REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELCC NO. E19 OF 2020

JOMO KENYATTA UNIVERSITY OF

AGRICULTURE AND TECHNOLOGY.....PLAINTIFF

VERSUS

KWANZA ESTATES LIMITED.....DEFENDANT

JUDGMENT

1. Proceedings in this matter started on 17th November 2020 when the plaintiff, a public university established under the Jomo Kenyatta University of Agriculture and Technology Act, 1994 (repealed), filed plaint dated 16th November 2020, against the defendant, a limited liability company incorporated under the Companies Act. The said plaint was later replaced with Amended Plaint dated 28th May 2021. The plaintiff averred that it entered into a lease agreement with the defendant pursuant to which it leased all the property known as Kwanza House Building Block 9/90 Nakuru Municipality (the premises) for a term of 6 years running from 1st May 2016 to 30th April 2022. That following the execution of the lease, a series of events took place whose result was that the lease was frustrated and/or rendered commercially impossible.

2. The following particulars of frustration of the lease were pleaded:

a. Change in law occasioned by implementation of a new placement policy by the KUCCPS where all students who attain the minimum entry requirements for admission to the university are sponsored by Government in both the private and public universities. This was done pursuant to Section 56 of the Universities Act, 2012 ("the Universities Act").

b. Reduced student enrolment occasioned by lack of self-sponsored students on account of the move by the government to fully sponsor all students who attain the minimum entry grade of C+.

c. Reduced and/or non-existent government support which was critical to financing the operation of the Plaintiff.

d. The emergence of the Covid-19 pandemic which resulted in the closure of schools and learning institutions.

e. The lack of funds for the Nakuru CBD campus whose income and expenditure is wholly reliant on revenues obtained from academic operations from its self-sponsored students program.

3. The plaintiff further averred that the lease agreement allowed it to terminate the said agreement and also envisaged possibility of termination prior to expiry of the term. That through a letter dated 10th July 2020, it issued to the defendant a three months' notice of intention to terminate the lease and vacate the premises. That despite the notice and despite the plaintiff vacating the premises on 31st January 2021, the defendant served on it invoices for rent for the period November 2020 to April 2021 and even instructed auctioneers to issue proclamation against the plaintiff for recovery of purported arrears of rent.

4. The plaintiff therefore prayed for judgment against the defendant as follows:

a. A declaration that the lease agreement in respect of all that property known as Kwanza House Building Block 9/90 Nakuru Municipality between the Plaintiff and the Defendant has been rendered commercially impossible.

b. A declaration that the lease agreement in respect of all that property known as Kwanza House Building Block 9/90 Nakuru Municipality between the Plaintiff and the Defendant has been frustrated by operation and/or change in law.

c. A declaration that on account of the frustration, the Lease in respect of all that property known as Kwanza House Building Block 9/90 Nakuru Municipality has been terminated and parties thereto are discharged from their obligations.

d. A declaration that upon expiry of the notice to terminate issued by the Plaintiff to the Defendant vide the letter dated 10th July 2020 the Lease agreement was terminated.

e. A declaration that having exited the suit premises on the 31st day of January 2021 the Plaintiff and the Defendant are no longer in a landlord tenant relationship with respect to the suit premises.

f. A declaration that the Proclamations for Distress of Moveable Property issued to the Plaintiff by Messrs. Pyramid Auctioneers on the 6th day November 2020 and the 10th day of February 2020 for the sum of Kshs 15,776,973/= and auctioneers fees of Kshs 1,577,697 and Kshs 16,053,762/= and auctioneer fees of Kshs 1,605,376/= respectively are unlawful in the circumstances.

g. A permanent injunction restraining the Defendant by itself, or through its agents, servants or assigns from levying distress and/or attaching, removing and/or selling or in any other way interfering with the Plaintiff's property.

h. A permanent injunction restraining the Defendant by itself, or through its agents, servants, employees or assigns from harassing, causing disturbance or in any way being a nuisance to the Plaintiff.

i. Costs of this suit.

j. Any other relief that this court may deem fit to grant.

5. The defendant filed defence and counterclaim in which it admitted that the parties entered into the lease agreement, that the plaintiff issued it with the notice dated 10th July 2020 and that it instructed auctioneers. It averred that the lease did not have a termination clause and that the notice of termination was void and could not validly terminate the lease. It further averred that the plaintiff was obligated to continue occupying the premises and paying rent up to 30th April 2022. The defendant generally denied the plaintiff's other averments.

