Alibhai & another (Trading as Sky Fri) v Technical University of Mombasa (Environment & Land Case 290 of 2017) [2022] KEELC 3896 (KLR) (28 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3896 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 290 OF 2017

NA MATHEKA, J

JUNE 28, 2022

BETWEEN

ZULFIQAR ALIBHAI ..... 1ST PLAINTIFF

SHAHINA ALIBHAI ..... 2ND PLAINTIFF

TRADING AS SKY FRI

AND

TECHNICAL UNIVERSITY OF MOMBASA ..... DEFENDANT

JUDGMENT

1. The Plaintiff's case is that, at all material times relevant to this suit, the Plaintiff was, the tenant of the Defendant in a 378m 2room which occupies the entire 5th floor of Engineering Block at the Defendant's Tudor Campus in Mombasa County under a lease agreement dated November 14, 2014. Both the Plaintiff and Defendant herein executed, and expressed commitment to abide themselves by, the aforementioned lease agreement which had the following salient features that the Plaintiff shall pay a monthly rent of Kshs 100,000 and the Defendant shall *inter alia* provide adequate water supply. The Plaintiff shall pay electricity bills only for the suit premises while the Defendant shall shoulder electricity costs for usage in the common areas. The Defendant shall keep in good and tenantable repair and condition the main structure of the suit premises. Subsequent to the execution of the aforementioned lease agreement, the parties herein agreed that the Defendant would close down the eatery at its Administration Block so that the Plaintiff could be the sole provider of food and beverages to the students and staff population at Defendant's Tudor Campus. The Defendant would ensure that the suit premises was easily accessible and since the suit premises was located at 5th floor which was the top most floor of Engineering Block, the Defendant would ensure the elevators are maintained in good working condition at all times during the term. Rent would only be payable during the presence of students in the Defendant's premises that is, only during the continuation of learning sessions and as such, they could apply for waiver in the event that the Defendant's said students were off campus.

The suit premises would always be adequately and readily available to the Plaintiff for the purposes of conducting business. The Plaintiff shall be the sole service provider for catering services during the Defendant's events throughout the year such as the campus night, fresher's nights, graduation and other events.

2. Pursuant to assurances represented to the Plaintiff by the Defendant, the Plaintiff proceeded to secure credit facilities from its financial provider to the tune of Kshs 600,000.00. The Plaintiff registered a charge over their matrimonial property as security of the after mentioned credit facilities. The Plaintiff began its operations sometimes on April 7, 2015 after a grand opening ended by top officials of the Defendant. However, soon afterwards, the Defendant began to persistently breach the aforesaid terms of the partly oral and partly written agreement. Due to the Defendants breach of the contract, the Plaintiff started defaulting in repayment of the credit facility thus accruing unnecessary penalties. Incurring extra electricity charges considering the Plaintiff was subjected to pay for the lighting at the common areas on the 5th floor. Loss of business as a large number of the Plaintiff s would-be customers took their business to the eatery at the Administration block as well as the container shops near the hostels and loss of business as lack of water and a blocked sewage system caused a large number of the Plaintiff's customers to shun the Plaintiff's cafeteria. The Plaintiff prays for judgment against the Defendant for:

    a) Reimbursement of Kshs 900,000 being the equivalent of 9 months' rent during which time the Plaintiff did not run its business;

    b) Reimbursement of Kshs 10,114,692.70 being the aggregate loan amount that Plaintiff took out as a result of the Defendants representations to it;

    c) Kshs 600,000 being payment in lieu of notice to vacate;

    d) A declaration that the Defendant has breached the Lease Agreement dated November 14, 2014 as well as the consequent oral agreements;

    e) A declaration that the Defendant has constructively ejected the Plaintiff from the suit premises;

    f) A declaration that the Plaintiff does not owe the Defendant any monies in arrears;

    g) Kshs 4,000,000 Being the aggregate amount the Plaintiff spent on replacement and repair as a result of the Defendant's negligence;

    h) Reimbursement of Kshs 400,000 being the equivalent of 4 months' rent during which time the Plaintiff did not run its business as a result of the Defendant's negligence;

    i) General damages and punitive damages for breach of contract;

