regarded as an adequate remedy. The courts will not prevent self-interested breaches of contract where the interests of the innocent party can be adequately protected by an award of damages. Nor will the courts award damages designed to deprive the contract breaker of any profit he may have made as a consequence of his failure in performance. The court's function is confined to enforcing either the primary obligation to perform, or the contract breaker's secondary obligation to pay damages as a substitute for performance.

155. The objective of compensating the claimant for the loss sustained as a result of non-performance makes it necessary to quantify the loss which he sustained as accurately as the circumstances permit. What is crucial is first to identify the loss: the difference between the claimant's actual situation and the situation in which he would have been if the primary contractual obligation had been performed. Once the loss has been identified, the court then has to quantify it in monetary terms.

156. This court having found that the locking up of the Plaintiff's premises was unlawful, tortious and amounted to constructive eviction, it finds and holds that a breach of the law ought to attract reprieve to the violated. In "Mattarella Limited – Versus -Michael Bell & another [2018] eKLR" the Court awarded the Plaintiff damages in the sum of Kenya Shillings Two Million (Kshs. 2,000,000/=) and held as follows:

> " While the defendants were not specifically levying distress for rent, what they sought to do and actually did was to take possession by use of the law of the jungle. That must be, as has always been, frowned upon by the courts. Not only frowned upon but equally remedied by award of damages so that everybody seeking to live within the territory of Kenya, a county whose citizens have chosen to be led by the rule of law, gets to know, if one be otherwise under some illusion, that arbitrariness and or just impunity is not a virtue but a vice. Vice cannot be countenanced but must be curtailed and discouraged. I am saying all the foregoing because I have come to the conclusion that a violation of a right, due process and the law invite a reprieve or remedy to the violated."

157. Therefore, I am fully satisfied that the Plaintiff is entitled to claim general damages and I hereby award him a sum of Kenya Shillings Two Million (Kshs. 2,000,000/=) as damages of unlawful eviction.

158. On whether the Plaintiff is entitled to be granted the Permanent Injunction restraining the Defendant from collecting rent on his property. From the filed pleadings, the Plaintiff sought for a Permanent Injunction Order restraining the Defendant whether acting by themselves or through their agents,

servants and/or workmen from doing any of the following acts, that is to say from further entering upon, interfering with, Evicting, levying Distress, Leasing out to any Third Party and/or otherwise Interfering with Plaintiffs/Applicant's possession, occupation and use of the Demised premises, being a Restaurant Space on the First Floor comprised in the building erected on demised suit premises.

159. Unlike Temporary Injunction which are granted only to be in force for a specified time or until the issuance of further orders from Court, Permanent Injunction are rather different, in that they are perpetual and issued after a Suit has been heard and finally determined. Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the Civil Procedure Code, 2010 if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances.

160. It's the effect of the order that matter as opposed to it mere positive working which makes it mandatory. The Honorable Court must be very cautious and vary that the matter before court is not only an application for mandatory injunction, but is one which, if granted would amount to the grant of a major part of the relief claimed in the action. Such applications should be approached with great circumspect and caution and the relief granted only in a clear case. Certainly, that would not be equity, fair and just at all to the other party.

161. Before proceeding further, its significant to appreciate the great distinction between the prohibitory injunction as envisaged in the "Locus Classicus" case of "Giella – Versus - Cassman Brown, 1973 E.A. Page 358 and a Mandatory Injunction. The first authority on making this distinction was "Shepard Homes – Versus – Sandham (1970) 3 WLR Pg. 356 Case" in which Megarry .J as he then was stated follows:-

> " Whereas a Prohibitory Injunction merely requires abstention from acting, a Mandatory Injunction requires the taking of positive steps, and may require the dismantling or destruction of something already erected, or constructed. This will result in a consequent waste of time, money and materials. If it is ultimately established that the Defendant was entitled to retain the erection".

162. Additionally, I wish to rely on the famous case of "Andrew Kamau Mucuha – Versus – Ripples Limited (1993) eKLR, in whose facts are fully on all fours with the instant case where while quoting the case of "Locabell International Finances Limited – Versus Agro Export (1986)1 ALL ER case, the Court of Appeal held:-

> " A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing of a case........if the Defendant attempted to steal a match on the Plaintiff...........a Mandatory injunction will be granted in special circumstances...."

