



REPUBLIC OF KENYA



Paramount Electronics Limited v Mugaa & another (Environment & Land Case 1281 of 2013) [2022] KEELC 2881 (KLR) (25 May 2022) (Judgment)

Neutral citation: [2022] KEELC 2881 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1281 OF 2013**

JA MOGENI, J

MAY 25, 2022

BETWEEN

PARAMOUNT ELECTRONICS LIMITED PLAINTIFF

AND

SIMON GATEMBU MUGAA 1ST DEFENDANT

MOHAMED IBRAHIM GULED T/A RASMA RESTAURANT 2ND DEFENDANT

JUDGMENT

1. By a Complaint dated 28/10/2013 and an Amended Complaint dated 3/06/2020, the Plaintiff herein sought for Judgment against the Defendants jointly and severally for the following orders: -
 - a) A declaration that the purported exercise by the 1st Defendant of the landlord's right to retake possession of the Demised Premises herein through the letter dated 26.7.2013 by M/s Waruhiu & Gathuru Advocates was illegal null and void ab initio.
 - b) A mandatory injunction compelling the 1st Defendant to terminate any leasing arrangement whether with the 2nd Defendant or any other party and to unconditionally reinstate the Plaintiff's tenancy in the Demised Premises in accordance with the Lease dated 31.1.2009.
 - c) An injunction restraining the 1st Defendant, his servants, agents and/or any of them from in any way alienating or demising the Demised Premises whether to the 2nd Defendant or to any other party.
 - d) An order that the 2nd Defendant do make the payments due to the Plaintiff in respect of the business in the Demised Premises.
 - e) A declaration that the Plaintiff is entitled to a renewal of its lease in respect to the Demised Premises for a further period of 5 years and 1 month from 1.3.2014 or from such other date as this Honourable Court may deem convenient,



- f) An order for specific performance of the lease between the parties by way of mandatory injunction compelling the 1st Defendant to renew in the respect of the Demised Premises for a further period of 5 years and 1 month from 1.3.2014 or from such other date as this Honourable Court may deem convenient.
 - g) Special damages as per paragraph 24 hereinabove from July 2013.
 - h) Refund of the sums paid as per paragraph 23 hereinabove from July 2013 to March, 2014.
 - i) General damages.
 - j) Costs of the suit.
 - k) Any other relief which this Honorable Court may deem fit to grant.
2. The suit is opposed. The 1st Defendant entered appearance and filed an amended defence dated 20/08/2020. The 2nd Defendant entered appearance and filed a defence dated 20/03/2014. The suit proceeded by way of viva voce evidence. Each party called one witness. The parties testified on 31/01/2022.

Plaintiffs' Case

- 3. The case is about the Plaintiff's tenancy in Shop No. 2 (on the ground and mezzanine floors) in a building known as Solace House which is situated along Tom Mboya Street in Nairobi erected on property known as LR No. 209/875.
- 4. The premises was leased to the Plaintiff by a lease dated 30/01/2009 by Lake Dry Cleaners who were the owners of the building at the time. It was for a 5-year and one month tenancy period from 1/2/2009. The tenancy was renewable for such term at the option of the plaintiff. The option was exercisable by the Plaintiff giving notice of its intention to renew the lease at least six months before the expiry of the term.
- 5. The permitted user of the premises was for "exhibition stalls" to be used by their stallholders for sale of general merchandise. It is their case that the user could however be changed for which the consent of the landlord was not to be unreasonably withheld. Meanwhile and to enable the plaintiff run the "exhibition stalls" business the lease allowed the plaintiff to issue licenses to the stallholders for selling and exhibiting their wares in the premises so long as the licensees did not become sub-tenants or statutory tenants of the landlord.
- 6. The plaintiff had already established this business in the premises (as the lease was a renewal). This had been done by subdividing the premises into stalls which it then gave to individual traders on license. It therefore continued with this business as it has been doing before.
- 7. The plaintiff contends that the business was being managed on behalf of itself by one Hassan Mohamed Ahmed vide a management agreement dated 1/2/2009. To assist him to manage the business which required close supervision on an hour to hour and day-to-day basis Mr. Ahmed had engaged the 2nd defendant to supervise the same and attend to the day-to-day issues of the stallholders. The manager and the second defendant also collected the license fees from the traders and limited the same to the plaintiff at the end of the month net of their commission.
- 8. On 31/05/2011, the plaintiff requested the landlord for change of user of the premises from "exhibition stalls" to a restaurant/hotel under management. This was prompted by a fire incident that



