REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 39 OF 2015

IL MATTARELO LTD..PLAINTIFF

VERSUS

1. **MICHAEL BELL**
2. **ASHBURTON GROVE LIMITED..................................DEFENDANT**

J U D G M E N T

1. By plaint dated the 17th March 2015 the plaintiff sought from Court Orders that:-

> **i. Permanent injunction to be issues to restrain the Defendants from interfering, selling, moving or dealing with the Plaintiff's goods at SHOP NO. 12 & 13 SITUATED AT PLOT AT TITLE NO. KWALE/DIANI BEACH/1588.**
>
> **ii. Declaration that the illegal and unlawfully entry by the 1st Defendant was a total breach of the contract and was illegal and the Plaintiff is entitled to payment of damages. The Defendants to pay the Plaintiff punitive damages for gross and blatant breach of contract.**
>
> **iii. The defendant to compensate the Plaintiff the sum of Kshs.40,000/= per day for loss or profit as a result of detention of his business goods until judgment of the court.**
>
> **iv. The Plaintiff ask for judgment for declaration that no rent was due as of 6th February 20156 and any action for constructive eviction was illegal and unlawful, an Order for Re-entry. Any other relief that the court deems fit to grant in the circumstance of the case plus cost of the suit.**
>
> **v. Cost of the suits and related expenses.**

2. The facts founding the suit were briefly that parties entered into an agreement for lease over a portion of a property situate in Diani and Christened Bahari Plaza identified as units 12 & 13 at a monthly rent of Kshs.90,000/= per month together with service charge of Kshs.10,400/= also payable monthly. The lease was to commence on the 1/10/2013 and run for a period of 5 years. The agreement was reduced into writing and produced as exhibit P2.

3. Owing to Ebola outbreak in Central Africa and Insecurity in East Africa and Kenyan Coast in particular and the resultant bad publicity, the plaintiff contended that his partner pulled out of the investment hence he suffered financial difficulties which disabled it from paying rent from the months of June through to September 2014. He then made a proposal which was accepted by the defendant that he would pay rebated rent at 50% and the difference thereof be compensated by the fixtures developed on the suit property by the plaintiff. However the parties did not agree on the value of the equipment and fixtures developed on the premises by the plaintiff hence the defendant demanded the immediate payment of the sum of Kshs.463,000/= after the plaintiff insisted that the value of the pizza oven was Kshs.500,000/= while the defendant insisted on the value being Kshs.100,000/=. Due that disagreement, parties met on 26/1/2015 and it was agreed that the plaintiff pays the sum of Kshs.563,600/= to cover arrears of rent up to 31/01/2015 for which sum he issued two cheques; from Kshs.100,000/= being current and that of Kshs.463,600/= being postdated to the 10/2/2015. However, the cheque dated 10/2/2015 was replaced by payment of cash into the defendant's asset on the 2/2/2015.

4. Thereafter, the plaintiff complains that the defendant demanded immediate payment of the entire rent and service charge for February 2015 unless he removed his property and vacated the premises within 3 days yet he was holding a rent deposit of Kshs.270,000/=. Since the 1st defendant was not the person to collect the service charge, the plaintiff approached Bahari Plaza, the recipient thereof, to confirm the service charge arrears and they confirmed that there was no service charge outstanding. He started removing the property from the premises

on the 5/2/2015 after he had on 3/2/2015 received a demand to pay Kshs.76,007/= allegedly owed to Kenya Power and Lighting Company Ltd. The plaintiff then contended that rent was due for payment between the dates of 5th and 10th after an invoice was rendered.

5. On 28/1/2015, there was a demand to repair the premises at a cost of Kshs.351,000/= which included repairs of the building to conditions prior to him taking over yet the plaintiff contended to have not made any alternations to the premises since taking over. On the 6/2/2015 while the plaintiff was in the process of removing his property from the premises, and during lunch break, the defendant is accused of having broken into the premises, removed things and locked the same from outside hence it took a court order obtained on 11/3/2015, from Kwale Law Courts, for the premises to be opened, inventory taken and goods removed.

