



REPUBLIC OF KENYA



**Mohamed v Kenol Kobil PLC (Environment & Land Case 26 of 2021)  
[2022] KEELC 12594 (KLR) (16 August 2022) (Judgment)**

Neutral citation: [2022] KEELC 12594 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE 26 OF 2021**

**AE DENA, J**

**AUGUST 16, 2022**

**(FORMERLY MOMBASA ELC NO.192 OF 2019)**

**BETWEEN**

**FUAD MAHMOUD MOHAMED ..... PLAINTIFF**

**AND**

**KENOL KOBIL PLC ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. By a Plaint dated October 28, 2019 the plaintiff filed suit against the defendant which was later amended on April 26, 2021. The orders sought are highlighted later in this judgement.
2. The defendant filed defence on November 29, 2019 which they later amended by leave of the court to include a Counterclaim on September 23, 2021. In the Counterclaim the defendant seeks:
  - a. A declaration that the plaintiff is in breach of the Lease
  - b. A declaration that the plaintiff's breach of the Lease occasioned losses to the defendant
  - c. General damages for loss of business
  - d. Mesne profits from May 2019 until final determination of this suit.
  - e. Interest on c) and d) above at court rates from the date of filing this counterclaim until payment in full.
  - f. Costs of the counterclaim and interest thereon and;



## a. Any other relief the court deems fit to grant

### The Plaintiffs Case

3. In his plaint the plaintiff averred that he was the registered proprietor of plot No Kwale /Tiwi 2394 (suit premises) which he leased to the defendant on March 2001 previously known as Kenya Oil Company now Rubis Energy Kenya PLC. That the lease was extended through a variation to April 30, 2035 making it a fixed term lease, at monthly rent of Kshs 240,000/= payable annually in advance every May escalating at 8% every 5 years. It was further averred the defendant purported to terminate the lease effective from October 31, 2019 and stopped paying rent for the years 2019,2020 and 2021 as well as rates and taxes to the Kwale County Council hence the reliefs sought in the plaint.

### Defendants' Case

4. The defendant through Further Amended Statement of Defence and Counterclaim denied that the lease was not terminable and averred that notice was issued pursuant to the Land Act. It is the defendant's case that by a letter dated April 1, 2015 Kenya National Highways Authority (KENHA) claimed that the defendants were installing an access along the Likoni Lunga Lunga road reserve at Tiwi without their permission. The defendants informed the plaintiff to deal as the registered owner who also constructed the petrol station and had admitted obtaining the approval before construction. It was alleged that the defendant continued to run the business but in May 2019 KENHA dug trenches at the exit and entry making the premises inaccessible and unfit for use. Consequently, the defendant issued notice in June 2019 to suspend rent and asked the plaintiff to make the premises fit for use within 6 months. It is alleged that the plaintiff demanded for rent to be paid and did not repair the premises. That meanwhile due to inaccessibility no sales were being made leading to huge losses causing the defendant to terminate the lease effective October 31, 2019. The defendant stated that it had a legitimate expectation of good business based on previous performance thus the counterclaim herein. It was denied that anything was payable to the plaintiff as particularized however rates obligations were admitted in accordance to the lease agreement.
5. The plaintiff filed a reply to Defence and Defence to counterclaim in which it urged the court to dismiss the counterclaim with costs.

### Hearing

6. The matter was heard on November 22, 2021 and March 17, 2022. Each side called one witness to testify on its behalf.
7. The plaintiff Fuad Mahmud Mohamed testified in support of his case. He stated that he was businessman in Nyali and owner of the suit property. That the defendant was his tenant having entered into a lease agreement following a letter of offer from Kenya Oil Corporation Limited dated February 6, 2001. That the lease agreement was registered on March 21, 2001 for 15 years and upon handing over the station he never got involved thereafter. Mr Mohamed went on to state that there were proceedings in Mombasa HCC 314 of 2002 where the defendant stated they built the petrol station. He testified that the suit was settled through an MOU dated May 6, 2005 where rent was to be paid to him yearly in advance. That a variation of lease dated May 9, 2005 was signed, registered and certificate of lease issued which expires on April 30, 2035. He informed the court that the defendant was still holding the certificate of lease, he was unable to lease the suit premises and had not earned rent since the year 2019.
8. Mr Mohamed further testified that he demanded for rent through Kiarie Kariuki Advocates vide letter dated May 20, 2019. The defendants responded thereto through letter dated May 22, 2019 which he



also responded through a letter dated June 7, 2019. He went on to state that he was not aware about the letter from KENHA alleging that the station was on road reserve. That he wrote to KENHA about the said letter through letter dated July 4, 2019 to which KENHA responded through letter dated July 8, 2019 enclosing their letter dated April 1, 2015 which he had never seen.