had occurred in the premises in October 2010 which was blamed on the stallholders. The landlord allowed a request vide a letter dated 6/06/2011.

9. The change of user meant that the stallholders were to vacate from the premises so as to pave way for the intended new business. They however resisted from vacating the premises and commenced proceedings in the BPRT in BPRT Case No. 498 of 2012. As they mainly dealt with the second defendant and the manager of the stallholders named the two as the respondents/landlords in the case. The proceedings were later discontinued, and the stallholders vacated from the premises.
10. The plaintiff managed to establish the restaurant/hotel business and the 2nd defendant would run the business and from the proceeds of the business he would pay Kshs. 400,000.00 to the plaintiff and keep the balance as his commission fees.
11. In June 2013 the 1st defendant acquired the building having purchased the same from Lake dry cleaners Ltd. It was at a time when the lease was still in force and effect on acquisition of the building the 1st defendant wrote to the plaintiff on 27/06/2013 seeking to increase the event that the plaintiff had been banned which was contrary to the express terms of the lease. This was resisted by the plaintiff vide letter dated 1/07/2013 which pointed out the relevant provision of the existing lease to that effect.
12. In response to this, the 1st defendant through his advocates wrote to the plaintiff on 7/07/2013 accusing it of various misdeeds with regards to its tenancy. In particular, the plaintiff was accused of having sublet the premises to the 2nd defendant in contravention to the lease terms. As a consequence of the alleged misdeeds, the 1st defendant informed the plaintiff that he had exercised the landlord's rights to forfeit the plaintiff's lease and to re-take possession of the premises with immediate effect. He further indicated that he would proceed to lease out the premises either to the second defendant or any other party that he pleased. The plaintiff was warned not to step on the premises or tried to deal with the second defendant with regard to the same henceforth.
13. The plaintiff contested the purported forfeiture of the lease through its advocates letter dated 22/07/2013. There ensued an exchange of correspondence between the advocates on the issue. It is through these correspondences that the plaintiff learnt that the 2nd defendant had written a letter to the 1st defendant dated 27/06/2013 by which he misrepresented to the first defendant that he was a subtenant of the plaintiff in the premises and requested the 1st defendant to grant him a direct lease while offering to pay the increased rent that the 1st defendant had demanded of the plaintiff. The plaintiff also learnt that the 1st defendant had acceded to the 2nd defendant's request and leased the premises to him.
14. The plaintiff considered its said lease dated 30/01/2009 to be binding and therefore continued to honour its obligations thereunder by paying the rent as and when the same fell due at the rate of Kshs. 116,000.00 until the same expired even though it had been dispossessed of the premises. The plaintiff claims a refund of this sums the speed from July 2013 to March 2014. Meanwhile and on his part, the 2nd defendant stopped paying the sum of Kshs. 400,000.00 that he had been paying the plaintiff on a monthly basis as a consequence of the plaintiff says that it suffered loss of income to that extent. the plaintiff thus claims for special damages based on this amount from July 2013.
15. Lastly and prior to the expiry of the lease dated 30/1/2009 the plaintiff by letter dated 6/8/2013 exercised its option to renew the lease but the same was declined by the 1st defendant vide a letter dated 8/8/2013. It is the plaintiff's contention that the 1st defendant was obliged under the terms of the lease to renew the same that was reserved for it under the lease.



