



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO. 34 OF 2006

ZAVERCHAND PADAMSHI SHAH PLAINTIFF

VERSUS

NATIONAL CEREALS & PRODUCE BOARD..... DEFENDANT

JUDGMENT

1. The plaintiff herein ZAVERCHAND PADAMSHI SHAH filed a plaint on the 22nd day of March, 2006 which was later amended on the 13th day of April, 2006. In the amended plaint the plaintiff sought judgment to be entered against the defendant for:-
 - a. *Damages for conversion.*
 - b. *Loss of earnings.*
 - c. *Interest on (a) and (b) above.*
 - d. *Costs of the suit.*
 - e. *Any further relief as this court may deem fit to grant.*
2. Briefly the plaintiff's claim against the Defendant was that he (plaintiff) entered into a lease agreement with the Defendant dated 6th January, 1999 and 15th January, 2000 by which the Defendant agreed to lease its store and office respectively situated on Plot No. Kisii Municipality/Block III/263. That in breach of the said lease agreement the defendant started compelling the plaintiff to pay taxes contrary to what was contained in the covenant which resulted into a dispute the subject of Civil case No. 600 of 2001 at the Chief Magistrate's court at Kisii that case is still pending for hearing and determination.
3. The plaintiff further claims that on or about the 25th May, 2005 while the above suit was still pending and orders of status quo being in force, the defendant through its agents wrongfully and unlawfully locked up the rented premises and detained the goods belonging to the plaintiff which he particularized as follows:-
 - a. *A volkswagon van*
 - b. *6 printing machines(for exercise books)*
 - c. *535 cartons of finished exercise books.*
 - d. *150 reams of foolscaps*
 - e. *Raw materials used for manufacturing exercise books.*
 - f. *11 reams of manila papers*
4. By a consent order recorded in court between counsel appearing for both parties the Defendant agreed to open the premises for the plaintiff to remove his goods and give vacant possession and

further that any party aggrieved with the closure be at liberty to commence legal proceedings in a court of competent jurisdiction. The premises were opened on the 14th of September, 2005 when the Defendant opened the premises pursuant to the consent order but the plaintiff alleged that several goods were missing and/or had been converted to the Defendant's own use. He particularized the alleged missing goods as follows:-

- a. 2 printing machines valued at kshs.3,250,000/-
- b. 371 cartons of exercise books valued at kshs.1,484,000/-
- c. 135 reams of foolscaps valued at kshs.20,250/-
- d. 11 reams of manila papers valued at kshs.26,500/-

5. He (plaintiff) claims that by reason of the said conversion he has suffered loss and damage in terms of:

- a. Value of the converted goods.
- b. Loss of earnings of kshs.120,000/-

Per day between 25th May, 2005 and 14th September, 2005.

6. The defendant filed an amended defence and counterclaim, denying the allegations/claims by the plaintiff and putting him to strict proof thereof. They aver that the plaintiff was duty bound to pay taxes and that they committed no breach in asking the plaintiff to pay the same.
7. They aver that the plaintiff was the one who breached his covenant to pay rent under the leases by hiding behind the excuse of the taxes to avoid the covenants. The Defendants therefore deny that KISII CMCC.NO. 600 OF 2001 relates to the alleged dispute on taxes and puts the plaintiff to strict proof thereof. The defendant also aver that no orders of status quo existed as on the 25th May, 2005 but what was in force was an order of stay of sale of goods that had been attached pursuant to a distress for rent done in the year 2001; that there was no order of injunction issued barring the Defendant from levying distress on any other goods and the Plaintiff was invited to strictly prove his claims.
8. The Defendants further aver that the consent order recorded in KISII CMCC.NO. 600 OF 2001 was done on 13th September, 2005, while the premises opened on the 15th September, 2005 pursuant to the said consent order and there was therefore no way the plaintiff could have discovered the alleged anomalies unless he had accessed the premises prior to the consent order in which case he would have been personally responsible for any such alleged loss.
9. Further that the padlocks used by the defendants to lock the suit premises were so used in addition to and not to the exclusion of the Plaintiff's own padlocks and thus the defendants had no access to the premises other than when the plaintiff was present. That in the circumstances, the plaintiff was duty bound to provide security for his moveable properties and if any property was lost as alleged then this was due to the plaintiff's own negligence and the Defendants cannot therefore be blamed for the alleged losses.
10. The Defendants further aver that since they did not take possession of the premises from the plaintiff they did not therefore assume any duty of care of the plaintiffs moveable properties which in any event had been attached by M/S LIFEWOOD AUCTIONEERS and the plaintiff could not reasonably expect the Defendants to guard the same in that behalf especially since he had obtained an injunction to stop the sale of the goods. The Defendants add that the plaintiff took possession of the premises on the 15th day of September, 2005 and acknowledged receipt of all his goods to his satisfaction and therefore the claims in the plaint are made in bad faith. The Defendants further deny converting the plaintiff's goods and seek proof from the plaintiff. The Defendants also contend that the plaintiff has come to court with unclean hands as he owes the Defendants the sum of Kshs.2,187,895.50/= in unpaid rent and that he (plaintiff) lacks the locus to bring this suit as the leases were completed with a different lessee.
11. By way of counterclaim the Defendants allege to have let out their stores and offices situated on Plot No. Kisii Municipality/Block III/263 to the plaintiff for a period of five (5) years and that the Plaintiff was under an obligation pursuant to the lease agreements to pay rent to the Defendants at