9. He added that the defendant was the one to obtain the authorization as demanded by KENHA. That during the year 2018 the defendant continued carrying out business, duly paid the rent, until May 2019. That all the allegations about the rent were responded to by his lawyer Kiarie Kariuki in letter dated July 9, 2019 which the defendant did not respond to until October 1, 2019 informing him of the termination. That he responded through letter dated October 7, 2019 by his lawyers on record. Further correspondences entailed letter to KENHA dated December 2, 2019 and their response thereto of December 20, 2019. Responding to the contents of the lease termination letter he denied that the defendant could not access the suit property after demolition. He reiterated that KENHA continued running their business thereof until May 2019. He denied that the premises were on road reserve having existed for 15 years and reiterated his prayers in the amended plaint. He also produced as part of his evidence copies of the documents in the plaintiff's list of documents dated April 26, 2021 which were marked as exhibits.
10. Emmanuel Kaloki the Retail Territory Manager of the defendant adopted his witness statement dated November 29, 2021 as his evidence in chief which was a restatement of the defendant's Amended Defence and Counterclaim. He went on further to confirm that the defendant was justified to terminate the lease since the plaintiff failed to service the premises to enable proper conduct of the business. He also produced copies of the documents in the defendant's list of documents dated April 1, 2021 which were marked as exhibits.
11. Both witnesses were cross examined extensively.

### **Submissions**

12. Parties thereafter filed and exchanged written submissions.

### **Plaintiffs Submissions.**

13. Reiterating the history of how the lease was entered into culminating to the variation herein it was argued on behalf of the plaintiff that the lease was a fixed term and was terminable only by effluxion of time on April 30, 2035 or by surrender of the unexpired term.
14. It was submitted that the defendant had not demonstrated how the content of the letter dated April 1, 2015 was conveyed to the plaintiff. That the plaintiff denied he was informed of the same and stated he became aware through KENHA's letter dated July 8, 2019 a response to his own letter of July 4, 2019. That it was evident in the letter dated April 1, 2015 that the defendant was carrying out the works and therefore obligated to seek the authorization.
15. Referring to the letter dated December 20, 2019, it was pointed out that KENHA demolished the culverts and or dug the trenches on April 17, 2018 and not May 2019 as alleged by the defendant. That DW1 could not confirm the date of demolition as he was not based in coast region at the time of the demolition. Counsel further urged that the actions by KENHA did not render the petrol station inaccessible and unfit for use since the counterclaim stated the defendant operated the business in a profitable manner between November 2018 and April 2019 which was confirmed by DW1.
16. It was further submitted that the termination notice could not issue in the absence of a termination clause. That the notice issued under section 65(e) of the Land Act was not supported by evidence that



the station was inaccessible. In any case there was admission that the defendant operated the business between November 2018 and April 2019 as stated earlier. According to counsel the leased premises was land comprising Kwale/Tiwi/2394 it only abutted the Likoni Lunga-Lunga road. That KENHA did not state that the defendant could not access the station via the road reserve, it was only concerned with the unauthorized installation by the defendant thereof which the defendant had notice of. Counsel urged that KENHA's interference with the entry and exit could not form a basis for termination of the lease since the road reserve was not part of the leased premises and the plaintiff was not liable to restore the same. This court was invited to take judicial notice that all petrol stations abutting public roads are accessed via road reserves and thus no basis to be said the same was inaccessible.

17. Additionally, it was submitted that the specific provisions of the lease that were allegedly breached by the plaintiff were not pleaded neither were they proved. Conversely it was the defendant who had breached the lease by failing to pay rent and rates as per clause 1 of the lease read together with clause 2 of the variation of lease.
18. It was further urged that the defendant having agreed to pay rates and rent as provided in the variation of lease was bound by the terms of the agreement and the court could not rewrite the agreement for the parties in line with the case of *National Bank of Kenya V Pipe Plastic Samkolit (K) Limited & Another* (2001) eKLR.
19. In response to the defendants claim for general damages, it was submitted that this was not payable as the defendant closed the business on its own volition despite operating it profitably after the demolition. Further they could not benefit from breach of the contract and placed reliance on *Capital Fish Kenya Limited v Kenya Power & Lighting Company Limited* (2016) eKLR. That the alleged losses ought to have been specifically pleaded and proved as required of special damages.
20. It was contended that only a plaintiff landlord can maintain a claim for mesne profits should the defendant continue to hold over the premises after the expiry of the lease as was the holding of Mativo J in *Rajan Shah T/A Rajan S. Shah & Partners* where the definition and character of mesne profits was explained.
21. The plaintiff therefore urged this court to find against the defendant as prayed in the amended plaint.