Evidence by the plaintiff

16. PW1 – Moez Sherali Haji testified that he is a director of the plaintiff company and adopted his witness statement dated 28/10/2013. He relied on list and bundle of documents dated 28/10/2013 together with a supplementary bundle of documents dated 3/12/2021 as his evidence.
17. During cross examination, it was his evidence that he had the authority to sign the affidavit as a director of the plaintiff company although he did not have the written authority from the company filed before the court. He averred that the lease in question was assessed and stamped and that there is no other document showing registration against the title of the lease.
18. He contended that a lease is a binding contract, and that the plaintiff became a tenant on 30/1/2009. The term was for 5 years 1 month and was to expire in February 2014. He added that as of the day of the hearing, there is no lease in favour of the plaintiff. As of the date of filing of the suit, 28/10/2013, the plaintiff was not in possession of the suit property. Repossession occurred in June 2013. He added that they had received a letter purporting to increase the rent.
19. It was his case that they had appointed managers to ensure smooth running of the premises and that he was not aware that the 22 were tenants of the premises.
20. He averred that they knew about the tribunal and the case. The documents refer to the 1st and 2nd defendants as landlords. He added that he was aware that the 2nd defendant was running Rasma restaurant and Mr. Guled was the proprietor of the said restaurant. The plaintiff got him to register the restaurant. The lease for the restaurant was run by Mr. Guled who was the manager of the plaintiff company. Mr. Guled got approvals and paid for most utilities.
21. He averred that he was a tenant in the premises and that the said premises was the subject matter in 498/2012. They received a new letter from a new landlord effective from June 2013 for a new tenancy agreement. PW1 contends that he responded to the letter of 17th and 27th June 2013 objecting to the rental increment.
22. He reiterated that the lease had lapsed, and the new landlord asked them to renew the lease and pay the new rent. He added that there was no lease agreement between them and the 1st defendant.
23. It was his contention that there is no employer/employee relationship between the plaintiff and the 2nd defendant. Neither did they have a relationship between the plaintiff and the 1st defendant.
24. He averred that they claim for special damages in their plaint as they paid rent from July 2013 to March 2014. They have banking slips. It is their case that he received rent from both the plaintiff and Mr. Guled. The landlord told the plaintiff to deposit Kshs. 389,580.945. However, they paid Kshs. 116,000/-. They applied for a renewal, but the lease was not extended from March 2014 to date. PW1 reiterated that there is no existing lease.
25. During re-examination, PW1 explained that page 64 of the lease indicated that Noor Exhibition center was a tenant of the business they were running. The same is mentioned on his witness statement. He reiterated that the 1st and 2nd defendants were the ones who were sued in the case before the Tribunal. That he had explained in page 31 of his bundle, why the managers were sued in suit no. 498 of 2012 and not the plaintiff.
26. He avers that he initially ran exhibitions where there were many people. By virtue of clause n(i), the landlord had allowed him to give licenses to the stall owners.



27. He averred that he requested the landlord for change of user when a fire broke out. He contended that during the days of exhibitions, Mr. Ahmed was to pay the plaintiff Kshs. 400,000 per month. Mr. Guled was in charge of collecting the rent. The same conditions remained during the restaurant days. The 2nd defendant's statement confirms the above arrangements.

28. With that evidence, the Plaintiff closed his case.

Defendants' case

29. The 1st Defendant filed a defence dated 18/01/2014 and an amended defence dated 20/08/2020. The 2nd Defendant filed a defence dated 20/03/2014.

1st Defendant.

30. The 1st Defendant denies the allegations made by the plaintiff and prays that the Plaintiff's suit be dismissed with costs. The 1st Defendant avers that the purported lease was never registered and consequently therefore, the relationship between the Plaintiff as tenant and the then landlord became a mere month-to-month tenancy, terminable by either party by way of a one month's notice of such intent. That the said "Lease" was void and/or was unenforceable at all material times, due to the fact that it was not registered.