6. The court order and inventory were produced and marked Exhibit P7 & P8. Upon opening of the premises, taking of inventory and removal of goods the plaintiff gave evidenced that the sum of about Kshs.460,000/= which was kept in the premises was found to be missing. By that time, .2.2015 the plaintiff had signed a lease for new and alternative premises on 3/2/2015 but was not able to move there till after he got his goods and approximated the loss at Kshs.150,000/=.

7. The plaintiff denied liability for payment of rent after the 6/2/2018 and further denied effecting any alterations to the premises as alleged in the counter claim. He therefore sought the prayers in the plaint from the defendants.

8. On cross examination by the defendants counsel, the plaintiff admitted having taken over premises hither o use for the operation of a business of bar and restaurant at a monthly rent of Kshs.90,000/= payable on or before the 5th of the relevant month. He said that he was to move from the premises by the 8/2/2018 in terms of agreement reached with the lawyers hence did not pay rent nor power bills because he was locked out and did not get the bills respectively. He however conceded being liable to pay power bills up to 6/2/2015.

9. He said that the pizza oven he built was mounted on the wall without the need to break it. He however admitted there being defects on or effect of his occupation on the wall which required repairs but did not get a chance to repair the said for reasons of being locked out. On the electrical wires left hanging after the air fans were removed he admitted having not effect repairs for lack of opportunity to do so having been locked out.

10. On re-examination, the witness said that as at 6/2/2015, he was not in arrears of rent as to entitle the defendant to re-entry in terms of the lease agreement. On the claim for electricity charges, he pointed out that the power bills were for the period February to April 2015 when he was not in occupation and could not have incurred power bills. On repairs, he said he was denied the chance to effect same by being locked out and that the floor tiles he was to replace remain in Situ and continued to be used by the defendant.

11. The second and last witness to be called by the plaintiff was one JANE KANINI WAMBUA. Her evidence was to the effect that she was the operations manager of the plaintiff having been so employed in the year 2014, October. That on the 6/2/2015 the restaurant was operating as usual when staff broke off at about 1.30pm and at about 2.00pm she received a telephone call from one Mrs. Bruce Mutie to the effect that their landlord had broken into the restaurant. With that information, her and the cashier rushed back only to find the place had been locked from outside.

12. She took photos of the premises and when she talked to the defendant she was told that the place had been locked due to failure plaintiff to pay rent and electricity bills. To her as at that date there was no rent outstanding payment, hence she made a report at Diani police station but was told to file a civil suit at Kwale Law courts. A suit was filed and an order obtained which enabled the plaintiff gain entry to the premises and took the inventory, exhibited at pages 110-115 of the bundle filed in court on the 18/3/2015. During the inventory taking, the witness said that a sum of Kshs.252, 000/= was missing from the cashiers desk while on her desk a sum of Kshs.210,000/= was missing making a total loss of Kshs.462,000/= and a further sum of Kshs.40,000/= from her personal purse. On that day of inventory, she went on, they only took out personal items but left behind the business item which were taken out later on 24/3/2015 pursuant to a court order. It was that day that they moved into new premises earlier on leased by the plaintiff.

13. The witness stated that they left behind two air conditioners and the improvements made in the premises and continued to pay salaries to the staff during the period the premises were locked. She said the bill for the period 14/3/2015 to 19/4/2015 was not incurred by the plaintiff as they were not in the premises. He showed the court two photographs of pizza ovens, one inherited in the premises and another built by the plaintiff. She confirmed that the premises were left as decorated by the plaintiff.

14. On cross examination by the defendant's advocates, the witness said that on the 6/2/2015 they had plucked out 4 fans which they intended to be taken to the new premises. That was done after the last client was served. She conceded that the letter dated 28/1/2015 stated rent was outstanding in the sum of Kshs.463,000/= up to January 2015 and that the rent of February would also be due before the plaintiff could vacate because rent was due by the 5th of the month and the cheque issued was postdated to 10/2/2018 and would have to be cleared before the plaintiff would be allowed to vacate.

15. On re-examination by Mr. Ambwere the witness stated that the two Air fans belonged to the plaintiff and that there had been an agreement that the plaintiff moves out within 3 days from the 5/2/2015. She denied refusal to pay rent and that had asserted that there had not been any allegation of destruction of the premises till after the plaintiff moved out.

16. When asked by the court on the fate of the cheque for Kshs.463, 000 and the agreement to move within 3 days for the 5/2/2015, the witness said that the cheque was paid and that the agreement was verbal though the lawyer but she was not present when it was negotiated and agreed. That piece of evidence marked the close of the plaintiffs case.