3. The Defendant states that it is not in dispute that the relationship between the Plaintiff and the Defendant is that of a Lessee and Lessor respectively. It is not in dispute that the above relationship between the Defendant and the Plaintiff was at all material times governed by the Lease Agreement dated November 14, 2014. It is admitted that the Plaintiff was under the obligation of paying a monthly rent of Kshs 100,000 payable quarterly in advance and with a rent increment of 5% per annum pursuant to Lease Agreement dated November 14, 2014. It is admitted that the Plaintiff was under the obligation of paying for all electricity charges payable by the Plaintiff pursuant to the Lease Agreement dated November 14, 2017. The Defendant states that at all material times to this suit, the Defendant maintained the premises in good condition. At all material times, the Plaintiff was aware of the existence of an eatery at the Administration Block of the Defendant University. At all material times, the Defendant never agreed to the closure of the above mentioned eatery as alleged by

the Plaintiff. At all material times, the Plaintiff was aware that the above mentioned eatery served and continued to serve the staff of the Defendant University. It is not in dispute that Clause 1 (s) of the Lease Agreement dated November 14, 2014 prohibited the Plaintiff from using the passenger lifts for carrying goods without the express consent of the Defendant.

4. That on or about November 14, 2014, the University entered into a Lease Agreement with the Sky Fries for the Lease of the entire 5th Floor of the Engineering Block of the Defendants' Tudor Campus in Mombasa County. The Lease was last a term six year at a monthly rent of Kshs 100,000/- payable quarterly and in advance with an annual increment of 5% till the expiry of the lease. The availability of the premises for purposes of conducting business by the Defendant was conditional upon the Defendant fulfilling its obligations as contained in the Lease Agreement. Consequently, there was no separate agreement entered into between the Plaintiff and the Defendant for purposes of waiving rent for the period the University was on break or any other period at all all terms of the rent were clearly stipulated in the Lease Agreement. The Defendant was under the obligation of paying for all electricity charges raised, in respect, of the premises directly to the service provider. The University installed passenger elevators in the building with an express condition in the Lease that it was not permitted for the passenger lifts and escalators to be used for carriage of any goods, packages, merchandise, furniture etc without the express consent of the University. Prior and subsequent to the entry of the lease, the following facts held time, the Defendant was aware of the existence of an eatery at the Administration Block of the University. The Defendant was aware that the above-mentioned eatery served and continued to serve the staff of the University. The University never agreed to the closure of the above mentioned eatery. Consequent to the above, there was no agreement between the Defendant and the University that the Defendant would be the sole provider of catering services during the University's events throughout the year. Further and in any case, the Defendant lacked capacity to fully cater for all the University's population, thus in any event such an agreement would have been impossible for the Defendant to implement. The Defendant contended that the Plaintiff defaulted in payment of the rent for several months and consequently the Plaintiff denied the Defendant access to the suit premises until April 10, 2019. In the premises, the University prays in their counter claim for judgment against Sky Fries in the following terms;

    a. A declaration that the Defendant, Sky Fries, is in contractual breach of the Lease Agreement dated November 14, 2014.

    b. A declaration that the Defendant Sky Fries constructively vacated the suit Premises.

    c. A declaration that the Lease Agreement dated November 14, 2014 between the Plaintiff University and the Defendant Sky Fries stands terminated due to contractual breach by the Defendant.

    d. An order that the Defendant Sky Fries pays the Plaintiff Kshs 600,000.00/- being payment in lieu of Notice to Vacate.

    e. An order that the Defendant Sky Fries pays the Plaintiff University. Kshs 450,000.00/- being accrued rental arrears as at April 10, 2019.

    f. General damages for breach of Contract.

    g. Interest on (d) and (e) above from date of breach.

    h. Costs of this suit.

    i. Any other award that this Honourable Court may deem fit.