- the agreed payable quarterly rebate which was for the store's rent per month Kshs.3,500/- from 1st September, 1999 to 31st August, 2000, Kshs. 38,500/- from 1st September, 2000 to 31st August, 2002 and Kshs. 42, 350/- for the remainder of the term whereas for the office rent per month was Kshs. 2,328/= from 1st January, 1999 to 31st December, 2001, Kshs. 2,568.85 from 1st January, 2002 to 31st December, 2003 and Kshs. 2,817.35 for the remainder of the term.
- 12.The defendants aver that in blatant breach of the provisions/ conditions of the lease agreements as above stated, the plaintiff refused to pay or defaulted in payment of rent whenever it fell due from March, 2001 hence running into areas which stood at Kshs.2,187,895.50 as at September, 2005. That is the amount the defendants counterclaim against the plaintiff being rent areas together with interest thereon at the prevailing commercial rates from the due date until payment in full. The defendants also pay for costs of the counter claim plus interest thereon.
- 13.The plaintiff's testimony briefly is that he entered into the agreement with the Defendant for store and go down space in 1999. That in 2001 defendants wrote to him over rent arrears which he disputed. He then filed suit to challenge the rents vide KISII CMCC. NO. 600 OF 2001. The amended plaint in the said case is exhibited to the court being **Exhibit.1**, application for injunction with the supporting affidavit being **Exhibit.2** and the orders granting the injunction being **Exhibit.3**.
- 14.He testifies further that the goods produced were to be kept until the suit was heard and determined but on the 31st May, 2005 auctioneers trading as Livelihood Auctioneers proclaimed the same, locked up the premises only leaving a letter (**Exhibit4**) about what they had done. He (plaintiff) produced the proclamation invoice as **Exhibit.5**.
- 15.The plaintiff also testified of having moved the Chief magistrate's court for an order for temporary injunction on 3rd June, 2005 being (**Exhibit.6**) but the orders were not complied. He also managed to get orders from the same court to have the premises opened(**Exhibit.7**). On the 26th July, 2005 he obtained other orders to have the property released and have its manager jailed for 3 months.
- 16.He testifies that the property was released and the premises were finally opened but when he went on the 14th September, 2005 with one Benjamin and on checking the goods and taking inventory of the same he found that some of the goods were missing. He produced the inventory as (**Exhibit.8**) which showed that following items were missing from the premises:-
- a. *2 printing machines;*
 - b. *371 cartons of exercise books;*
 - c. *135 reams of foolscaps and;*
 - d. *11 reams of manila paper.*
- 17.That he made a demand for the missing items. He produced **P. Exhibit 9** – demand letter – and purchase receipts (**P. Exhibit 10**) for the printing machines valued at Kshs.8,600,000/=. He also produced the invoice and delivery notes for the machines as **P. Exhibit 11** and **12** respectively.
- 18.He testified further that the Defendants closed the premises for 110 days from 25th May 2005 to 14th September 2005 when he did no business whatsoever. He continues that the Defendants had no court order to close the premises. He further testified that he was present the first time there was proclamation but on the second proclamation he was not present and only got the proclamation while he was at his residence.
- 19.The plaintiff also told the court that he suffered loss of earning at Kshs. 120,000/- a day for that period as he was making Kshs. 120,000/- gross a day while his profit was Kshs. 60,000/- a day. He produced balance sheet for the year 2004 being **Exhibit 15(a)** and the one for the year 2005 being **Exhibit. 15(b)**.
- 20.He told the court that he did not refuse to pay rent nor was he in arrears of kshs. 2.8million he only found out subsequently that the Defendants were not allowed to lease the premises and so he opted to come out of the agreement but they (Defendants) kept the premises locked and held onto to his goods without allowing him to continue operating his business. He also said that the premises were fenced and the Defendants were the ones taking care of the same with 24 hour guards at the gate who locked the said gate and never allowed him to enter the godown. That the