163. With all due respect and arising from the surrounding facts and inferences, there are no special circumstances nor enabling environment to grant the permanent injunction orders sought by the Plaintiff herein against the Defendant. Its undoubted that the eviction from the demised premises has already occurred. It a s case of the horse has already bolted from the stumble and the train having already departed from the station. The demised premises belong to the Defendant and restraining them from further entering upon, interfering with, Evicting, levying Distress, Leasing out to any Third Party and/or otherwise Interfering with Plaintiffs/Applicant's possession, occupation and use of the Demised premises, being a Restaurant Space on the First Floor comprised in the building erected on demised suit premises would be detrimental to their business. It will tantamount to pure abstract and

academic exercise to no avail at all. For these reasons, I therefore decline granting this prayer sought by the Plaintiff herein.

Issue No. d). Who will bear the costs of the suit

164. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap. 21).

165. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See the Supreme Court case of:- "Jabir Singh Rai – Versus Tarchalans Rai Singh, (2014) eKLR and "Hussein Janmohamed & Sons – Versus - Twentsche Overseas Trading Co. Ltd [1967] EA 28".

Where the courts held:-

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

166. Thus, it follows that the Court finds no good reason why the successful party should not be awarded costs of the action. Accordingly, from the instant case, the Plaintiff shall have the costs of the Suit.

VIII. Conclusion and Disposal

167. The upshot of the foregoing is that after conducting such an intensive and elaborate analysis to the framed issued, the Honourable Court based on the principles of Preponderance of Probabilities and the balance of convenience, is satisfied that the Plaintiff has established its case and is entitled to the prayers sought in the Plaint dated 19th November, 2019 against the Defendant. For avoidance of any doubts, I proceed to specifically order:-

    a. That Judgment be and is hereby entered in favour of the Plaintiff as against the Defendant in its entirety save for Prayer No. 1 of the Plaint with costs.

    b. That the Amended Counter - Claim dated 5th February, 2020 by the Defendant and against the Plaintiff herein be and is hereby partially dismissed with costs to the Plaintiff.

    c. That the Judgement be and is hereby entered for the damages amount pleaded under Prayers (b) and (c) of the Plaint by the Plaintiff as follows:

        i. General Damages for derogation from grant at a sum of Kenya Shillings Twenty Four Million Six Hundred Thousand (Kshs. 24,600,000/=).

        ii. Damages for unlawful constructive eviction at a sum of Kenya Shillings Twenty Four Million Six Hundred Thousand (Kshs. 24,600,000/=)

        iii. Reimbursement of the value of Goods detained at a sum of Kenya Shillings Twelve Million Eight Fourty Seven Thousand Three Fifty Hundred (Kshs. 12,847,350/=)

        iv. The total amount pleaded by the Plaintiff at an amount of Kenya Shillings Sixty-Two Million Forty-Seven Thousand Three Hundred and Fifty (Kshs.62,047,350/-) as 23rd May, 2023.

    d. That for avoidance of doubt, the Honourable Court has does not deem it fit to award Prayer 1 of the Plaint on the permanent injunction sought by the Plaintiff against the Defendant as the tenancy agreement has already been terminate and therefore that prayer shall not be reviewed.

e. That an order be and is hereby issued that the Plaintiff does quit, vacate and hand over forthwith the demised premises to the Defendant and in default an order of eviction of the Plaintiff from the Defendant's property namely; Sub-division No. 1696 (Original Number 612/2) Section III Mainland North, Kilifi County does issue.

f. That an order be and is hereby do issue directing the Plaintiff to forthwith as soon as the Defendant effects the payment of the damages awarded on (c) above remove and/or lift the Caveat placed on the Defendant's Title for Plot Sub-division No. 1696 (Original Number 612/2) Section III Mainland North, Kilifi County and in default, an order do issue directing the Land Registrar at the Mombasa Land Registry to remove the Caveat aforesaid, at the Plaintiff's cost.

g. That the Plaintiff shall have the Costs of this suit and the Amended Counter - Claim which costs are awarded with interests at Court rates.

It Is So Ordered Accordingly.

JUDGMENT DELIVERED VIA E – MAIL AS PER THE NOTICES DISPATCHED TO ALL THE PARTIES SIGNED AND DATED AT MOMBASA THIS ......28TH ....DAY OF ...... NOVEMBER ....2023.

....

HON. JUSTICE L. L. NAIKUNI

ENVIRONMENT AND LAND COURT AT MOMBASA.

JUDGMENT AMENDED AND DELIVERED VIA E – MAIL TO ALL THE PARTIES SIGNED AND DATED AT MOMBASA THIS ......18TH ....DAY OF ...... MARCH ....2024.

Copy sent by M/s. Joan Ndwiga (Office Admin) to:

Njoroge Katisya & Co. Advocates

Gachie Mwanza & Co. Advocate