5. During the hearing of this suit, the Plaintiff called PW1, one Shahina Alibhai one of the partners in the Plaintiff's business. She testified that after the lease was executed, the Vice Chancellor of the Defendant and the Defendant resolved to have the eatery closed, that the elevators would be maintained, that rent would only be payable when the school was in session, that the suit premises would be readily available to the Plaintiff to conduct their business, that the Plaintiff would be the sole provider for catering services during school events. PW1 insisted that there was an oral agreement between the parties. She reiterated that in November 2016 there was a fire in the building that rendered the elevators useless and the restaurant being on the 5th floor the customers could not use the stairs. She testified that the fire caused electrical faults and the restaurant could not operate the refrigerator, hence the food was spoilt. PW1 added that the Plaintiff informed the Defendant there was no action to repair and restore electricity to the premises. She added that the Defendant demanded that the Plaintiff should pay for the said repairs. She further testified that the Plaintiff took a break from the business when the students were on holiday in December 2017, and when the Plaintiff resumed in early 2017 they were barred from entering the suit premises. She insisted that the Plaintiff continued to pay the rent. PW1 was cross-examined. She testified that there was sewage blockage that was never fixed, that Plaintiff paid electricity for the common areas, and that there was an oral agreement that rent would only be paid when school was in session. She testified that the loan facility was not in the lease agreement. She testified that the Plaintiff locked the premises when the restaurant took a break in December 2017 and when they returned they were denied entry to the suit premises. Upon re-examination, she testified that there was an oral agreement for waiver of rent and exclusive catering services. She testified that the Plaintiff complained about the blocked sewage system and electricity but the Defendant did not respond.

6. The Defendant called DW1, one Serah Okumu the legal officer of the Defendant. She testified that on several instances the Plaintiff defaulted in paying rent and the only waiver was for the month of November 2016. She testified that the Plaintiff locked the premises denying access to the Defendant and rent continued to accumulate till April 10, 2019 when the Plaintiff vacated the suit premises and the rent had accumulated to Kshs 3,450,000. DW1 was cross-examined. She testified that there were negotiations before the parties entered into the lease agreement. She added that as per clause 5 of the lease, the lessor had the duty to keep the common areas lit. She testified that there was a fire in 2016 unfortunately DW1 was unable to confirm whether there was a black out or not, or whether the elevators had stopped working. She testified that during the graduation in December 2016, the Plaintiff was offered a food stand. She testified that in January 2017, the Plaintiff locked the premises and disappeared until the court ordered it opened. DW1 testified that when the suit premises were opened, their property was not there. She reiterated that the Plaintiffs did not pay rent.

7. Upon re-examination, DW1 testified that the Plaintiff was the Defendant's tenant, and the did not pay rent even after several demands. She reiterated that there was no oral agreement.

8. Mr Opondo learned counsel for the Plaintiffs filed his written submissions. Counsel submitted that a contract could exist where no words have been used but where it can be inferred from the conduct of the parties. He submitted that the Defendant had waived the rent on several occasions hence, the oral agreement supplemented the lease agreement. To buttress this argument, counsel cited the case of *Ali Abid Mohamed vs Kenya Shell & Company Limited* (2017) eKLR and the decision in *SN vs Peter Gisore* (2020) eKLR. Counsel submitted that the Defendant breached the lease agreement by failing to ensure that the premises were fit for purpose as per clause 5 (b) of the lease. He submitted that the Plaintiff informed the Defendant of these breaches vide a letter. He submitted that without prior notice, the Defendant denied the Plaintiff entry into the suit premises from the year 2017 and this

repudiated the lease by conduct. To put emphasis on this claim, counsel relied on the case of *Mwangi vs Kiiru* (1987) eKLR.