value of the missing property was Kshs. 3,250,000/- for the two machines (stitching machine worth 750,000) and ruling machine was worth 2.5million) 371 cartons of exercise books A4 worth kshs. 4,000/- per carton total being Kshs. 1,484,000/= 135 reams of foolscaps worth Kshs. 150 per ream making a total of kshs. 20,250/-, 11 reams of manila papers worth kshs. 26,500/=, with the grand total being Kshs. 4,780,750/- which he is asking to be paid by the defendant together with loss of earnings, interest on both and costs of the suit.

21. The Court on 2nd November, 2009 allowed the production of

MFI.10,11 and 12 by the plaintiff being relevant to the matters in issue as they showed that the plaintiff was the owner of the goods he alleges went missing and for which he blamed the defendant. He stated that he was the owner of the goods because he bought them. MFI.10 is the agreement signed between him (plaintiff) and the seller. MFI.11 is the invoice the seller sent to him and MFI.12 is the delivery note sent along with the goods.

22. On the 18th November, 2010 the matter proceeded before M.A. MAKHANDIA, J (as he then was) who took over the same from A.O. MUCHELULE, J who was no longer in the station. At that hearing, the plaintiff produced **Exhibits 9, 10 and 11**.

23. On cross-examination the plaintiff confirmed that he entered into a lease agreement with the Defendant for a period of 5 years with effect from 6th January, 1999; that the said agreement was never renewed after it expired on 6th January, 2004 but he continued occupying the leased premises. He further testified that he used to pay rent and was issued with receipts but occasionally he would fall into arrears.

24. He confirmed that at the time of expiry of the lease he was in arrears for which Defendants levied distress, leading to proclamation of his property though the same were never attached and/or sold and that to date he has not cleared the said arrears which he confirms to be kshs. 2,187,895/50. He further testified that the printing machines were attached by the Defendant who did not physically carry them away. He said that he was present when the premises were closed by the Defendant; that no inventory was taken but he had a record of the stock in the premises.

25. He also confirmed that the premises were locked with a padlock; that he did not have a security guard for the premises but he used to lock the premises with his own padlock before the attachment. He adds that he did not lock the premises with his own padlock when the same were locked by the defendant. When the premises was re-opened pursuant to a court order he (the plaintiff) was present and an inventory was taken to ascertain the properties in the premises.

26. He further told the court that the defendants only locked the premises but he (plaintiff) was not stopped from accessing the same. He adds that he had an opportunity to have his security guard look over the premises when they were locked but he did not take it up as he was running other businesses in Kisii during that period. He told the court that he had nothing to show that his goods were converted by the Defendants.

27. During re-examination he reiterated what he had told the court in examination in-chief. He told the court that during the period when the premises were locked he never accessed them but the premises could only have been accessed by the Defendants who were better placed to account for the properties' disappearance.