31. The 1st defendant contends that the said "lease" whether registered or not, expressly barred the tenant from sub-letting the said premises to any party, without the knowledge of, and the express written consent of the then landlord, or his successor in title.

32. The 1st Defendant avers that the true and correct state of facts is that upon (the 1st Defendant) becoming the registered owner of the leased premises, he became aware that the Plaintiff had sublet the premises and/or surrendered the same to another entity, "M/s Rasma Restaurant"; which fact he had not disclosed to the previous landlord, and which fact (the Plaintiff) also did not reveal to the 1st Defendant.

33. The 1st defendant contends that the plaintiff continues to maintain the subterfuge that it is and was at all material times in possession of the said premises, when in fact the same were at all material times in the possession of the 2nd Defendant, as an illegal assignee and/or sub-tenant of the Plaintiff, trading as the said "M/s Rasma Restaurant". The 1st Defendant further denies the allegation that the Plaintiff has, as alleged "continued to pay rent until the expiry of the said lease" or at all.

34. The 1st Defendant avers that the Plaintiff's belated claim for alleged refund of sums allegedly paid as rent up to March 2014, as made on or about the 3/7/ 2020 through this Amended Plaintiff, is time-barred and unsustainable as a claim against the 1st Defendant, due to limitation of time.

2nd Defendant.

35. The 2nd Defendant denies the allegations made by the plaintiff and prays that the Plaintiff's suit be dismissed with costs. The 2nd defendant avers that he was a sub-tenant of the plaintiff, and it was he who was sued by the stall holders as their landlord. He avers that he was not and has never been an employee of the Plaintiff.

36. The 2nd defendant avers that he has indeed set up a restaurant at the said premises and is the registered owner and as a sub-tenant of the plaintiff it was agreed that he would pay rent to the plaintiff at the end of each month. All monies paid to the plaintiff by the 2nd defendant was for rent of the said premises.



37. The 2nd defendant has obtained a valid lease from the 1st Defendant to occupy the said premises which he had sublet from the Plaintiff.

Evidence by the defendants

1st Defendant

38. DW1 – Simeon Gatembu Mugaa testified that he is a businessman in Nairobi and adopted his witness statement dated 29/05/2017. He also relied on list and bundle of documents dated 29/05/2017 as his evidence.
39. He averred that there was a transfer instrument at page 120-123 on his bundle which is a transfer from Lake Dry Cleaners to himself dated 30/04/2013. He contended that the plaintiff was a tenant in the premises. That they were tenants on ground floor and the building has four floors.
40. He contends that he never found the plaintiff physically in the building. He found Mohamed Guled.
41. During cross-examination, he testified that the title shows that the property does not belong to him. The title shows that the property belongs to Lake Dry Cleaners. He averred that he never did any due diligence by visiting the property.
42. He avers that he was the one who wrote the letter dated 27/06/2013. That he approached Mr. Guled who informed him that he pays to Mr. Hassan and that he was not the tenant. That he informed him that he was sublet by Mr. Hassan and by Paramount.
43. It is his contention that there is a lease with the 1st defendant dated 1/7/2013. That his advocates wrote to the plaintiff on 4/7/2013. He averred that he did not serve any notice to the plaintiff notifying them about the termination of the lease. He added that he wrote to the plaintiff on 4/7/2013 to let him know that he did not have any dealings with the plaintiff.
44. During re-examination, he reiterated that the transfer documents were between him and Lake Dry Cleaners. The said documents show that the transfer was registered on 16/03/2013. He reiterated that he never met the directors of paramount.
45. He averred that Mr. Guled had indicated that he had been sublet by Mr. Hassan at Kshs. 400,000 per month. He met Mr. Hassan who told him that he had been sublet by paramount, who he approached vide a letter dated 27/06/2013. The plaintiff responded saying that they had a lease in place. It was his case that the owner of the premises was very old and so there was confusion.
46. The 1st Defendant averred that the witness statement by Guled is in accordance with what he had told him. He contends that after the letter he wrote to the plaintiff, they have never gone to him to seek the equipment of the restaurant. There is also no list of equipment that they have claimed.
47. The 1st Defendant closed his case.