### **Defendants Submissions**

22. On its part the defendant urged that it was the responsibility of the plaintiff to obtain accessibility permits from KENHA to enable the defendant to effectively occupy and use the premises for the intended purpose of operating a petrol station. Counsel pointed that the plaintiff letter dated July 4, 2019 informing KENHA of the Ministry of works approval granted in 1999 pursuant to which the plaintiff built culverts for entry and exit to the service station was an admission that it was the plaintiffs responsibility as the developer to obtain the permits from KENHA which KENHA denied was furnished to it if at all it was obtained from its predecessor. That the plaintiff's argument attributing responsibility to the defendant by dint of delivery of the letter to it had no basis since KENHA was not privy to the terms of the lease and who was developing. They could only deliver to the person in occupation.
23. Counsel urged that the defendant's responsibility under clause 1(m) of the lease was limited to permits related to use and storage of the products sold thereof and not to statutory provisions relating to acquisition of the demised premises including the permit from KENHA.
24. In addition, it was urged that the plaintiff was aware of the letter dated April 1, 2015 based on the contents the plaintiffs letter dated June 7, 2019 responding to the defendant's decision to suspend



rent until the issues raised by KENHA were resolved which letter also caused the plaintiff to write to KENHA the letter dated July 4, 2019 discussed in paragraph 28 herein.

25. The defendant emphasized that they were justified to terminate the lease since the plaintiff did not ensure the defendant's peaceful occupation to run its business thereof. Counsel admitted to the absence of a termination clause in the lease at signing but urged the court to note that the lease was 'a lease for value' and as long as the defendant could not carry out the purpose for which the contract was entered there was no commercial basis to be bound by the lease to continue paying rent. That the plaintiff's inaction despite advice by KENHA in July 8, 2019 letter led to inaccessibility of the premises which was a breach of the lease materially affecting the purpose of the lease leaving the defendant with no option but to terminate.
26. Citing the case of *Chimanlal Meghji Naya Shah & Another V Oxford University Press (EA) Limited* (2007) eKLR, it was argued on behalf of the plaintiff that no landlord can force a tenant to stay on his premises for a particular period whether a lease exists or otherwise. Further that while the defendant tried to hold off termination by issuing notice of suspension of rent allowing the plaintiff to remedy the breach it became unsustainable to maintain the lease given the economic climate. Further reliance was placed on paragraph 13 of the letter of agreed terms dated February 6, 2001 where the parties recognized that termination of the lease was a possibility that could occur.
27. The defendant urged that the photos (see page 53 and 54 of Plaintiff's list of documents) were of legal evidentiary value for failing to meet the requirements of Section 106 B of the *Evidence Act* and cited *Richard Nyagaka Tong'i Independent Electoral & Boundaries Commission & 2 Others* Election Petition No 5 of 2013 eKLR. Counsel however submitted should the court uphold the same, they still clearly showed the demised premises were inaccessible.
28. Citing *Chimanlal Meghji Naya Shah & Another V Oxford University Press (EA) Limited supra* It was urged the plaintiff was not entitled to the claim for rent as he did not mitigate his loss by looking for other tenants. That the handover of the premises which the plaintiff ignored presented an opportunity to discuss mutual terms of termination instead the plaintiff chose to file the present suit. It would be unconscionable and amount to unjust enrichment to pay rent for the remainder of the lease. Reliance was placed on *Margaret Nyari Muiruri vs Bank of Baroda (K) Limited* (2014) eKLR. It was further submitted that the claim for payment of rent for 2019, 2020 and 2021 was not payable because the plaintiff was only entitled to the rent that had accrued for the six months from May 2019 to October 2019 when the defendant terminated the lease.
29. Counsel further distinguished *National Bank of Kenya V Pipe Plastic Samkolit (K) Limited & Another* relied upon by the plaintiff pointing that there were special cases where equity will be applied to relieve a party from a bad bargain such as the present case.
30. The claim for land rates for 2019 was opposed on the basis that the defendant had already affected payment to the county government of Kwale during the time the defendant was in occupation and there were no arrears. Moreover, no demand for the rates from the county government had been tendered. That special damages were to be specifically pleaded and strictly proved.
31. On whether the plaintiff breached the lease agreement it was pointed that a contract which requires performance of specific duties or obligations if breached would lead to compensation for the loss suffered. In this case only the defendant should be compensated for loss of business.