6. In the counterclaim, the defendant averred that the lease did not have an option of termination and that following the purported notice of termination dated 10th July 2020, it stood to suffer loss of KShs 97,817,231 being rent for the period up to 30th April 2022 and KShs 64,652,250 being cost of restoring the premises to a tenantable state of repair. It totalled both amounts to KShs 162,469,481.

7. The defendant therefore prayed that the plaintiff's suit be dismissed with costs and that judgment be entered against the plaintiff for;

a) A declaration that the lease entered into between the Defendant and the Plaintiff on 1st May 2016 remains in force and has no break clause and the Plaintiff is obligated to continue paying rent the stipulated rent of land known as Nakuru Municipality Block 9/90 for the entire period of the lease, and to pay the agreed rent up to 30th April 2022.

b) A declaration that the purported notice of termination of lease issued by the Plaintiff dated 10th July 2020 is null and void in law.

c) Payment of Kshs 162,469,481/=

d) Costs of the suit with together with interest.

e) Any other relief this Honourable Court may deem fit to grant.

8. The plaintiff filed a reply to the defence and defence to the counterclaim in which it urged the court to dismiss the counterclaim with costs.

9. On 2nd June 2021, an order was made by consent of the parties in the following terms:

By consent:

The Plaintiff shall pay to the defendant the sum of KShs 40 million (forty million) all inclusive, being the cost of restoring the premises to its original state, which payment shall be made within 40 (forty) days from today.

10. The matter then proceeded to hearing. Each side called only one witness.

11. Robert Kinyua, a Professor of Physics and Deputy Vice Chancellor in Charge of Academic Affairs at the plaintiff university, testified in support of the plaintiff's case. He stated that on 1st May 2010 the plaintiff and the defendant entered into an initial lease agreement pursuant to which the defendant leased the premises to the plaintiff for the purpose of housing its Nakuru Central Business District Campus (Nakuru CBD Campus) for a period of Six (6) years ending the 30th April 2016. That upon expiry of the said initial lease, on 1st May 2016 the plaintiff and the defendant entered into an unregistered lease agreement (the lease) in which the defendant agreed to lease the premises to the plaintiff for the purpose of housing its Nakuru CBD Campus for a term of Six (6) years from 1st May 2016 to the 30th April 2022.

12. Professor Kinyua further testified that among others, the lease provided for payment of rent as follows:

a. From the 1st day of May 2016 to the 30th day of April 2017, an annual rent of KShs. 45,543,000.

b. From the 1st day of May 2017 to the 30th day of April 2018, an annual rent of KShs. 47,820,150.

c. From the 1st day of May 2018 to the 30th day of April 2019, an annual rent of KShs. 50,211,157.

d. From the 1st day of May 2019 to the 30th day of April 2020, an annual rent of KShs. 52,721,714.

e. From the 1st day of May 2020 to the 30th day of April 2021, an annual rent of KShs. 55,357,799.

f. From the 1st day of May 2021 to the 30th day of April 2022, an annual rent of KShs. 58,125,689.

13. He went on to state that a security deposit for rent of KShs. 11,385,750 was paid in accordance with Clause 3.4 of the initial Lease and by agreement, the same was applied to the lease. That the plaintiff has adhered to the terms of the lease and that subsequent to the execution of the lease, the following events transpired:

a. The plaintiff experienced dire financial constraints occasioned by reduced government support and a decline in the uptake of programs.

b. The Nakuru CBD Campus made severe losses and was unable to financially sustain itself.

c. The situation was occasioned by a reduction of self-sponsored students following a decision by the Government to implement a new placement system where all students who qualify for admission to university are fully funded.

d. In the year 2014, the Government through the Kenya Universities and Colleges Central Placement Service (KUCCPS) formulated a new placement policy where all students who qualify for admission to university are placed as Government sponsored students in both private and public universities.

e. As a result of the policy, the placement of Government Sponsored students by KUCCPS into private universities started in the year 2017.

f. The effect of the new placement was that all students who scored a minimum entry of grade of C+ and above became fully sponsored by the Government of Kenya and not self-sponsored as had previously been the case. The result was a decline in enrolment of students in the public universities and a corresponding increase in enrolment of students in private universities.

g. The placement left the plaintiff without self-sponsored students for admission into its programs at the Nakuru CBD campus.