2nd Defendant

48. DW2 – Ibrahim Mohamed Guled testified that he is a businessman in the suit property and adopted his witness statement dated 25/10/2021. He also relied on list and bundle of documents dated 9/11/2021 as his evidence. He also produced documents relating to the case at the Tribunal. They are in the supplementary list of documents dated 27/01/2021.
49. During cross examination, he testified that they are in court because of the problem relating to the plaintiff's business where at first there was an exhibition and then they moved to a restaurant.



50. He avers that Mr. Hassan and himself were family members. That he found him at Noor Exhibition whereby he told him to work, and he would pay him as the person who had worked for him had left.
51. It was his case that the exhibition wasn't doing well and so he advised Mr. Hassan to either hand back the premises or open a restaurant. He contended that the letters at page 85 to 95 were written for him.
52. During re-examination, he informed the court that he owned the company named Rasma. That he footed the bill for the renovation of the restaurant. He averred that he was the one who signed the letter dated 27/06/2013. That he paid Ahmed Kshs. 400,000. That Hassan used to pay him.
53. With that evidence, the 2nd Defendant closed his case

Submissions

54. At close of hearing, parties to the suit filed submissions which I have read and considered. The Plaintiff, the 1st Defendant and the 2nd Defendant all filed submissions dated 1/03/2022, 25/03/2022 and 20/03/2022 respectively.

Issues for determination

55. Having considered all the pleadings filed in this matter, the following arises as the issues for determination before this court.
 - a. Is the suit time barred?
 - b. Whether the plaintiff has authority to institute proceedings.
 - c. Is the plaintiff entitled to the orders sought?

Analysis and determination

a) Is the suit time barred?

56. The Court has now carefully read and considered the pleadings, the submissions and the evidence adduced and the exhibits thereto and renders itself as follows; -
57. It was the 1st Defendant's submission that the suit is time barred. The cause of action is founded on a contract, a lease agreement dated 30/01/2009. The plaintiff instituted this suit in 2013 having filed the Plaint dated 28/10/2013 on the even date. Section 4(1) of the Limitations of Actions Act provides that a claim for actions founded on contracts have a 6-year limitation period. The Court finds and holds that the cause of action having accrued in 2013, the Plaintiff was well within time.

b. Whether the plaintiff has authority to institute proceedings.

58. The 1st Defendant submitted that the Plaintiff lacked the authority to institute the present proceedings as they have not attempted to file a resolution prior to the hearing of the case. It is his case that this suit is fatally defective on that ground.
59. In the case of *Mavuno Industries Limited & 2 Others Vs Keroche Industries Limited* [2012] eKLR the court held as follows: -

“As properly submitted by the defendant, under Order 4 rule 1(4) of the Civil Procedure Rules, where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. Nowhere is it stated



that such authority or resolution must be filed. The failure to file the same may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff's bundle of documents which common sense dictates it should. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaint or with the Registrar of companies, as the requirement is extended by the defendant, does not invalidate the suit."

60. The above case fortifies the fact that such a failure may attract some consequences but does not in itself invalidate a suit. In any case, the 1st Defendant should have raised this objection earlier and not after the matter has proceeded for hearing and a judgment date fixed. Striking out of suits is a draconian measure which should be used sparingly and only in hopeless cases as was held in the case of *D.T. Dobia & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR where the court held that:

"A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it."

61. The Court has discretion on whether or not to strike out any pleading that is non-compliant and further Article 159 of *the Constitution* of Kenya, 2010 obliges the court to deliver justice without undue regard to technicalities. See *Stephen Boro Gitira v Family Finance Building Society & 3 others* [2009] eKLR.

c) Is the plaintiff entitled to the orders sought?