## Analysis and Determination

32. I have considered both the plaintiff's and defendants' pleadings, evidence and submissions. The issues that arise for determination are;
- a. Who between the plaintiff and the defendant was responsible for compliance to the notice dated April 1, 2015 by the Kenya National Highway's Authority.
  - b. Whether the lease was terminable by notice and if yes was it terminated by the notice dated October 1, 2019.
  - c. Whether there was breach of the lease and if yes by which party?
  - d. Whether the plaintiff is entitled to the reliefs sought in the plaint
  - e. Whether the defendant is entitled to the reliefs sought in the counterclaim.
  - f. Which party shall bear the costs of the suit and the counterclaim.

### **Who between the plaintiff and the defendant was responsible for compliance to requirements contained in the letter dated April 1, 2015.**

33. From the pleadings and the evidence adduced before this court, the genesis of the present dispute is a letter dated April 1, 2005 by KENHA which was produced by both parties as part of their evidence (PEX 13, DEX 3). It is addressed to Kenol Petrol Station, Tiwi. I find it necessary to produce verbatim part of the content here below; -

Dear Sir,

Installation of an illegal access road and signboard along likoni- lunga lunga (a14 road) at tiwi

'The Kenya National Highway Authority (KENHA) has noted that you are installing an access along Likoni Lunga-lunga (A14) road reserve at Tiwi without permission from the Authority.

Please be informed that you are contravening the *Kenya Roads Act* (2007) clause 149 1(a) and Section 91 (1) of the *Traffic Act* Cap 403 of the Laws of Kenya.

You are therefore required to halt any further works on the road reserve immediately and seek authorization from the Director General, Kenya Highways Authority to carry out the aforementioned works.

Enclosed with the letter was a picture depicting the illegal access road and sign board.

34. It is the defendant's testimony and submission that the letter was brought to the plaintiff's attention being the registered owner of the suit property to deal. On the other hand, the plaintiff told this court that between him and the defendant, it was the defendant who was to follow up on the requirements by KENHA. He referred this court to the above letter which according to him directed the addressee who was the one undertaking the said works. '...to go seek authorization from KENHA'.
35. It is pleaded and submitted by the defendant that the demised premises under the lease encompassed a service station that had been developed by the plaintiff before the lease date including all the fittings on the premises necessary for operating the station. That this was supported by the plaintiff's admission in his letter to KENHA dated July 4, 2019 (PEX 11) where he confirms that in the year 1999 he obtained approval from the Ministry of works to create access by installing the culverts. That in response KENHA (see letter dated July 8, 2019 PEX 12) directed him that it was the responsibility



of the developer to initiate the appropriate application process for the permits. That the plaintiff had failed to submit the said permit and was therefore to initiate the process for a new one to enable the defendant to effectively occupy and use the premises for the intended purpose of operating the station. The plaintiff admitted upon cross examination that he previously sought the permit as stated in the letter and that he did not have the same in court. In his witness statement and oral evidence, the plaintiff denied that he built the station by producing the pleadings in Mombasa HCC 314 of 2002 where the defendant stated they built the station.

36. To resolve the above contest this court will be guided by the lease agreement (PEX 2) which stipulates what was leased to the defendant. The demised premises are defined thus; -

All that portion of a piece of land comprised in the abovementioned Title where he has developed a service station together with all the buildings and improvements erected and being thereon...' (emphasis is mine)

It is evident from the lease that the petrol station was developed by the Lessor, the plaintiff herein. I'm aware though of the specific installations undertaken by the defendant as listed in the MoU (PEX5) but these would not form the service station as envisaged under the definition.