14. He added that the Nakuru CBD Campus was wholly reliant on self-sponsored students for its income and expenditure and that the unprecedented decline of students severely affected the plaintiff's financial resources. That the plaintiff also faced reduced and/or non-existent government support which is critical to its operations. That government directive on the closure of Universities issued on the 16th March 2020 due to the Covid-19 pandemic further worsened the plaintiff's cash flow challenges as the Nakuru CBD Campus remained closed.

15. That the plaintiff was to use the premises as a learning centre which purpose was frustrated as the plaintiff was leasing unutilized premises with no commercial value, thus rendering the circumstances upon which the performance of the lease is called for radically different from that which was undertaken and/or agreed upon by parties. That the said events were unforeseen by the plaintiff at the time of entering into the lease and as a consequence the plaintiff found it impossible to continue with its operations in the premises as envisaged under the lease. That the lease has been frustrated by operation and/or change of law which has defeated its objects and purpose thus rendering it commercially impossible.

16. Professor Kinyua went on to state that as a result of the above matters, through letter dated 10th July 2020, the plaintiff issued a three (3) month notice to the defendant intimating its intention to terminate the lease and vacate the premises. That in blatant disregard of the notice, the defendant served upon the plaintiff an invoice dated 19th October 2020 for KShs. 15,776,973 in respect of rent covering the period November 2020 to January 2021. That on 10th October 2020, upon expiry of the plaintiff's notice of termination, the plaintiff commenced the process of vacating the premises but the defendant restrained it from removing its property from the premises by placing security guards and goons at the entry and exit of the premises. Subsequently, through a letter dated the 6th November 2020, the defendant instructed Messrs Pyramid Auctioneers who issued a Proclamation for Distress of Moveable Property dated the 6th November 2020 for the sum of KShs 15,776,973 and auctioneers' fees of KShs 1,577,697.

17. Professor Kinyua further stated that the plaintiff ultimately vacated the premises on 31st January 2021 and that despite vacating, the defendant purported to instruct Messrs Pyramid Auctioneers through a letter dated the 10th February 2021 to proclaim against the plaintiffs' properties for purported recovery of rent arrears in respect of the period of February 2021 to April 2021 for the sum of KShs. 17,659,138. That the auctioneers issued a Proclamation for Distress of Moveable Property dated the 10th February 2021 for the sum of Kenya Shillings KShs. 16,053,762 and auctioneer's fees of KShs 1,605,376. That through a letter dated 8th February 2021, the plaintiff gave the defendant notice for the formal hand over of the premises and invited the defendant through letter dated 11th February 2021 for the formal hand over which was to be done on 12th February 2021. That however, the caretaker declined to participate in the handover exercise and that upon

conclusion of the exercise, a report was prepared.

18. He added that the plaintiff paid rent up to 31st January 2021 in accordance with the invoice that was presented to it and that on 5th May 2021, the plaintiff paid KShs. 778,848 being one-month late payment fee. That the lease had an exit clause at its clause 5.5. He produced copies of the documents in plaintiff's list of documents dated 16th November 2020, plaintiff's supplementary list of documents dated 28th May 2021 and plaintiff's further supplementary list of documents dated 31st May 2021 as exhibits. The plaintiff's case was then closed.

19. Geoffrey Makana Asanyo, the Managing Director of the defendant, testified next as defence witness. He confirmed that the parties entered into the lease and further stated that it was agreed that the plaintiff would pay the rent and the service charge reserved quarterly in advance clear of all deductions and pay a late payment fee of five percent per month (5%) on any rent or other sum due and payable under the lease if such sum was not paid within fourteen (14) days from the date on which it was payable. He added that the lease did not have a break clause and that the plaintiff is obligated to continue leasing the property for the entire term. That on 1st April 2020, the Vice-Chancellor of the plaintiff wrote to the defendant requesting for a full waiver of the rent payable from 1st April 2020 and for the subsequent period the university would remain closed. That the defendant replied on 14th May 2020 and informed the plaintiff that it was not possible to waive the rent as requested.

20. Mr Asanyo further testified that the defendant received the letter dated 10th July 2020 purporting to terminate the lease and added that the defendant responded to it through the defendant's advocates' letter dated 28th July 2020, informing the plaintiff that the lease had no break clause and that the defendant expected full payment of rent up to the end of the term. He added that on 13th August 2020, he held a meeting with the plaintiff's representatives and it was agreed that if the rent then due in the sum of KShs 17,105,821.65 was paid on or before 13th August 2020, the request for early exit would be considered. That no payment was received by 13th August 2020 as agreed and, as a result, Mr Asanyo wrote a letter dated 17th August 2020 informing the plaintiff that the defendant had withdrawn its offer of considering early exit.