Defendant's case and evidence

17. For the defendant, was filed a statement of defense and counter- claim. The defense essentially denied the plaintiffs claim in total and made an addition, on a without prejudice basis, a pleading that the defendant was justified to re-enter and take possession of the let premises

on account of intentional and calculated damage that was occasioned to it by the plaintiff while vacating the premises before settlement of the rent arrears because the deposit of rent held was insufficient to meet the cost of such repairs.

18. The counter-claim was in the sum of Kshs.617,190/ being the costs of repairs, unpaid rent and service charge, advocate's fees and unpaid electricity bills. Also filed with the statement of defense and counter-claim was the witness statement by Michael Bell whose thrust was that having been in arrears of rent since August 2014, the plaintiff was given notice to vacate and did start moving out by removing lights and fans from the premises thereby occasioning damage to the premises as a consequence of which the defendant obtained advice to lock up the premises and did so lock after the plaintiff neglected to restitute the premises to their original conditions because the deposit held was not sufficient to meet the costs of repairs. It was then contended that the claim against the defendants was incompetent and misconceived.

19. Those averments were adopted as evidence in chief at trial and reliance placed upon the list and copies of documents dated 28/10/2015 which included electricity bills, letters from advocate and photos of the property taken by the architect taken prior to and after alternation of the plans as well as survey of desired renovations. In evidence he said he carried out repairs at the costs of Kshs.432,190/=.

19. On cross examination the witness admitted there being no minutes authorising him to defend the company in court. He confirmed that as at the date the plaintiff took possession no inventory was taken on the conditions of the building. He equally admitted having produced no receipts for the repairs. He further admitted that the contract mandated a two (2) months' notice but that incase of rent arrears the notice could be shorter. It was equally conceded that on 4/2/2015, the plaintiff electricity bills in the sum of Kshs.26,147/= to cover the period up to 5/2/2015 and that he locked to premises without any court order and further that as at the date of giving evidence he had not refunded the sum of Kshs.270,000/= being rent deposit. He denied having produced any receipts for the alleged repairs. He also admitted that the letter from the defendant's advocate did not mention damage to the premises.

20. In re-examination the witness said that the wall was removed and damaged on 6/4/2015 to enlarge the kitchen and that the electricity bill was for the period of 21/12/2014 to 5/2/2018.

21. The defendant called a second witness who was the architect. He equally adopted his statement and produced his assessment report for which he said he charged the sum of Kshs.46,400/= VAT inclusive. In cross examination, he admitted not being a registered architect nor a member of the professional architects in Kenya. For the alleged repairs he said the assessment was done by the defendant and that he merely confirmed same. He also confirmed that he did not sign the report.

22. When asked questions by the court the witness said he was unable to give quantities nor costing of the repairs. With the two witnesses the defense case was closed and parties then took time to file submissions. Pursuant to the order on submissions the plaintiff did file submissions on 8/2/2017 while the defendant did so on the 21/4/2017.

<u>**Issues for determination**</u>

23. Prior to the hearing date, both parties had filed separate issues albeit called agreed issues. The plaintiffs list of issues contained some 11 items and filed in court on 14/10/2015 while the defendant isolated some 6 items as filed in court on 28/10/2015. When locked at together those two sets of issues boil down to the following issues:-

i. Whether the defendant was entitled to re-enter and lock up the premises as he did on the 6/2/2015.

ii. If that be answered in the affirmative, whether the plaintiff therefore suffered any loss or damage and entitled to any damages for such re-entry? What is the quantum thereof?

iii. Whether the plaintiff lost any money when the defendant re-entered the premises?

iv. Is the plaintiff entitled to damages for loss of business?

v. Did the plaintiff in vacating the premises occasion any damage thereto? If so what was the extent and cost of such damage?

vi. How ought the deposit of rent in the sum of Kshs.270,000/= held by the defendant be treated and applied?

vii. **What orders should be made as to costs?**

<u>**Analysis and determination**</u>

24. I have had the benefit of reading the submissions offered by the parties and from the onset I take the view that the determination of this suit and the counter claim would have to be centered upon the interpretation of the terms of the written lease between the parties dated 1st October 2013 to enable determine its import on the parties' rights and duties and thereby ascertain any breach by any of the parties and the legal effect of such a breach. That lease is evidently not witnessed nor registered hence it did create a controlled tenancy.