37. The question that arose in my mind was does this make the plaintiff responsible for compliance with the letter dated April 1, 2015. Prima facie the answer could be no. Let me point out at this stage that the fact that KENHA stated that it was the responsibility of the developer to initiate the process for permits cannot be conclusive proof that the plaintiff was responsible for the permits. To me it all depends on the agreement between the parties and the developer may not necessarily be the registered owner of the suit property. This then led me to the defendant's evidence and submission that the operations of the station were guided by the lease which placed responsibility upon the registered owner who was also responsible for obtaining the attendant permits.
38. Admittedly the relationship of the parties to an agreement are guided by the terms set out in the agreement and which was also admitted by the plaintiff during cross examination. I'm aware the plaintiff in its pleadings alluded to clause 1(m) of the lease to shift the responsibility to the defendant which he could not defend on cross examination. I respectfully agree with counsel for the defendant that the clause was limited to storage and safety of the petroleum products.
39. I therefore proceeded to identify the relevant clauses enumerating the obligations of the Lessor. These are enumerated at clause 2 of the lease which provides; -
- 2 (a) To keep the roofs main walls and all main structural timbers of all buildings forming part of the demised premises electrical apparatus comprised in and forming part of the electrical circuits of the same and exterior of such buildings and all additions thereto and the drains sanitary and conservancy tanks water supply and the pipes carrying the same situate on and serving the demised premises in good and tenantable repair and condition but so that the liability of the Lessor under this sub-clause shall only extend to repairs which may become necessary other than by reason of willful damage occasioned by the Lessee.
- (b) The Lessee paying the rents hereby reserved and performing and observing the several covenants and stipulations herein contained or implied shall peaceably hold and enjoy the demised premises during the said term without any interruption by the Lessor or any person rightfully claiming under or in trust for it.
40. Sub clause (a) above refers to keeping the premises in tenantable repair and I do not think the demolitions undertaken by KENHA would fit under this clause anyway for they were not repairs. This then led me to the plaintiffs' submissions that its responsibility was limited to the demised premises.



The demised premises as observed earlier in this judgement comprised the title where the Lessor has developed a service station together with all the buildings and improvements erected and being thereon. Clearly the entry and exits from the definition did not comprise the demised premises and if that was the intention of the parties it does not manifest from the lease agreement. It is trite that this court cannot re- write the agreement for the parties see *National Bank of Kenya V Pipe Plastic Samkolit (K) Limited & Another supra*.

41. Sub clause (b) relates to quiet possession as long as rent is paid and the Lessees covenants both under the lease or implied are observed. DW1 testified that the termination of the lease was justified as a result of the plaintiff not meeting his obligations in the lease. He told the court that the plaintiff failed to service the premises to enable proper conduct of the business. It is not clear from this testimony if the defendant's witness was referring to service of the premises in the context of keeping the premises in tenable repair and if this is so this clearly would not apply in the present circumstances.
42. The Lessor cannot be held responsible for what is outside the demised premises and if he were to be held responsible this was not stipulated in the lease. From the lease agreement I find that it was not for the registered owner that is the plaintiff to comply with the letter dated April 1, 2015.
43. This leaves the court with the only option of the person who was installing the works which to me is the developer referred to in letter dated July 8, 2019 (PEX 12) and who the defendant wants this court to believe refers to the party who constructed the station, the plaintiff. I find no problem with the plaintiff's admission that he sought a permit in 1999 which was granted and pursuant to which he constructed culverts on the road reserve. It is noteworthy that in the initial agreement he was to be the dealer (see the proviso (iii) to clause b page 2 of the initial lease and the pleadings in HCC 314 of 2002). It is further noteworthy that the letter from KENHA refers to works that were ongoing as at April 2015 when they visited the site and not the previous works admitted by the plaintiff. Moreover, the issue was not the installation but the authorization that was required by statute for one to undertake the same on the road reserve. During his evidence in chief the plaintiff testified that after handing over the premises he never got involved thereafter. Mr Makori the defence witness during cross examination upon being shown the letter dated April 1, 2015, first admitted that at the time of the said letter Kenol Kobil himself was carrying out some installation, they were told to stop and seek authorization which authorization was not sought. However, upon being shown the letter dated May 20, 2019 (PEX 9) he conceded that the business was being operated through a dealer and further that it is the dealer who informed the defendant of the demolition by KENHA. My perusal of this letter which is addressed to the plaintiff by Kenol Kobil confirms this position where it is stated thus; -  
  
'.....KENHA thereafter proceeded to dig trenches on the entry and exit to the station making the station inaccessible and unfit for habitation or use and it is due to this that our Dealer has terminated his Dealership Licence Agreement with us' (emphasis mine).
44. Even assuming it was the dealer undertaking the works herein, he is the defendant's agent and it does not change the finding that it is the defendant who was undertaking the works, he was the developer of the works that were stopped. This further supports my earlier finding that it was not the plaintiff's responsibility to obtain the present authorization.
45. Based on the foregoing this court thus makes a finding that the defendant was the party responsible for compliance and obtaining the authorization to carry out the works.