62. According to the Amended Plaint, the plaintiff entered into a lease agreement dated 30/01/2009 with Lake Dry Cleaners, who are the previous owners of the suit property. The object of the lease was for the Plaintiff to carry on business of "Exhibition stalls". Evidence before the Court also indicates that the Plaintiff wrote to the previous landlord requesting for change of user to "restaurant/hotel under management" on 30/05/2011, which request was approved through a letter dated 6/06/2011.

63. The suit property was later sold to the 1st Defendant who quickly wrote a letter to the Plaintiff purporting to increase the rent. The plaintiff refused to accept the same as the lease agreement did not allow the monthly rent to be increased throughout the duration of the lease. Evidence before the Court also indicates that by the time the 1st Defendant acquired the suit property, the said lease had run for a period of 4 and half years and was therefore still in force.

64. The dispute herein came about when the 1st Defendant wrote a letter dated 4/07/2013 to the Plaintiff, through his advocates, citing that he was exercising his right, under the lease, to retake possession of the premises because of a breach on the part of the Plaintiff. Evidence before the Court also shows that the 1st Defendant and the 2nd Defendant entered into a lease agreement dated 1/07/2013.

65. It is not in dispute that the lease agreement dated 30/01/2009 was for a term of five (5) years and one (1) month commencing on 1/02/2009 and was set to lapse in March 2014. It is also not in dispute that the lease was not registered. It is the Court's view that an unregistered lease is only a mere contract between the parties. See section 36(2) of the *Land Registration Act* 2012.

66. Black's Law Dictionary, 9th Edition, Page 213 defines a breach of Contract as;

"a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages



and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages.”

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

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

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

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

69. This Court will not purport to interpret the terms of the agreement at this stage. The Court will be guided by what is plainly provided.

70. Based on the above decisions, the starting point for me will be the agreement that the parties signed and the terms therein. According to the agreement the term of the lease was to run until March 2014. Clause 6 (b) provided that in the event that the tenant is in any breach or non-performance, the landlord may after the expiry of a written thirty (30) days’ notice enter upon the premises and repossess the same.

71. From the pleadings, the lease agreement did not allow the plaintiff to sublet the suit premises. It is the Defendants’ case that the 2nd Defendant sublet the suit premises from the Plaintiff. The Plaintiff denied the said allegation claiming that the 2nd Defendant was running his business on his behalf and remitting income in the amount of Kshs. 400,000.00 as part of their agreement. The only document produced in court was a management contract with one, Mr. Ahmed who allegedly hired the 2nd Defendant to run the day-to-day business of the restaurant/hotel under management. There is however no document produced to corroborate this.

72. I am of the view and inclined to agree with the Defendants that the Plaintiff was sub – letting to the 2nd Defendant which was in breach of the terms of the lease. From the provisions of clause 6 (b), it is imperative to note that where there is a breach and/or violation of the terms of the lease, the tenant is entitled to be issued and served with a 30 days’ Notice to remedy the breach. However, in contravention of the said Clause 6 (b), the 1st defendant herein did not issue a 30 days’ notice before dispossessing the Plaintiff and issue the 2nd Defendant with a lease dated 1/07/2013.

73. I find that the letter dated 4/07/2013 purporting to disposes the plaintiff of the premises was not lawful and/or legally sound as the same did not comply with the terms of clause 6 (b) of the lease agreement. The 1st Defendant cannot in this respect rely on his own irregular act to escape from his obligations under the lease agreement.