9. Counsel submitted that the Plaintiff is entitled to the relief claimed. He submitted that students were on recess for 9 months, hence, the Plaintiff is entitled to be reimbursed Kshs 900,000; that the Plaintiff is entitled to Kshs 400,000 being money spent on renovations and purchase of equipment retained by the Defendant; Kshs 400,000 for the 4 months when there were electrical faults, the restaurant was inaccessible due to the fire, and food spoiled due to business interference attributed by the Defendant, the Plaintiff is entitled to reimburse the Plaintiffs Kshs 10,114,692.70 being the credit facility taken by the Plaintiffs; and Kshs 600,000 as 6 months' rent in lieu of notice to vacate.

10. This court has considered the evidence and the submissions therein. The first issue to be determined is whether there was an oral agreement between the Plaintiff and the Defendant, and if not, whether the Defendant's conduct if any suggested that there was an oral agreement. It is the Plaintiff's case that there was an oral agreement providing that on application, the Defendant could waive the rent, that the Plaintiff was only subjected to pay rent when school was in session, and that the Plaintiff would be the sole provider of food and beverage within the university premises. The Defendant denies all these allegations and maintains that the lease is the only agreement that governed their lessor-lessee relationship.

11. The Court of Appeal in *William Muthee Muthami vs Bank of Baroda* (2014) eKLR, stated that for a contract to be valid under the law of contract, it must be proved that there was offer, acceptance and consideration.

> In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach."

12. PW1 testified that there was an oral contract because the Plaintiff and the Deputy Vice Chancellor of the Defendant had discussions after the lease had been executed, and with this assurance, the Plaintiffs took out the credit facility. The Defendant denies that there was any oral contract. I find that the Plaintiff has failed to prove that there was an offer, acceptance, and consideration. Mr Opondo counsel for the Plaintiff submitted that the Defendant's conduct inferred that an oral contract existed. He cited the case of *Ali Abid Mohammed versus Kenya Shell & Company Limited (2017) eKLR*, where the Court of Appeal stated as follows;

> It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. See *Timoney and King v King* 1920 AD 133 at 141. In the circumstances of the instant case, there existed an enforceable contract between the parties by reason of Conduct. Indeed, it was not disputed by the respondent that it supplied petroleum products to the appellant at a specific amount per liter and for a certain period of time."

13. In the instant case I find that the Plaintiff used to put their requests in writing for instance, they took possession of the suit premises after the lease was executed on November 14, 2014 however, the Defendant waived the rent and the lease officially commenced in March 2015. The evidence on record is that the Plaintiff wrote a letter to the Defendant dated January 15, 2015 requesting that the lease should commence on 1st March 2015 due to the Defendant's graduation and examination that disrupted the Plaintiff's plan of taking possession of the suit premises. The Defendant responded with a letter dated January 16, 2015 accepting the Plaintiff's request. The Defendant stated in the letter that they accept the request because of the graduation and examination.

14. On January 15, 2016, the Plaintiff wrote to the Defendant requesting for waiver of rent for semester breaks, during the strike period and the use of the electricity meter on the corridor lighting. On January 25, 2016, the Defendant responded to the said letter demanding rent arrears and stating that their proposal on rent waiver during semester break should have been discussed during the contract negotiation stage and if the parties were to consider amending the lease, the Plaintiff was to first clear the rent arrears before there could be any negotiations. On February 25, 2016, the Defendant extended the payment period for payment of the rent arrears due to the closure of the Plaintiff's bank. The Defendant then agreed to waive the rent for the time the students were on strike. From the foregoing, I do not see how the Defendant's conduct would lead the Plaintiff to presume that there was an oral contract to waive the rent when school was out of session or to close the eatery in the administration block. I only see that the Defendant was acting in good faith and waived the rent when its actions such as strike, graduation and examination frustrated the Plaintiff.