**Whether the lease was terminable by notice and if yes was it terminated by the notice dated October 1, 2019.**

46. During his testimony DW1 produced a copy of a letter dated October 1, 2019 (DEX 6). The letter is addressed to the plaintiff terminating the lease agreement. It is the plaintiff's case that the lease is for fixed term and it has no provision for early termination. I noted from the defendant's submissions that Counsel admitted to the absence of a termination clause in the lease (see paragraph 4.3.3). I have perused the lease agreement and I have not found any termination clause. This is further supported by the letter dated October 1, 2019 allegedly terminating the lease agreement which was issued under the provisions of Section 65 (1) (f) of the Land Act 2012 and not under any clause in the lease agreement. It is therefore my determination that the lease did not contain a termination clause.
47. It is also not in dispute that nonetheless the defendant proceeded and issued the letter dated 1<sup>st</sup> October 2019 to terminate the lease agreement. The notice was issued pursuant to the provisions of Section 65 (1) (f) of the Land Act 2012. The section is on covenants implied in a lease on the part of lessor. It provides; -
- 65(1) in every lease, there shall be implied covenants by the lessor with the lessee, binding the lessor-
- (f) if it is an express or implied term of the lease that the leased land or a building on it may be used for any one specific purpose or purposes, the lessee may terminate the lease on giving one month's notice to the lessor, if the land or building cannot be, or can no longer lawfully be, used for any of those purposes'
48. Counsel for the plaintiff in response to the application of the above section did not submit on whether this section can be invoked or not. Instead it was submitted that there was no evidence to support that that the station was inaccessible. That there was admission the business operated between November 2018 and April 2019. Additionally, that the premises did not comprise the road reserve and interference with exit and entry could not be the basis for termination.
49. The general rule is that rights and obligation of the parties to a lease are often set out in the lease agreement. However, if the parties fail to provide for them the statutory obligations are imported into the agreement. As rightly stated by Counsel for the plaintiff the Lessee to successfully rely on the said provisions, they must prove if the demised premises could no longer lawfully be used for the purpose for which they were leased, in the present case for the running of a petrol station. The letter of termination states that the defendant received notice from KENHA that the petrol station was built on a reserve. The letter goes to further state that KENHA subsequently dug trenches on the entry and exit to the subject property making it impossible to operate the station. The defendant did not produce any evidence from its end in proof that the station was inaccessible. It was upon them to discharge this burden of proof since the information was reasonably expected to be in their knowledge and more so in the present case where the issue of accessibility seems to be the main reason for the termination herein. This is compounded by the fact that at paragraph 15 of the Further Amended Statement of Defence and Counterclaim it is stated that between December 2018 – April 2019 the station had operated profitably. The defence witness admitted during cross examination that the station was closed on October 31, 2019. The witness had difficulty in confirming the date of demolition. It is however clear from the letter dated December 20, 2019 which is addressed to the plaintiff from the defendant (see PEX 17) that the demolition by KENHA was undertaken on April 17, 2018. If the demised premises were inaccessible, then the defendant ought to have stopped serving its customers on this date but there is a contradiction in the counterclaim in that upto April 2019 the business was running profitably meaning the demised premises were accessible. The plaintiff testified that the defendant backfilled the



trenches the following day and continued undertaking the business which was not controverted by the defendant.

50. I'm aware that KENHA in their letter while confirming the date of demolition as at April 17, 2018 attached photos of the same. The defendant questioned the evidentiary value for want of certificate under section 106B of the *Evidence Act*. I agree with this submission and find the photographs to be of no evidentiary value. I find guidance in the holding of the Court of Appeal in *John lodinyo vs Independent Electoral & Boundary Commission and County Assembly of Kisumu* 2018 eKLR where the court rendered itself thus; -

"55.It is at this juncture that the provisions of section 106B of the *Evidence Act* come into play as the section sets out the conditions to be fulfilled to have this evidence admissible since evidence shall only be admissible if a certificate is presented identifying the electronic record and a description of the manner in which the electronic evidence was produced, together with any particulars of any device involved in the production of that document, which the appellant did not do. This Court in the case of *County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others* [2015] eKLR stated that:

"Section 106B of the *Evidence Act* states that electronic evidence of a computer recording or output is admissible in evidence as an original document "if the conditions mentioned in this section are satisfied in relation to the information and computer." In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B (2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced..."

56. In this case, the election court found these forms inadmissible as there was no certificate produced as required by section 106(1) of the *Evidence Act*. We agree with the observations of the election court that various factors come into play when proceeding to admit such evidence as electronic evidence due to the vulnerability and easy manipulation of electronic evidence and the ease with which such evidence can be modified during the collection of the evidence. The evidence may also be easily tampered with making it more difficult to detect any signs of manipulation of documents. We therefore find that the election court did not err in finding the electronic evidence inadmissible, and therefore this ground of appeal must fail.
51. The defendant did not call its dealer as a witness to lead evidence on accessibility of the premises which was very critical to their case. It is my view that on a balance of probabilities the defendant has failed to prove that the station was inaccessible and therefore the provisions relied upon were not available to them. In any event even if it had been proved that the station was inaccessible this courts finding that it was not the responsibility of the Lessor to comply with KENHAs directive still denies the defendant the chance to invoke the said provisions to terminate the lease. Based on this then it is also my finding that the notice was not valid and did not terminate the lease.