21. Mr Asanyo went on to state that on 30th September 2020, the defendant instructed M/S. Triad Architects to inspect and evaluate the status of the leased premises and the cost of restoring it to its original state and that the said architect submitted a report dated 18th October 2020 indicating that the cost of restoration cost would be KShs 64,652,250.00 and that the works would take about 6 months to be executed. That subsequently, on 5th October 2020, the defendant's advocates wrote to the plaintiff informing it that it was in breach of the terms of the lease and that the plaintiff would be required to restore the building to its original state at a cost of approximately KShs 64,652,250. That upon realizing that the plaintiff wanted to remove its goods from the premises to defeat the right to levy distress, the defendant instructed KK Security Services Limited to ensure that no goods were removed from the premises. That based on the absence of a break clause in the lease, the defendant made financial commitments to financial institutions and that it stands to suffer irreparable loss and damage if the plaintiff is allowed to breach the terms of the lease.

22. Mr Asanyo also testified that as at 21st June 2021 which was the date of his testimony, the premises were still under the control of the plaintiff and that once the plaintiff pays the amounts in the consent recorded on 2nd June 2021, the parties could agree on a handover. That the plaintiff paid rent for November 2020 to January 2021, though not fully. That the plaintiff's exit from the premises on 31st January 2021 was unprocedural and that the defendant did not take part in the handing over since there were outstanding issues. He also produced copies of the documents in the defendant's list of documents dated 24th November 2020 as exhibits. Defence case was then closed.

23. Parties thereafter filed and exchanged written submissions. It was argued on behalf of the plaintiff that by virtue of the consent recorded on 2nd June 2021, the issue of restoration of the premises was settled. It was further argued that the evidence offered by the plaintiff that the lease was not registered had not been controverted and that consequently, the effect of non-registration is that the nature of the lease changes into a contract enforceable inter-partes and that the relationship between the parties is governed by the law of contract together with doctrines of equity. **Sections 43 (2)** of the **Land Registration Act** and **Section 4** of the **Registration of Documents Act** as well as the case of **Chon Jeuk Suk Kim & another v E. J. Austin & 2 others [2013] eKLR** were cited in support of those arguments. Further, that the decision of the Court of Appeal in **Kenya Commercial Bank Limited v Popatlal Madhavji & another [2019] eKLR** is inapplicable to the circumstances of this case since it was made in the context of a valid lease.

24. It was also argued, while making reference to the pleaded particulars of frustration, that the lease had been frustrated and/or rendered commercially impossible and that the plaintiff ought to be discharged from it. Reliance was placed *inter alia* on the cases of **Five Forty Aviation Limited v Erwan Lanoe [2019] eKLR** and **National Carriers Ltd -vs- Panalpina (Northern) Ltd (1980) Int.Com.L.R. 12/11**.

25. It was further argued on behalf of the plaintiff that a holistic reading of the lease as well as the use of the phrase *on sooner determination* at its clauses 5.5, 5.6 and 5.27 envisages its termination prior to expiry of the term and consequently the plaintiff had the right to terminate it. The Calcutta High Court (Appellate Side) case of **Sri Ashwin Bhanulal Desai -vs- Bijay Kumar Manish Kumar Huf on 7 November, 2019** and **Garibi Limited v Ogilvy East Africa Ltd [2014] eKLR** were cited in support. Further, that in the event of any ambiguity with regard to the proper construction of the provisions on termination of the lease, it should be interpreted against the defendant and in favour of the plaintiff, in line with the case of **Brand City Limited v United Housing Estate Limited [2016] eKLR**.

26. Additionally, it was submitted that even in the absence of an express provision for the termination of the lease, doctrines of equity and the law of contract law allow the court to imply terms to a contract in order to give effect to its nature and purpose. That in this case, parties to the lease intended that the contract would be commercially viable in that the plaintiff would use the premises as a training/learning centre in exchange for the consideration of fees paid by students for the programs offered, a situation that no longer obtained with the result that the plaintiff was leasing an unutilized premises with no commercial benefit and/or value to it. That in the circumstances, the termination was lawful and was effected in accordance with the lease. In support of those arguments, the cases of **Bid Insurance Brokers Limited v British United Provident Fund [2016] eKLR** and **Chimanlal Meghji Naya Shah & Another v Oxford University Press (EA) Limited [2007] eKLR** were cited.