15. In the case of *Bid Insurance Brokers Ltd vs British United Provident Fund* (2016) eKLR, the court held as follows in regard to contracts;

> Before however taking these issues, it is necessary to understand the nature of contract. According to *Black's Law Dictionary*, 8th Edition –
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> "The term "contract" has been used indifferently to refer to three different things:
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> i. the series of operative acts by the parties resulting in new legal relations;
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> ii. the physical document executed by the parties as the lasting evidence of their having performed the necessary operative acts and also an operative fact as itself;
>
> iii. the legal relations resulting from the operative acts, consisting of a right or rights in personam and their corresponding duties, accompanied by certain powers, privileges, and communities. The sum of these legal relations is often called "obligation" William R. Anson – Principles of the Law of Contract"
>
> 11. These attributes may be found in "oral contract", also called "parole contract", or "simple contract", which is a contract or modification which is not in writing, or is only partially in writing. A parole contract is subject to the common law principle that a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add to, vary, a contract in writing. This rule usually operates to prevent a party from introducing extrinsic evidence of negotiations that occurred before or while the agreement was being reduced." (emphasis added)

15. Also, P S Atiyah – *An Introduction to the Law of Contract* 3rd Edition 1981 on parole evidence rule stated as follows;

> The basic principle is often called the parole evidence rule, and according to this rule evidence is not admissible to contract or qualify a complete contract. This rule is usually

stated as a rule of evidence, but it probably best regarded as a rule of substantive law. The question is not really whether evidence can be admitted which might vary the written document, but whether if the evidence is admitted, it will have the legal effect of varying the document."

16. In this instant case, the allegations that there is an oral agreement would vary the written lease agreement, hence the Plaintiff's claim that the oral agreement supplements the lease agreement cannot stand.

Page 2 of the lease agreement states as follows;

> ...Yielding therefrom a monthly rental of Kshs. 100,000 only per month payable quarterly in advance with an annual increment of 5% till the expiry of the lease."
>
> Clause 1 (a)
>
> ...to pay the rent in the manner aforesaid as any other sums payable and/or provided in the lease"

17. The Defendant alleged in his counterclaim that the Plaintiff defaulted in paying rent for the month of June-December 2015 and January to November 2016.The Defendant waived the rent for November 2015. The Plaintiff in both letters dated January 15, 2016 sought a waiver for 4 months being the time when the school was out of session, hence, agreeing to be in default. The Defendant stated that in an attempt to clear the arrears, the Plaintiff has paid different amounts on different occasions totaling up to Kshs 650,000. Section 66 (1)(a) of the *Land Act* 2012, stipulates that the payment of the rent reserved in the lease at the times and in the manner specified in the lease is a mandatory condition implied on part of the lessee. Hence the Plaintiff had an expressed obligation to pay rent to the Defendant paid quarterly and in advance, the Plaintiff did not do that. The Plaintiff insisted that the restraint wholly depended on the students and the staff, and when school was out of session, they suffered a blow. This is unfortunate however the court cannot rewrite a contract. In the case of *National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd* (2002)2 EA 503 the court stated that;

> A court of law cannot rewrite a contract, between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shah JA in the case of *Fina Bank Ltd v Spares and Industries Ltd [2000] 1 EA 52*: "It is clear beyond peradventure that save those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".

18. Both parties blame each other for lack of issuance of the Notice to vacate. Clause 6 (i) and (ii) state as follows;

(i) Either party can terminate this agreement by giving six (6) calendar month's written notice or six (6) months' rent equivalent in lieu of notice;

(ii) If the said rent shall at any time during the term become more than one-quarter equivalent to i.e. three months in arrears, whether legally demanded or not, or if the lessee shall omit to perform or observe any of the covenant herein contained then the lessor or its authorized agent retains the right to terminate the lease, and assume possession of the premises immediately and take whatever action it thinks fit to recover the arrears of the rent PROVIDED that in the event the lessor will first give to the lessee 30 days' notice of the breach of the proposed redress which if not complied with by the lessee within thirty days, then the lessors may take, without

further notice to the lessee, whatever action he thinks to recover the arrears of rent/or obtain the redress required."