74. It is worthy to point out that the terms of the lease document were written therein and thereafter executed by the parties, for same to be binding thereof. For clarity, the terms were not meant to beautify the lease instrument. Having duly executed and signed the lease document, the 1st Defendant herein is duly bound and same cannot therefore seek to unilaterally, amend, rescind and/ or alter same by sidewind. See the case of *National Bank of Kenya Limited v Pipeplastic Samkolit Limited & 8 Others* (2001) eKLR on the Court and re-writing contracts.
75. Having carefully analyzed the available evidence, the Court finds and holds that the 1st Defendant unlawfully terminated the lease agreement and issued the 2nd Defendant with a lease while the Plaintiff's lease was still in force. Even though the Plaintiff was in breach of the terms of the lease, the 1st Defendant went about it the wrong way.
76. The Plaintiff has sought for orders as laid down in the Amended Plaint dated 3/06/2020.
77. The court cannot render itself on prayer (b), (e) and (f) to compel renewal of a lease or termination of a lease.
78. The court cannot render itself on prayer (c) on an order for injunction as it has been overtaken by events and it will be no more than an academic exercise. The parties have all admitted that the 1st Defendant has already leased out the suit premises to the 2nd Defendant who is already in possession and thus the same is no longer available. Therefore, prayer (c) cannot be granted.
79. Regarding prayer (d), evidence before this court shows that the 2nd Defendant identified himself as a landlord in BPRT Case No. 498 of 2012. The Court has also found that the Plaintiff was subletting the suit premises to the 2nd Defendant. The same was in breach of the terms of the lease and was therefore the arrangement was void from the beginning. Ordering the 2nd Defendant to pay Kshs. 400,000.00 from July 2013 to March 2014 would lead to unjust enrichment. Equity detests unjust enrichment therefore the Court cannot grant prayer (d). See the Court of Appeal case of *Macharia Mwangi Maina & 87 others -vs- David son Mwangi Kagiri* [2014] eKLR.
80. Regarding prayer (g) on special damages for loss of income at the rate of Kshs. 400,000.00 per month, it is common ground that he who seeks a claim for Special Damages, is obliged to particularly plead, and thereafter specifically prove such a claim. Only then, can a court of law delve into and/or make an award for such a claim. Consequently, and in the absence of particulars of special loss, no award for Special Damages can arise and/or be granted. In support of the foregoing position, I restate the now established position of the law as was captured in the Decision in the case of *John Richard Okuku Oloo v South Nyanza Sugar Company Limited* (2013) eKLR, where the Court of Appeal stated as hereunder;
- “We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity, but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of”.
81. Regarding prayer (h) the Plaintiff adduced evidence indicating that he continued to pay rent from July 2013 to March 2014 therefore the Court is satisfied that he is entitled to a refund of the same.
82. Regarding prayer (i) on general damages, it is trite law that no General Damages can be claimed and/ or awarded for Breach of Contract. In support of the foregoing, I beg to adopt and restate the position



as captured in the case of *Kenya Tourist Development Corporation v Sundowner Lodge Limited* [2018] eKLR, where the court had this to say;

“..... as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In *Dharamshi vs. Karsan* [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication”.

83. Section 27 of the *Civil Procedure Act* gives the Court the discretion to grant costs. It is trite law that costs usually follow the events. In this instant case, the Plaintiff is the successful party and is therefore entitled to the costs of the suit.
84. Having reviewed the issues for determination and having addressed the same, I am compelled to make the following orders: -
- a) A declaration be and is hereby issued that the purported exercise by the 1st Defendant of the landlord's right to retake possession of the Demised Premises herein through the letter dated 26.7.2013 by M/s Waruhiu & Gathuru Advocates was illegal null and void ab initio.
 - b) The Plaintiff is hereby entitled to a refund of the sums paid as per paragraph 23 in the Amended Plaintiff dated 3/06/2020 from July 2013 to March, 2014.
 - c) I award the Plaintiff the costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 25TH DAY OF MAY 2022

.....

MOGENI J.

JUDGE

In the presence of

Mr. Wanjohi for the Plaintiff

Mr. Kimani for the 1st Defendant

Mr. Njenga for the 2nd Defendant

Vincent Owuor Court Assistant