27. The plaintiff therefore urged the court to allow its claim as prayed and to dismiss the counterclaim with costs.

28. On its part, the defendant argued in submissions filed on its behalf that although the lease was not registered, the issue of registration and the consequences thereof were not pleaded by the plaintiff. Consequently, the defendant relied on the case of **Ann Wairimu Wanjohi v James Wambiru Mukabi [2021] eKLR** and urged the court to disregard the issue. That in any case, non-registration does not preclude the use of the document to show the terms of contract between the parties.

29. Regarding the question of whether the lease was terminated by the letter dated 10th July 2020, it was argued that the lease does not have a break clause. That a holistic reading of the lease shows that the parties never intended to give the plaintiff the right to determine the lease before the expiry of the term and that the "sooner determination" referred to in clauses 5.5, 5.26 and 5.27 only relates to the termination provided for in clause 7 of the lease and not any termination by the plaintiff. Reliance was placed on the case of **Kenya Commercial Bank Limited v Popatlal Madhavji & another [2019] eKLR**.

30. It was further argued that the plaintiff is inviting the court to rewrite the contract between the parties by seeking a declaration that the lease was rendered commercially impossible. Further, regarding the argument that the lease was frustrated by operation of or change in law, it was argued that the plaintiff did not adduce to show which law changed and that the placement policies which the plaintiff cited are dated 2014 and were in force before commencement of the lease. Relying on the cases of **Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & another [2014] eKLR** and **Samuel Chege Gitau & another v Joseph Gicheru Muthiora [2014] eKLR**, it was argued that the doctrine of frustration is not applicable to the case. Accordingly, the court was urged to dismiss the plaintiff's case with costs.

31. Regarding the counterclaim, it was argued that the plaintiff is obligated to pay the stipulated rent for the entire term of the lease and that the defendant is therefore entitled to KShs 95,557,508.70 for the period up to 30th April 2022 together with costs of the counterclaim.

32. The plaintiff filed supplementary submissions the breadth and scope of which I have duly noted.

33. I have considered the parties' pleadings, evidence and submissions. The issues that arise for determination are whether the lease was frustrated, whether the lease was terminated through the notice dated 10th July 2020 and whether the reliefs sought by the parties should issue.

34. There is no dispute that the plaintiff entered into the lease agreement with the defendant pursuant to which the plaintiff leased all the property known as Kwanza House Building Block 9/90 Nakuru Municipality for a term of 6 years running from 1st May 2016 to 30th April 2022. The lease provided that the plaintiff would pay to the defendant an annual rent of KShs. 45,543,000 for the period 1st day of May 2016 to the 30th day of April 2017; an annual rent of KShs. 47,820,150 for the period 1st day of May 2017 to the 30th day of April 2018; an annual rent of KShs. 50,211,157 for the period 1st day of May 2018 to the 30th day of April 2019; an annual rent of KShs. 52,721,714 for the period 1st day of May 2019 to the 30th day of April 2020; an annual rent of KShs. 55,357,799 for the period 1st day of May 2020 to the 30th day of April 2021 and an annual rent of KShs. 58,125,689 for the period 1st day of May 2021 to the 30th day of April 2022. The rent was to be paid quarterly in advance.

35. Both parties are in agreement that the lease was not registered. Quite apart from the fact that the plaintiff did not raise the issue of non-registration in its pleadings, nothing much turns on the question of whether or not the lease is registered since such an agreement is valid as between the parties. The Court of Appeal reiterated as much in **Mega Garment Limited v Mistry Jadva Parbat & Co. (Epz) Limited [2016] eKLR** where it stated:

> ***The time-honoured decision of this Court in Bachelor's Bakery Ltd v Westlands Securities Ltd (1982) KLR 366 which has been followed in a long line of subsequent decisions elucidates the status of an unregistered lease. It reiterates and confirms the firmly settled law, first, that a lease for immovable property for a term exceeding one year can only be made by a registered instrument; that a document merely creating a right to obtain another document, like the one in this dispute, does not require to be registered to be enforceable; that such an agreement is valid inter partes even in the absence of registration, but gives no protection against the rights of third parties. That exposition of the law hold true in this case.***