19. In addition to this, the right of a lessor to forfeiture is also provided for by Section 73 of the *Land Act*. The lessor has a right to forfeit the lease, by entering and possessing the premises if the lessee commits any breach of or omits to perform any condition expressed or implied in the lease. This right to forfeit can only be exercisable where the lessor served the lessee notice. The Plaintiff claimed that after the fire in November 2016 that affected the electricity in the suit premises and the December 2016 recess, they locked the restaurant and took a break, however, when they returned in early 2017, they were barred from entering the suit premises by the Defendant's security guards. The Defendant alleges that the Plaintiff locked the suit premises till the court ordered for it to be opened in April 2019.

20. I have perused the record of the court. The Plaintiffs vide an application dated August 3, 2017, sought orders to break in and enter the suit premises to collect its tools of trade and wares and the Defendants to be at liberty to lease out the suit premises. In that application, the Plaintiff claimed that the Defendant's agent had barred them from entering the suit premises, whilst the Defendant argued that the Plaintiff have locked the suit premises on its own volition and left. According to the Defendant, the lease had not been terminated. This court dismissed the Plaintiff's application. The Defendants filed an application dated February 21, 2019 seeking *inter alia*, leave to enter upon and repossess the suit premises. The court on April 9, 2019 granted leave to the Defendant to enter upon and repossess the suit premises pending determination of the said application. The Plaintiff in the plaint conceded that it locked the premises and took a break. The Plaintiff further contended that when they came back early 2017, the security guards barred them from accessing the suit premises. The Plaintiffs have not brought any evidence before this court to show that they sought an explanation from the Defendant as to why they were denied access to the suit premises, or demanded access to enter the suit premises. As aforementioned, the lease could only be terminated if a 6 month notice to vacate is issued by either party or the lease could be terminated by a lessor after 30 days' notice of the breach. None of the parties complied with Clause 6(i) and (ii).

21. The Plaintiff claimed that there was a blocked sewer system, there was inadequate water supply to the premises, the disrepair of the electrical wiring system, refusal to remit its portion of electric costs for common areas, and inoperable elevators limiting access to the restaurant. Page 2 of the lease states as follows;

> ...services to be provided by the lessor including:
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> a. General maintenance, landscaping, and garbage collection in the common areas, parking and loading areas;
>
> b. adequate water supply;
>
> c. insurance of the building;
>
> d. fire fighting appliances;
>
> e. General security;
>
> f. Convenient parking for customers and traffic control;
>
> g. Public facilities including washroom."

Clause 5 of the lease provides for the duty of the lessor. It stipulates as follows:-

> Clause 5(b)

> Subject to the payment by the lessee of the rent herein before reserved and provided that all the covenants on the part of the lessee have been performed and observed and unless prevented by any cause beyond the control of the lessor to keep in good and tenantable repair and condition of the main structure...including the roof, timber foundations and external and load bearing internal walls (but not the interior faces of such parts of external or internal walls as bound by the premises of the rooms therein) and all drains...water pipes, sanitary apparatus, wires, and cables in or under the Engineering block...and the entrances staircases, landing corridors, passenger lifts...used by the lessee in common with others. AND to carry out repairs to the interior of the premises...created by reason of structural repairs to or defects to the engineering block or by breach of non-performance of the obligation of the lessor.
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> Clause 5 (c)
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> Unless prevented by any cause beyond the control of the lessor to keep clean and adequate lighted the common parts of the Engineering block during such hours as the lessor may reasonably decide and to maintain in good working order and repair all apparatus equipment plant...serving the passenger lifts...the water heating system, the electrical lighting and other appliances in the common parts of the engineering block...
>
> Clause 5 (d)
>
> To insure and keep insured the Engineering Block from loss or damage by fire storm tempest, and such other risk that the lessor may deem expedient...AND to rebuild or reinstate the premises including the means of access thereto so far as the same may be damaged or destroyed...