<u>**(i) Re-entry by the defendant**</u>.

25. Under Clause 5, provisos, the parties agreed as follows:-

a) "If the rent hereby reserved or any part thereof shall at any time be unpaid for <u>two months (2 months) after becoming</u>

<u>payable</u> (whether lawfully demanded or not) or if any of the covenants on the part of the Lessee herein contained shall not be performed and observed then and in any of the said cases it shall be lawful for the Lessor to re-enter upon the premises or any part thereof in the name of the whole and thereuponthis Lease shall determine absolutely but without prejudice to the right of action of the Lessor in respect of any breach of any of the covenants on the part of the Lessee herein contained".

26. It is therefore plain by parties own written agreement to lease, which even though not registered nor witnessed was the basis upon which possession was given and taken hence it is binding as between the parties on its terms, that the defendant would only be entitled to re-entry when rent goes into arrears of two months.

27. The evidence on record is that rent was paid up to 31/01/2015 . That is what comes out of the defendants advocates letter dated 3/2/2015. That was conceded by the 1st defendant in his evidence in chief and upon cross examination. That being the position on state of rent payment, even on the terms of the lease agreement, without resort to the statute, there had not accrued a right to re-enter on the 6/01/2015 as the defendant purported to do. To that extent the re-entry was unlawful and an evident breach of the contract between the parties.

28. Secondly under part VI the Land Act, section 75 in particular, a lessor is only entitled to forfeiture after service of a Notice of at least 30 days. Here no iota of evidence of any notice was ever led nor alluded to go as to comply and satisfy the requirements of the law. Once again the statute would deem the forfeiture by the defendant in locking the premises unlawful.

29. In any event there are ample correspondence from the defendant that would clearly disentitle it to re-entry. I have in mind the letter dated 5/2/2018 in which the defendants advocate wrote:-

> **"We understand that your client needs to move by Saturday. Kindly advise your client to pay outstanding rent arrears, noting that according to their tenancy agreement, rent is payable on 5th of every month. *<u>Therefore if the same is not received by close of business on the 6th February 2015, our client will now be demanding rent for this month</u>*".**

30. That letter is explicit that what was deemed arrears of rent was indeed alleged electricity bill calculated by the defendant at Kshs.30,348/= and said to have been deducted from the rent paid.

31. The quoted excerpts of the letter is explicit that the plaintiff had up to end of 6/2/2015 to pay the alleged rent. I will however deal exclusively with this issue when dealing with the question of outstanding electricity bills. The plaintiff was equally given notice that on default of payment by that date, the rent for February would be charged. That notice having come from the defendants own legal counsel, and with regard to the provisions of Section 120Evidence Act, was it justifiable or lawful for the defendant to move to the premises before the time so granted? I find that the landlord was totally wrong to have acted as he did both under the contract, under the law and on the basis of the letter. I do find that the defendant attempt and action of re-entry was wholly and utterly unlawfully and tortious.

32. The law in this country is that even for re-entry the rule of law must be complied with if no consent is achievable. In ***Gusii Mwalimu Investment Co. Ltd vs Muahimu Hotel Kisii Ltd, [1996] eKLR*** 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. <u>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".</u>**

33. 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.

34. This position has been reiterated in the past and the words of Maraga J, as he then was, in ***Charles Mwangi Kamau vs Mohammed Hassan Sheikh Noor, Mbs HCC No. 2 of 2005***, puts it more succinctly when the judge said:-

> **"Sad will be the day when any court of law will with equanimity allow and assist a party to retain a position of advantage that he obtained through planned act of contemptuous disregard to the law of the land".**

35. By his prayer No. 2 in the plaintiff the plaintiff did pleaded and prayed for punitive damages. Punitive damages are awarded as a way of punishment for flagrant infringement or disregard of the law and rights and as a way to deter others from such unwarranted violations

For this case I am convinced that had the plaintiff sought exemplary over and above punitive damages I would award both as a way of expressing displeasure at the defendant's wanton disregard of the law on re-entry. Having so said and having read the submissions offered by the parties, even if neither cited any decisions on the principles applicable and quantum of damages awardable, I have for myself read the decision by my brother Mbogholi Msagha j,[1]in which the judge awarded damages in the sum of Kshs.800,000/- on the 6/4/2016. Taking into account all the circumstances of the case including the fact that parties had negotiated and almost agreed on the discounting of arrears of rent and service charge for value of equipment left in the premises, I do award to the plaintiff the sum of Kshs.2,000,000/= being punitive and exemplary damages for the wrongful re-entry by the defendant.