36. The plaintiff has claimed that the lease was frustrated by operation of the law or change in the law. In **Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & another** (supra), the Court of Appeal discussed the principles applicable to the doctrine of frustration as follows:

> ***[16] This now leads us to the issue of whether the agreement was genuinely frustrated.***
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> ***In Halsbury's Laws of England, Vol. 9(1), 4th Edition at paragraph 897:-***
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> ***"As subsequently developed, the doctrine of frustration operates to excuse from further performance where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated. This assessment has been said to require a 'multi-factorial' approach. Five propositions have been set out as the essence of the doctrine. First, the doctrine of frustration has evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises so as to give effect to the demands of justice. Secondly, the effect of frustration is to discharge the parties from further liability under the contract, the doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not to be extended. Thirdly, the effect of frustration is to bring the contract to an end forthwith, without more and automatically. Fourthly, the essence of frustration is that it should not be due to the act or election of the party***

seeking to rely upon it, but due to some outside event or extraneous change of situation. Fifthly, that event must take place without blame or fault on the side of the party seeking to rely upon it; nor does the mere fact that a contract has become more onerous allow such a plea.".

37. The same court reiterated those principles in **Five Forty Aviation Limited v Erwan Lanoe** (supra).

38. The plaintiff has focused its case that there was frustration by operation of the law or change in the law around what it has termed implementation by the government of a placement policy formulated in the year 2014 pursuant to **Section 56** of the **Universities Act, 2012**. That pursuant to the policy, all students who qualify for admission to university are fully funded by the government and are placed in both private and public universities with the result that the plaintiff was left without self-sponsored students for admission into its Nakuru CBD campus which was wholly reliant on self-sponsored students for its income.

39. As correctly pointed out by the defendant, the relationship between the parties predates both the **Universities Act, 2012** and the so called 2014 policy. As is manifest at paragraphs 3 and 4 of the amended plaint, the parties entered into their first lease agreement on 1st May 2010 and upon its expiry, they entered into the lease that is the subject of this suit on 1st May 2016. Thus, both the statutory provisions and the 2014 policy referred to were in place as at 1st May 2016 when the lease was executed. In the premises, the plaintiff has not demonstrated any change in the law or operation thereof that would discharge it from liability under the lease.

40. The plaintiff also contended that it experienced dire financial constraints occasioned by reduced government support and a decline in the uptake of its academic programs; that its Nakuru CBD Campus made severe losses and was unable to financially sustain itself and that there was a government directive issued on the 16th March 2020 due to the Covid-19 pandemic that led to closure of universities. While some or all of those events may have resulted in economic hardship to the plaintiff and even the defendant, that cannot be a reason for to excuse any of the parties from further performance of their obligations under the lease. It is settled law that parties are bound by the terms of their contracts and that it is not the business of courts to rewrite contracts between parties. See **Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd [2017] eKLR**. Further, parties should be ready to live with the consequences of agreements that they enter into since equity does not ordinarily allow a party to escape from a bad bargain. See **National Bank of Kenya Ltd versus Pipe Plastic Samkolit (K) Ltd & another [2011] eKLR**.

41. In view of the foregoing discourse, I find that the lease was not frustrated.

42. The next issue for determination is whether the lease was terminated through the notice or letter from the plaintiff dated 10th July 2020. The defendant has confirmed receipt of the said notice. The notice stated in part as follows:

We therefore wish to notify you of our intention to terminate the lease agreement and vacate the said premises upon the expiration of a notice period of Three (3) months from the date of this letter.

We undertake to restore the building to a tenantable state of repair in accordance with clause 5.26 of the lease agreement which requires the Lessee to;

'To yield up at the expiration or sooner termination of the said term the demised premises to the Lessor with the fixtures and fittings thereto (other than the partitions fixtures and fittings installed in the demised premises with the consent of the Lessor pursuant to the provisions of this lease which shall remain the property of the Lessee) in such good and tenantable repair and condition subject to fair wear and tear as shall in the strict accordance with the Lessee's covenants and agreements herein contained with all locks, keys and fastening complete.'

We appreciate the cordial relations we have enjoyed with Kwanza Estates limited during our tenancy at Kwanza House.

43. It will be noted that the letter did not specify any clause of the lease pursuant to which the notice was issued. Clause 5.26 which was mentioned does not provide for termination. It instead, as is acknowledged in the notice, addresses the plaintiff's obligation to restore the premises to a tenantable state of repair.