22. The Plaintiff claimed that the fire that occurred in the building in November 2016 rendered the elevators inoperable and the stairs were inaccessible. They also claimed that there was no electricity in the building causing *inter alia* the food to get spoilt. This caused the Plaintiff to suffer loss. DW1 confirmed that there was a fire in the suit premises. There is no evidence presented by the parties on the cause of the fire. DW1 did not deny neither did she know the effects of the fire damage. It is for this reason that the Plaintiff locked the restaurant in December 2016. Clause 5(d) states that it is the obligation of the Defendant to insure and keep insured the suit premises from loss and damage caused by a fire. This was not done by the Defendant. The Plaintiff has further claimed that he paid electricity charges for the restaurant and the common areas. The Defendant in their statement of defense alleged that it was the duty of the Plaintiff to pay all the electricity charges. Clause 5(c) it is the duty of the Defendant to ensure adequate lighting on the common areas.

23. The Plaintiff claimed that they are entitled to reimbursement of Kshs 10,114,692.70 being the aggregate loan amount that they took out as capital for the restaurant business in the University. There is no clause in the lease that states that this was to happen and so the Plaintiffs took out the facility on their own volition therefore the Defendant is not liable for anything that might result from the default in payment of the loan facility. The Plaintiff also claimed that they spent Kshs 400,000 being the aggregate amount spent on replacement and repairs as a result of the Defendant's negligence.

24. From the foregoing, I find that, there was no oral agreement that the rent was to be waived when school was out of session and they would be no other eateries in the vicinity, therefore, the Plaintiff breached the lease agreement by defaulting to pay rent. I find that the Plaintiff has failed to prove their case on a balance of probabilities and I dismiss it.

25. On the counterclaim by the Defendant, none of the parties terminated the lease agreement in accordance to the provisions in the lease. It the Plaintiffs were inclined to terminate the contract, they would have done so by issuing a 6 months' notice or if the Defendant wanted to terminate the lease more so after the Plaintiff defaulted in paying rent, the Defendant could have issued a 30 days notice on breach. The Defendant breached the lease agreement by not insuring and keeping insured the suit premises from loss and damage caused by the fire and reinstating the premises. This caused the Plaintiff to lose business. As aforementioned the lease was not terminated until the court ordered the Defendant to enter into the suit premises in April 2019 and with the evidence on record, the Plaintiff were still in occupation but the suit premises was not fit for purpose due to the fire. Section 65 (1) (e) stipulates as follows;

> That if, the leased premises or any part of them are destroyed or damaged at any time—
>
> i. by fire, flood or explosion or other accident not attributable to the negligence of the lessee, or lessee's invitees or employees;
>
> ii. by civil commotion; or
>
> iii. by lightning, storm, earthquake, volcanic activity or other natural disaster, so as to make the leased premises or any part of it wholly or partially unfit for occupation or use, the rent and any contribution payable by the lessee to the outgoings on the premises or a just proportion of that rent of contribution according to the nature and extent of the damage sustained shall be suspended and cease to be payable until the leased premises have been, once more, rendered fit for occupation and use; and if the leased premises have not been rendered fit for occupation and use within six months after their destruction or damage, the lessee shall have the option to terminate the lease after giving one month's notice;"

26. I find that the Defendant also breached their part of the contract by failing to keep the premises in good repair and failed to issue a notice to terminate the agreement for non-payment of rent. I find that both the Plaintiffs and the Defendant did not meet their obligations as per the terms of the lease. I find that the Defendant has failed to prove the counter claim on a balance of probabilities and I dismiss it. Each party is to bear their costs of this suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF JUNE 2022.

N A MATHEKA

JUDGE