28. When I took over this matter on the 3rd October, 2011 the parties agreed that the matter proceeds from where it had reached before Makhandia, J. On the 11th December, 2012 the matter came up for defence hearing. Mr. Geoffrey Richard Owange the legal officer of the Defendant was the first to testify as DW1. He told the court that he knew the plaintiff herein who was one of their tenants in Kisii Depot; but was no longer a tenant. He testified that the plaintiff ceased being their tenant on or about 2005 UPON EXPIRY OF THE LEASE AGREEMENT.

29. He testified that when the plaintiff left the premises he was in arrears of rent. He produced some unpaid invoices running from 1st April, 2003 to 1st May, 2005 totaling to Kshs. 2,187,895/50. He told the court that the invoices showed details of rent payable and when it was due. The documents he had were all statements of account touching on the lease agreements with the plaintiff and they were marked as Defence **Exhibits 1A and 1B**.

30. He further told the court that the lease entered into between the plaintiff and defendant was in writing (**P.Exhibit.2**) and the same provided for re-possession of the premises by Defendant in

- case of default at clause (a) of page 7 of the lease. DW1 further stated that once rent was in arrears for 30 days the defendants had a right to re-possess the premises which they did. DW1 further stated that upto and including the day of his testimony, the plaintiff had not cleared the arrears. He urged the court to allow the defendants' counter claim with costs and to dismiss the plaintiff's claim with costs to the defendants.
31. On cross-examination by Mr. Bosire for the Defendants, he (DW1) confirmed that the lease agreement was entered into in 1999 and was to expire in January, 2004 but the plaintiff stayed on after the expiry because of a court order. He also told the court that he had never received any communication from the Plaintiff that he (plaintiff) wanted to move out of the premises on the ground that the defendant had no right to lease. That according to clause 1(b) at page 3 the purpose of the lease was for storage and manufacture of exercise books.
 32. He testified further that the **National Cereals and Produce Board Act, Cap 378 Laws of Kenya** allowed them to lease premise for such purposes through the directive of the minister and although he did not have the particular directive the Act allowed them to lease. He told court that he did not have any minute of the Board allowing the lease for that purpose but denied a suggestion that the Act only allowed them to store cereals.
 33. He further told the court that it was not true that they refused to let the plaintiff move out. He testified that they never got any notice from the plaintiff of his intention to move out nor did they hold the plaintiff hostage in the premises as alleged. He explained that there was a court order barring them from evicting the plaintiff as they (defendants) had given the plaintiff a notice to move.
 34. That the notice was given after the plaintiff defaulted the 1st quarter payment and that such notice is given through statements. He testified that he did not know whether an inventory was taken when the premises were locked, but he recalled the court order requiring the defendants to re-open the premises. He could however not say when the court order was given.
 35. DW1 further confirmed that there was a court order for disobedience and the manager was to be committed to 3 months' jail term. He adds that he was not aware whether plaintiff's goods were missing because the defendant obeyed the court orders issued and the plaintiff got all his goods back on the 14th September, 2005. He told the court that they never received any letter of complaint from the plaintiff regarding alleged loss of 2 printing machines and other items allegedly missing.
 36. He also testified that he was not aware of the plaintiffs letter dated 30th September, 2005 and it would surprise him if he was told that they (defendants) responded to it. He added that it was not true that proclamation was made a day after closure. He said that during the proclamation the machines were included. He further testified on cross-examination that on re-opening of the premises the plaintiff took the inventory in the presence of the depot manager of the defendant and Victoria Auctioneers. They also gave another auctioneer instructions to take inventory and there was disparity in the inventories by the 2 auctioneers.
 37. He stated that the 2nd proclamation consists of other items that were not in the first inventory and according to the report from the auctioneers; it was the plaintiff who opened the premises on 31st May, 2005. He testified further that the plaintiff had his own padlocks and they (Defendants) had their own, both parties had to be present for the premises to be opened and that for this reason, there was no way the defendants could have entered the premises and converted any items belonging to the plaintiff.
 38. He confirmed that the premises were closed on 25th May, 2005 and there was a letter of even date to that effect. The letter showed that there were 4 padlocks placed by PATRICK KARANJA but the same letter does not indicate that the plaintiff put his own padlocks. He agreed that the premises were locked by the Defendants alone and that there was proclamation on 31st May, 2005 but the proclamation does not show that plaintiff was present. He maintained that it was not true that any goods went missing and adds that the plaintiff carted away all his goods that were there at the time of re-opening of the premises. He told the court that he was not aware of any police report showing that some goods were reported stolen. He denied that the plaintiff was forcefully detained.
 39. On re-examination by Mr. Kamau, DW1 confirmed that the defendant had authority to lease the premises with the minster's authority, which authority is delegated to the Board of Directors by the