#### **Whether there was breach of the lease and if yes by which party?**

52. It was the defendant's evidence and submission that the plaintiff's inaction despite advise by KENHA in the letter dated July 8, 2019 which led to inaccessibility of the premises was a breach of the lease materially affecting the purpose of the lease leaving the defendant with no option but to terminate. The plaintiff's submission was that the suspension of rent and termination of the lease when there was no termination clause were actions that caused breach of the lease on the part of the Lessee. I have noted that Warsame J as he then was in *Chimanlal Meghji Naya Shah & Another V Oxford University Press*



*(EA) Limited supra* also found that in a situation where the lease did not contain a termination clause, termination before expiry of lease amounts to breach of contract. Further the Court of Appeal equally held in *Kenya Commercial Bank Vs Popatlal Madhavj and Ano.* (2019) eKLR that termination of lease mid-term was not available to a party in a lease that did not provide for termination clause. Also see *Inar Singh Ltd Vs Star Times Media Co Ltd* (2021) Eklr where the learned judge agreed that a tenant cannot unilaterally terminate a lease which has no termination clause. The defendant therefore was in breach for purporting to terminate the lease in the absence of a termination clause.

53. Having made the foregoing findings it goes without say that the defendant's counterclaim must fail.

#### **Whether the plaintiff is entitled to the reliefs sought in the plaint**

54. The next question for this court's consideration then is whether the plaintiff is entitled to the prayers sought in the plaint. Based on his evidence that he was not the one responsible to comply with the directives in the letter dated April 1, 2015 which resulted into the digging of the trenches herein culminating into suspension of rent and alleged termination of the lease the plaintiff craves the following orders; -

- a. Kshs 10,615,173.12
- b. Kshs 198,184, outstanding rates plus penalty and interest and as at October 28, 2019 which sum continues to escalate and the plaintiff claims the said sum Kshs 198,184 with interest and penalty thereon as may be charged or assessed by the County Government of Kwale as at the time of payment.
- c. A declaration that the purported termination of the lease is invalid null and void.
- d. A declaration that the rent as reserved in the lease and variation of the for the unexpired term of the lease shall be payable to the plaintiff in the total sum of Kshs. 62,234,971.20
- e. Interest on a), b) and d) above at court rates, from the date of filing suit until payment in full
- f. Any other relief the court deems fit to grant
- g. Costs and incidentals of this suit.

55. It was the plaintiff's evidence that he was unable to lease the premises since the defendant was still holding the certificate of lease and that he had not earned rent since the year 2019. The claim for Kshs 10,615,173.12 is stated to be in respect of rent for May 2019 to April 2022 at the monthly rent of Kshs 279,936/=. The plaintiff during the hearing testified on how proceedings in Mombasa HCC 314 of 2002 pitting the plaintiff and the defendant was settled and produced the MOU dated May 6, 2005 (PEX 5) where the agreements therein including payment of rent were entrenched in the variation of lease dated May 2005 (PEX 6). Clause 2.1 varies the terms of rent to the effect that for the period of five (5) years commencing May 1, 2005 rent was Kshs 240,000 per month payable by the Lessee to the Lessor yearly in advance. Thereafter the rent was to escalate at 8% after every 5 years. At clause 2.1(a) and (b) were agreements on offsetting of some amounts from the rent payable which are not in issue and I have assumed were amortized. My calculation confirms that as at the year 2019 rent must have escalated at Kshs 279,936/=. per month. In response to this claim the defendant submitted that the plaintiff was only entitled to rent that had accrued for the six months from May 2019 to October 2019 when the defendant terminated the lease. My understanding is these are the 6 months when rent had been suspended vide the letter dated May 20, 2019. The rest of the claim covers the period after termination and I will deal with it in the next limb of the prayer touching on rent the remainder of the period of the lease.