Lost money

37. Even though parties isolated this as an issue based pleading and there having been evidence led to the effect that some money was left at the premises which was then lost, there was never a prayer for that sum. That sum to me is in the nature of special damages that ought to have been specifically pleaded, prayed for and strictly proved. I do find that there was no compliance with this legal requirement and therefore I am unable to make any award to that effect. However even if it had been pleaded as the law dictates, and it being alleged that it was partly money for sales, one would have expected some evidence in the form of the records of such sale for the day to avail some proof the presence of the money earned on that date.

38. The third reason the sum cannot be awarded is the fact that the evidence on record of the happenings of 6/2/2015 is contradictory and not easy to reconcile. The PW 1 said that on that day they were moving out yet the other witness PW 2 gave evidence that on that day the restaurant was operating normally and they only closed for lunch. Those two accounts are difficult to reconcile. Taken together with the fact that by that time the plaintiff had acquired alternative premises to ran its restaurant business make me doubt that such a large amount of money could have been left in the premises. I resolve the third issue to the effect that no money was proved to have been left and lost in the presence to justify the same being awarded to the plaintiff.

Loss of business

39. While it would be the natural consequence that the plaintiff lost some business due to what I have found to have been unlawful and wrongful re-entry, such a loss when made quantifiable at the date of filling suit is in the nature of special damages. It ought to have been specifically pleaded and strictly proved. In this matter, the body of the plaint pleaded Kshs.35,000/= per day, the prayer quoted the sum of Kshs.40,000 per day but there was no evidence at all on how that figure was arrived at. It would have been possible and desirable to avail to court records of sales even for a month to prove the general trend but no such attempt was made at all.

40. I have awarded to the plaintiff exemplary damages form unlawful and wrongful reentry and in the making that award I was conscious that those damages were to equally take care of the losses occasioned by the closure and disruption of business. For that reason I decline to award any damages specifically for lost business as prayed.

41. I will consider the plaintiffs last prayer for declaration on rent arrears together with the defendants counter claim because they are interrelated.

42. In their counter claim, and it is not specific to which of the defendant it was pleaded, and sought, the defendants sought the recovery of the sum of Kshs.617,190 and particulars thereof duly given. The defendants also filed documents including a document entitled *"summary of intended renovation to the suit property after the plaintiff vacated (description of works)"* the document done by DW 2 but not signed by him. It is equally not dated. Of note however is the fact that it gives the costs of repairs at Kshs.432,190/ as opposed to the claimed sum of 409,690 . The document further gives credit to the plaintiff for the deposit held thereby leaving a balance of Kshs.248,490 including electricity bill of Kshs.30,000/= and service charge of Kshs.109,800/=.

42. However in his evidence the witness said four critical things that make the claim based on his professional assessment untenable. He said that; he is not licensed to practice as an architect in Kenya; does not belong to the professional association of architects and quantity surveyors and that he did not carry out the assessment by himself but the same was done by the 1st defendant and lastly that he was unable to give quantities nor costs of such quantities of the work to be done. On merits, those aspects of the evidence make it incredible and incapable of forming a basis as a professional opinion.

43. The second and related reason the evidence cannot be relied upon is the fact that under section 3, Architects and quantity surveyors Act, it is a criminal offence to practice as an architect or quantity surveyor unless one is registered and licensed under the Act. DW2 was thus unqualified to practice as an architect and therefore incapable of giving professional opinion to be relied upon by the court. His evidence cannot be relied upon by the court unless the court is prepared to assist the witness circumvent the provisions of a statute.

44. Having disbelieved the evidence of DW2, the remainder of the evidence on that claim as given by DW1 is clearly insufficient to justify a judgment in favour of the counterclaimant That claim is in the nature of special damages in the absence of how the sum was arrived at the same cannot be sustained but must be dis-allowed.