- minister. He also stated that the defendants did not prevent the plaintiff from vacating the premises; and that it was PATRICK KARANJA who locked the premises according to the letter dated 25th May, 2005. That this was done in the presence of the plaintiff's wife and workers on behalf of the plaintiff. He was not in a position to explain whether there were additional padlocks put by the plaintiffs.
40. DW2 PATRICK MBUTHIA KARANJA ID.NO. 10086204 testified on the 29th January, 2013. He told the court that he was the current Board Secretary at the Defendants company and that this dispute stems from landlord/tenant relationship where the plaintiff who was doing printing business was their tenant on Plot No. Kisii Municipality/Block III/263 from January, 2001 for 2 years at a monthly rental of kshs. 42,350/=.
 41. He testified that in December, 2001 the Government introduced Value Added Tax (V.A.T) on buildings for non-residential purposes, and when they were sorting out the issue with the plaintiff the Defendant went ahead and paid the VAT in the sum of kshs. 29,564/- per month on behalf of the plaintiff until it was withdrawn a few months down the line. He added that the plaintiff resumed to pay the VAT and at the same time he did not pay his normal rent with the result that the arrears escalated to kshs. 2.8million as at the time of filing the suit in the chief magistrate's court.
 42. He testified further that they had records of the rent arrears namely the statement of account NCPB form No. 35 which he produced as DExhibit.2. He also stated that because of the rent arrears, the lease was not removed though the plaintiff remained in the premises for another six (6) months. That the plaintiff neither paid the rent arrears nor the rent for those additional six (6) months.
 43. He told the court that the defendants were to be paid the rent arrears by cheque on 25th May, 2005 but this never happened as the plaintiff was not at his premises when he (DW2) went to pick up the cheque from the plaintiff's office. At the plaintiff's office he met the plaintiff's wife and some other 3 workers and he (DW2) explained the reason for his visit and told them that if there were no payment he was going to lock the premises.
 44. He testified further that the plaintiff's wife voluntarily locked the premises using their usual padlocks and he told her that he would add his own (4) padlocks which he did. He also testified that when he locked the premises there were some properties inside of which he took an inventory which included printing material, an old volkswagon van and one old printer. That when he asked plaintiff's wife to sign the inventory she declined. The inventory is dated 25th May, 2005 and it was witnessed by CHARLES NGETICH, ERASTUS ADONGO and DAVID CHEPKWONY who was in charge of accounts, GEOFFREY MAKORI a guard with METRO GUARDIAN SECURITY GURARDS and one ANTONY OKEYO. He has produced the said inventory which is marked **D.Exhibit.3**.
 45. DW2 also testified that the Plaintiff filed a suit in the lower court and on the 15th September, 2005 the plaintiff went to the premises for his properties while he (DW2) was not present. He says he only knew this from the occurrence book of the Defendant dated 15th September, 2005 produced as **Exhibit.4**.
 46. As to the plaintiff's claim DW2 is categorical that the defendants did not convert the plaintiff's properties. He also said the plaintiff still remains in arrears of rent the subject of the counter claim. He prays for judgment on the counter claim of Kshs.2.8 million rent arrears, interest and costs and also prays that the plaintiff's suit be dismissed.
 47. On cross examination by Mr. Bosire, DW2 confirmed that the defendants had a lease agreement with the plaintiff. He referred to section 4 of the NCPB ACT which Act does not give the defendant any power to manufacture exercise books but in this case it was the plaintiff as lessee who was manufacturing books. Under **Section 4 (d)** and **4(2)** defendant was allowed to engage in other duties, like leasing out excess capacity with the approval of the minister for whatever purpose.
 48. He explained that the minister usually issues circulars from time to time but he had not carried any of the circulars though the fact that they leased excess space was enough evidence of that power. He confirmed that he did not have any inventory evidence which approved the lease with the plaintiff; that the minister's approval was gazetted in 1998 though he did not have a copy of the Gazette Notice in court. He added that the lease was due to expire on 31st January, 2004 being a 5 year lease with effect from January, 1999.