A declaration that the rent as reserved in the lease and variation of the for the unexpired term of the lease shall be payable to the plaintiff in the total sum of Kshs 62,234,971.20

56. This claim has been made on the basis that the lease was a fixed term lease with no break out clause. On the other hand, the defendant urged that the rent for the remaining lease period was not payable for failure by the plaintiff to mitigate his loss by looking for other tenants. That such payment would be unconscionable and amount to unjust enrichment.
57. In determining whether this declaration should issue I have considered various factors. Firstly, the defendant tenant has already left the premises and this court cannot compel them to re-take possession. Also see *Inar Singh Ltd Vs Star Times Media Co Ltd* (*supra*) where the court further stated that a court cannot compel a tenant to continue in occupation of leased premises even if the tenant has no valid reason for vacating the premises and that the available remedy for the landlord would be damages for breach. Secondly the premises are capable of being leased again after these proceedings. Indeed, paying rent for the entire remainder period would be unjust enrichment. The plaintiff would earn twice and having been persuaded by the principles set out in *Samuel Kamau Macharia Vs Kenya Commercial Bank Limited, Kenya Commercial Finance Company Limited* [2003] eKLR this in my mind would be unjust enrichment. Kuloba J in explaining the concept of unjust enrichment had this to say; -
- ‘...., indeed, as a remedy attracting wrong, unjust enrichment was well-known in our courts fairly early. Thus, as far back as 1957, we see it spoken of by the then Court of Appeal for Eastern Africa comprising of Judges of eminence, namely, Sir Newnham Worley, P, Sir Ronald Sinclair, V-P, and Briggs, J A, in the case of *Saleh bin Ghaleb v Hussein al Qu’aiti*, [1957] EA 55, at p 73, where one finds this passage, vis, “so far as the allowances are concerned, this was a clear case of unjust enrichment” leading to a suffering of wrongful loss of which equity would provide a remedy. Broadly founded upon the aim of equity to do justice between parties, the doctrine of unjust enrichment and the remedy of restitution to counter unjust benefit proceed upon the realization that to allow a defendant to retain such a benefit would result in his being unjustly enriched at the plaintiff’s expense, and this, subject to certain defined limits, will not be tolerated by the law, and owing to the importance and aim of this doctrine in every advanced and civilized system of justice: “Woe unto the day when it is lost sight of in Kenya, which would also be contrary to the spirit of Section 3(c) of the *Judicature Act*. I trust that in future, in appropriate cases, there will be less smothering of just equitable rights” on the basis of technical objections and artificial distinctions oblivious to justice and substance.’
58. Thirdly I’m inclined to look at the behavior of the parties and specifically the plaintiff who chose not to attend the handover as invited in the letter of termination or pursue it thereafter including the certificate of lease. He was wrong to sit back and do nothing with the expectation that the court would grant him the relief sought herein.
59. Based on the foregoing I decline to make the declaration that rent as reserved in the lease and variation for the unexpired term of the lease shall be payable to the plaintiff. I will however allow the claim for Kshs. 10,615,173.12 stated to be in respect of rent for May 2019 to April 2022 which in my view should also cover damages for breach and will serve justice in the circumstances.
60. The plaintiff claims Kshs 198,184 outstanding rates plus penalty and interest and as at October 28, 2019 with interest and penalty thereon as may be charged or assessed by the County Government of Kwale as at the time of payment. The claim for land rates for 2019 was opposed on the basis that the defendant had already effected payment to the county government of Kwale during the time the defendant was in occupation and there were no arrears. The defendant did not lead any evidence of proof that they had made good the rates. On the other hand the plaintiff did not produce any evidence with regard to the amount stated in his pleadings. There being no proof I decline to grant this prayer.



61. The upshot of the foregoing is that this court enters judgement for the plaintiff against the defendant in the following terms; -
- a. The defendant shall pay to the plaintiff Kshs 10,615,173.12 in respect of rent for May 2019 to April 2022.
  - b. Interest on a) at court rates, from the date of filing suit until payment in full.
  - c. The defendant shall return the original certificate of lease dated June 2, 2005 in respect of Kwale/Tiwi/2394 to the plaintiff.
  - d. The defendant's counterclaim is hereby dismissed.
  - e. The Land Registrar Kwale shall cancel the entries dated 21<sup>st</sup> March 2001 and 2<sup>nd</sup> June 2005 in respect of the lease dated 19<sup>th</sup> March 2001 and variation of lease dated May 9, 2005.
  - f. The defendant shall bear the costs of the suit.

Orders accordingly.

**DELIVERED AND DATED AT KWALE THIS 16<sup>TH</sup> DAY OF AUGUST 2022**

**A E DENA**

**JUDGE**

**Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:**

**Mr Vincent Omollo for the Plaintiff**

**Ms Mwaka for the Defendant.**

**Mr Denis Mwakina- Court Assistant.**