45. There was also an element on the counter-claim being Architects fees. Having found that the law forbids D2 from practicing without registration and license that sum is equally irrecoverable.

46. Next is the claim for unpaid rent and service charge for the month of February 2018. It is conceded that the defendant did lock the premises and thereby re-entered on the 6/2/2015. I consider that closure to amount to dispossession of the premises and therefore constructive eviction. The law is that upon a tenant being dispossessed of the premises, he stands immediately relieved of all the obligations to pay any rent or other monies due under the lease and indeed from all obligations under the lease.

47. Section 77 of Land Act provides:-

"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.

48. That being the legal position and having found that there was dispossession on the 6/2/2018, the last day he had to pay rent, the plaintiff was relieved from payment of the sums now claimed by the defendant and the same cannot be granted or made payable by the court.

47. The last element of the counter claim is the sum of Kshs.47,700 said to be unpaid electricity bill. While the counter claim claims Kshs.47,700/= the documents filed in support thereof say different things. The document prepared by DW 2, which I have found to be inadmissible gives the sum of Kshs.35,000/= yet the letter by the defendant's advocates dated 5/2/2015 demanded a sum of Kshs.30,348/=. However a customer's statement listed as document no. 7 in the defendants list of documents shown that as at 4/02/2018, there was a payment in the sum of Kshs.49,860/= which settled the power bill in full.

48. That is the sum payment of which was adverted to in the letter by the defendant's advocates dated 5/2/2018 at paragraph 1 to have been paid by the plaintiff. Clearly and uncontrovertibly by the time the plaintiff was dispossessed of the premises there was no power bill outstanding and none is therefore claimable or recoverable from the plaintiff.

49. The sum total of the foregoing is therefore that the counter-claim by the defendants cannot succeed but must fail and is therefore dismissed with costs.

50. There has emerged in both evidence and documents filed that the plaintiff did pay a rent deposit of Kshs.270,000/= which was never refunded upon dis-possession. That sum was not specifically pleaded and claimed by the plaintiff but in their respective evidence and the submissions filed the same is clearly adverted to and therefore made subject of determination by the court.

50. As said before that sum is specifically admitted by DW 1 in his evidence as due for refund just as DW 2 in his document called description of works (No.7 in the defendants list of document), specifically acknowledged the same as due to the plaintiff. Even though not specifically prayed for, this being a court of law if must answer to its core duty to do justice devoid of undue technicalities. It would be an act of placing justice at the mercy of the procedural rules of pleadings to decline to order refund and thereby unjustly enrich the defendant when the contract between the parties clearly made the deposit refundable upon termination of the term. To answer to the court's overriding objective to do justice and to avoid hardship, I invoke the courts inherent powers and direct as part of the plaintiffs prayer that the court grants any other order deemed fit, and make an order that the sum of Kshs.270,000/= be refund to the plaintiff. I repeat that in the circumstances of this case I have deemed it just and expedient to grant a refund of the deposit because it is conceded to have remained with the defendant

RENDITION AND FINAL ORDERS

51. i) Judgment be and hereby entered for the plaintiff as follows:-

a. A declaration that the defendant did unlawfully and wrongful re-enter the let premises on the 6/2/2015 by looking out the plaintiff.

b. An award of punitive and exemplary damages in the sum of Kshs.2,000,000/= for unlawful and wrongful re-entry.

c. An order that the defendants do refund to the plaintiff the sum of Kshs.270,000/= paid to the defendant as deposit of rent.

d. A declaration that no rent was due for payment to the 2nd defendant on the 6/2/2018 when it unlawfully re-entered and having so re-entered the plaintiff was relieved of all obligations under the lease immediately upon re-entry.

e. The defendant's counter-claim is dismissed for want of proof and for being unmerited.

f. The sums awarded in (b) and (c) above shall attract interest at court rates from the date of this judgment till payment in full.

g. The plaintiff gets the costs of the suit as well as that of the counter claim to be paid by the defendants.

52. It is so ordered.

Dated and delivered at **Mombasa** this **29th** day of **August 2018.**

P.J.O. OTIENO

JUDGE

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[1] Azim Sameja Lta Business 2000 vs Lakhamishi Virpalshah & 5 Others [2016] eKLR