49. He told the court that the plaintiff did not apply for extension of the lease though there were indications he wanted to extend. He denied that they forced the plaintiff to stay on in the premises.
50. DW2 further testified that the accounts they had produced in court were for the period up to February, 2005; and according to **Exhibit.2** plaintiff paid some rent amounting to Kshs. 683,116/- on 4th March, 2013 which brought down the arrears to Kshs. 2,051,239/50/=; and that after amendment of plaint, the figure of 2,187,895 for the counter claim was not correct.
51. He confirmed that the defendants closed the premises in May and re-opened them in September during which period they did not use the premises. He adds that the tenancy was from month to month and it not being a controlled tenancy, they did not go to the BPRT. He does not agree that the defendants acted illegally when they closed the said premises. He said the premises were closed with consent of the plaintiff. He confirmed that there were two lease agreements, one for the office and one for the store though he was not there when the lease agreements were signed.
52. He told the court that he was not aware if another inventory was done when the plaintiff took back his goods on the 14th September, 2005. He claimed that their OB showed that the plaintiff took his goods on the 15th September, 2005 but not on the 14th September, 2005.
53. Regarding court orders, DW2 testified that he knew orders were granted but the orders were not served upon the defendants. He further testified that there were no machine missing as they were not there in the first place. He confirmed that the defendants sent auctioneers to proclaim sometime on 30th May, 2005 some 5 days after closure and the auctioneer used his (DW2's) inventory during the proclamation. He was not present when the auctioneers went to the store.
54. In re-examination, DW2 told the court that at no time was the plaintiff's office closed and that after the lease expired the plaintiff continued using the premises. He testified further that the Defendant had powers to use its properties and that the rents received were for purposes of keeping and maintaining the properties.
55. At the close of the Defendants case the parties agreed to file and exchange written submissions which the court has had the opportunity of reading through together with the authorities cited therein.
56. The issues for determination in this matter are as follows:-
- a. *Whether the Defendant herein had authority to lease its premises being land parcel No. KISII MUNICIPALITY/BLOCK III/263 commonly referred to by the Defendant as "KISII DEPOT STORE NO.1" and if not whether the lease agreement entered into between the parties herein was illegal, null and void.*
 - b. *Whether the Defendant was right to close the above mentioned premises and whether by such closure the plaintiff suffered loss and damage.*
 - c. *Whether the plaintiff had any goods and/or properties in the closed premises and whether the same went missing during the period of closure thus entitling him to special damages.*
 - d. *Whether the defendants have proved the counter claim against the plaintiffs.*
 - e. *Who is to pay the costs of this suit?*
57. On the first issue, it is not indispute that the plaintiff and the defendant entered into a tenancy agreement on the 6th January 1999. The question raised by the plaintiff in his submissions is whether the defendants had the requisite authority to lease the premises to the plaintiff herein. As rightly pointed out by the defendants, the plaintiff did not raise this issue in the pleadings whether in the plaint as originally filed or in the amended plaint dated 13th April, 2005. It is trite law that parties are bound by their pleadings. In my considered view, submissions do not form part of pleadings. From the evidence on record, this issue seems to be an issue to be determined in Kisii CMCC No.600 of 2001, a matter that is still pending before the said court. As the issue is not before this court, and since no evidence has been adduced by the plaintiff to show that the defendants lacked the requisite authority to lease the suit premises, I cannot entertain the issue and make a finding on it. I would be making such a finding in vacuum.
58. It was not for the defendants to prove whether or not they had the authority to lease the premises. It is the plaintiff who seemed to suggest that the defendants had no such authority, and even them in a very belated manner, it was incumbent upon the plaintiff to prove on a balance of probabilities