44. The plaintiff has maintained that the lease has a termination clause at its clause 5.5 and that a holistic reading of the lease as well as the use of the phrase *on sooner determination* at its clauses 5.5 and 5.27 envisages its termination prior to expiry of the term. The defendant, on the other hand, has maintained that the lease does not have a termination clause and that the plaintiff bound to discharge its obligations to the end of the term created therein. I have perused the lease and I have not seen any termination clause.

45. In **Kenya Commercial Bank Limited v Popatlal Madhavji & another** (supra), the Court of Appeal stated:

This leads us into the next issue, which is whether the tenancy was validly terminated. The appellant has argued that, since the draft lease remained unsigned and unregistered lease, it became a controlled tenancy within the ambits of section 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301, and therefore, it was entitled to terminate the tenancy with one month's notice.

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 upto the date of expiry, that being the 31st December 2003.

46. The defendant has argued that the case of **Kenya Commercial Bank Limited v Popatlal Madhavji & another** (supra) is distinguishable since the lease herein was not registered. That argument cannot possibly be right. If anything, Court of Appeal explicitly stated in **Kenya Commercial Bank Limited v Popatlal Madhavji & another** that non-registration results in a valid and enforceable agreement as between the parties.

47. It is therefore my finding that the letter or notice dated 10th July 2020 did not terminate the lease or agreement between the parties. The agreement remains binding and the parties are under obligation to discharge their obligations until the end of its term on 30th April 2022. It follows therefore that the plaintiff's case totally fails. The plaintiff is not entitled to any of the reliefs that it has sought. It also follows that the defendant is entitled to prayers (a) and (b) of its counterclaim.

48. Regarding prayer (c) of the counterclaim, I note that the claim for KShs 162,469,481 is broken down into KShs 97,817,231 being rent for the period up to 30th April 2022 and KShs 64,652,250 being cost of restoring the premises to a tenantable state of repair. The claim for restoration was settled at KShs 40 million (forty million) all-inclusive, pursuant to the consent recorded on 2nd June 2021. According to the assessment report prepared by Triad Architects on behalf of the defendant and dated 1st October 2020, the period needed to restore the premises was put at six months. Considering that the plaintiff vacated the premises on 31st January 2021, the defendant has had more than adequate time, since the date of the consent, to carry out the restoration. While I am aware that the parties agreed in the consent that the sum of KShs 40 million be paid within 40 (forty) days from the date of the consent, the defendant has a duty to mitigate its losses and cannot sit back and wait endlessly for the payment.

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

50. In terms of the lease dated 1st May 2016, the plaintiff was liable to pay an annual rent of KShs. 55,357,799 for the period 1st day of May 2020 to the 30th day of April 2021 and an annual rent of KShs. 58,125,689 for the period 1st day of May 2021 to the 30th day of April 2022. Thus, the sum of KShs 13,839, 449.70 is due for the period 1st February 2021 to 30th April 2021 while the entire sum of KShs 58,125,689 for the period 1st day of May 2021 to the 30th day of April 2022. In total, the plaintiff owes KShs 71,965,138.70 for the period 1st February 2021 to 30th April 2022. I will award the said sum.

51. In view of the foregoing, I make the following final orders:

1. The plaintiff's suit is dismissed with costs to the defendant.

2. Judgment is hereby entered for the defendant and against the plaintiff as follows:

a) A declaration is hereby issued that the lease entered into between the defendant and the plaintiff on 1st May 2016 remains in force and has no break clause and the plaintiff is obligated to continue paying the stipulated rent up to 30th April 2022.

b) A declaration is hereby issued that the purported notice of termination of lease issued by the plaintiff dated 10th July 2020 is null and void in law.

c) KShs 40,000,000 (forty million) all inclusive, being the cost of restoring the premises to its original state, in terms of the consent recorded on 2nd June 2021.

d) KShs 71,965,138.70 (seventy-one million, nine hundred sixty-five thousand, one hundred thirty-eight shillings, seventy cents) being rent for the period 1st February 2021 to 30th April 2022.

e) Costs of the counterclaim with together with interest.

Dated, signed and delivered at Kakamega this 27th day of April 2022.

D. O. OHUNGO

JUDGE

Delivered through electronic mail in the presence of:

Court Assistant: E. Juma