- that the defendant did not have such authority. It was also incumbent upon the plaintiff to plead that fact and pick to adduce the evidence to prove it. Having failed to do so, I resolve this issue in favour of the defendants.
59. In any event, the plaintiff alleged in his submissions that by leasing out premises to the plaintiff who was engaged in printing and manufacturing business, the defendants acted outside the purview of their mandate under the National Cereals and Produce Board Act. In my humble view, that is far from the truth. The person carrying on the printing and manufacturing was the plaintiff and not the defendants. The defendants have given evidence to show that the money received as retns was used for maintenance of the premises.
60. Further, the plaintiff in this case is estopped by the provisions of **Section 121 of the Evidence Act, Cap 80 of the Laws of Kenya** from denying that the defendants had at the beginning of the tenancy in 1999 a good title to the premises which were leased by the plaintiff. It is interesting to note that while the plaintiff is claiming monies arising from his occupation of the defendant's premises, he is also saying that the lease agreements under which the monies claimed arose were illegal, null and void. The plaintiff cannot be allowed to approbate and reprobate in the same breath.
61. The second issue is whether the defendants were right in closing the suit premises when they did. From the evidence on record, I am satisfied that the defendants had the right to close the premises due to non-remittance of rent that was grossly in arrear. Further, and there is evidence from both the plaintiff and the defendants that the premises were closed with the full knowledge and consent of the plaintiff. This happened after the plaintiff failed to pay the rent arrears which he had promised to do by cheque on 25th May 2005. The plaintiff and the defendants had agreed that DW2, Patrick Mbutia Karanja, was to collect the cheque on the 25th May 2005, but when DW2 went for the cheque from the plaintiff the plaintiff was nowhere to be seen. Instead, only the plaintiff's wife and some workers were at the office. On that very day, DW2 informed the plaintiff's wife that in default of rent payment. The premises would be closed. The plaintiff's wife voluntarily closed the premises and agreed that the defendants would also put their own padlocks to secure the place until the issue of rent was resolved. There was, in my considered view, adequate notice of intended closure to the plaintiff.
62. The second limb of the second issue is closely linked to the third issue which raises the question as to whether there were any goods and/or properties in the closed premises which went missing during the period of closure. There is no clear evidence before court to show what properties were in the premises as at 25th May 2005 when the premises were closed and which of those properties had gone missing by the time the premises were re-opened either on 14th or 15th September 2005. The plaintiff alleged that the defendants converted those missing goods to their own use.
63. The evidence on record shows that both plaintiff and defendants had their padlocks on the premises so that none could re-open the premises without the other. From his testimony, there is nowhere where plaintiff says that the missing goods were taken by the defendants, nor did the plaintiff plead and prove that the defendants owed him a duty of care over the alleged properties and that there was breach of such care. In the circumstances, I make a finding that the plaintiff did not prove his allegation of conversion since he did not prove what goods if any, were locked up in the premises on 25th May 2005 and which of those goods were actually missing as on 14th or 15th September 2005.
64. The upshot of what I have stated above is that the plaintiff did not prove that he suffered any loss and/or damage as a result of the closure nor did he prove that any items went missing and were converted by the plaintiff. Even if I had found that there was conversion, the value of those facts could only be what was pleaded in the plaint.
65. On the counter claim, there is ample evidence showing that the amount on the counter claim was owed by the plaintiff to the defendants and the same remains unpaid to date. The plaintiff admitted as much in his testimony both during his evidence in chief and during cross-examination. The defence produced several exhibits in support of this claim. I would therefore enter judgment for the same in favour of the defendants.
66. As regards costs, these follow the event. Accordingly I enter judgment as follows:-

- a. *The plaintiff's suit be and is hereby dismissed with costs to the defendants.*
- b. *Judgment on the counterclaim be and is hereby entered in favour of the defendants as against the*

plaintiff in the sum of Kshs.2,187,895/50 together with costs and interest thereon from date of filing the counterclaim.

67.Orders accordingly.

Delivered, dated and signed at Kisii this 24th day of September, 2014.

R.N. SITATI

JUDGE.

In the presence of:-

Mr. Bosire Gichana (present) for Plaintiff

Mr. Bigogo for Kalya & Co. (present) for Defendant

Mr. Bibu - Court Assistant