



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Property Development and Management Company - PDM (Kenya)
Limited v Bernard Kasema t/a Millionaire Associates & 2 others (Civil Suit
137 of 2015) [2022] KEELC 13619 (KLR) (21 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13619 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL SUIT 137 OF 2015
JO MBOYA, J
OCTOBER 21, 2022**

BETWEEN

**PROPERTY DEVELOPMENT AND MANAGEMENT COMPANY - PDM
(KENYA) LIMITED PLAINTIFF**

AND

BERNARD KASEMA T/A MILLIONAIRE ASSOCIATES 1ST DEFENDANT

CYRUS KAMAU METHU 2ND DEFENDANT

HASTINGS KYALE MULI 3RD DEFENDANT

JUDGMENT

1. Vide Plaintiff dated the 16th February 2015, the Plaintiff herein approached the Honourable court seeking the following Reliefs;
 - i. An Order for Specific Performance in respect of all the 1st Defendant's obligations under the Agreement for Lease dated 23/02/2010 including the signing of the Proposed Lease and the payment of all rental, service charge and Service Charge Adjustment arrears (plus VAT and interest thereon) over the Premises from 1/01/2014 to 31/12/2014 and which arrears as at 31/12/2014 amounts to Kshs 2,514,928.44/=;and
 - ii. The Payment of all accruing rental, service charge and Service Charge Adjustment amounts (plus VAT and interest thereon) post 31/12/2014;
 - iii. In the alternative to or in lieu of a) and b) above, general damages for breach of the Agreement for Lease and which general damages should be equivalent to the rental and service charge (plus VAT thereon) payable between 1/01/2014 and the intended expiry date of the lease, to



wit.29/02/2016 or from 1/01/2014 until the date the Premises are leased out to an alternate tenant;

- iv. Costs of this suit and interest thereon at court rates;
 - v. Interest in respect of a) and b) or c) above as per Clause 3 b) of the Agreement for Lease; and
 - vi. Any other or further relief as this Honourable Court may deem just and fair to grant.
 - vii. In the alternative to judgment as against the 1st defendant as prayed under a. above, the plaintiff prays for judgment against the 2nd and 3rd defendants thus:
For Judgment against the 2nd and 3rd Defendants jointly and severally for:
 - viii. The payment of all rental, service charge, service charge adjustment arrears (plus VAT and interest thereon) over the Premises from 1/01/2014 to 31/12/2014 and which arrears amounts to Kshs 2,514,928.44/=;and
 - ix. Payment of the rental and service charge (plus VAT thereon) payable under the Agreement for Lease post 31/12/2014 until the intended expiry date of the lease or until the date the Premises are leased out to an alternate tenant;
 - x. Interest in respect of a) and b) above as per Clause 3 b) of the Agreement for Lease;
 - xi. Costs of this suit and interest thereon at court rates;
 - xii. Any other or further relief as this Honourable Court may deem just and fair to grant.
2. Upon being served with the Complaint and summons to enter appearance, the Defendants duly entered appearance and thereafter filed a statement of defense and counterclaim. For clarity, the Counter-claim was filed by and on behalf of the 1st Defendant.
 3. For completeness, it is appropriate to reproduce the Reliefs that were sought at the foot of the counter-claim. Same are reproduced as hereunder;
 - a. This Honourable Court dismisses the Plaintiff's suit with costs to the 1st Defendant.
 - b. Payment of Kshs 280,195 Only, due and owing from the Plaintiff to the 1st Defendant.
 - c. Release of the 100 seats by the Plaintiff to the 1st Defendant.
 - d. Payment of General Damages for unlawfully and without a justifiable excuse holding onto the 1st Defendant's seats.
 - e. Loss of business and loss of user arising out of unlawful detention of the seats (to be computed before the hearing of this suit).
 - f. Interest on(b) above from 17/02/2014 to date of payment.
 - g. Costs of this suit and interest on the cost at court rates.
 4. Suffice it to point out that upon being served with Statement of Defense and Counter-claim, the Plaintiff herein duly responded thereto by filing a Reply to statement of Defense and Defense to Counterclaim.
 5. On the other hand, after the Plaintiff had filed the Reply to Defense and Defense to counterclaim, the Defendants filed a document, namely, Reply to Defense to counterclaim.



6. Be that as it may, the pleadings herein thereafter closed and the suit was subjected to Case conference, with a view to ascertaining its readiness for hearing and determination.
7. It is also appropriate to point out that thereafter, indeed the suit herein was listed for hearing on the 3rd November 2021. However, when same came up for hearing, the Plaintiff's counsel applied for an adjournment on various reasons, inter-alia that the Plaintiff was indisposed.
8. Nevertheless, it is common ground that the Plaintiff herein is a limited liability company and hence same cannot by any stretch of imagination be indisposed.
9. Be that as it may, it is important to state that the application for adjournment was opposed and thereafter the court was obliged to render a ruling. For clarity, a ruling was indeed rendered and the application for adjournment was dismissed.
10. Following the dismissal of the application for adjournment, the Plaintiff's advocate indicated that same did not have any witness before the court and premised on the statement, the court proceeded to and dismissed the Plaintiff's suit for want of prosecution.
11. In the premises, the Judgment herein essentially relates to and concerns the claims at the foot of the Counterclaim mounted by the 1st Defendant.

Evidence by the parties:

a. Counter-claimer's Case:

12. The Counter-claimer's case is premised on and or revolves around the evidence of one Bernard Kasema. For clarity, the witness testified as DW1.
13. The witness herein stated that same approached the Plaintiff herein with a view to procuring a Business space in the premises known as LR No 209/5575, otherwise known as Cambrian Building, situated along Moi Avenue, within the City of Nairobi.
14. Further, the witness testified that arising from the approach, the Plaintiff herein positively considered his request and thereafter prepared an Agreement for lease dated the 23rd February 2010, in respect of which the Plaintiff agreed to let to and in favor of the 1st Defendant a portion of the suit property, measuring 1575.09 square feet.
15. It was the witness' testimony that after executing the Agreement to Lease/letter of offer, same entered upon and took possession of the demised premises on the 1st March 2010. Besides, the witness added that same similarly moved 100 office seats into the demised premises in readiness to commence and operationalize his business.
16. Similarly, the witness stated that same was also required to pay a Security deposit in the sum of Kshs 418, 555/= Only, plus additional sums comprising of Stamp duty, advance service charge, Value added tax and Legal fees, prior to and or before taking up the Demised premises.
17. The witness stated that same complied with the terms of the Agreement to lease and indeed paid the sum of Kshs 487, 634.20/= only, which monies were duly received and acknowledged.
18. On the other hand, the witness also stated that on the 29th January 2014, same also made a further payment of Kshs 100, 000/= only. Consequently, the witness added that the entire sum that was paid on account of Security deposit amounted to kes.587, 634.20/= only.



19. Nevertheless, the witness pointed out that the business that same proposed to undertake or carry out in the demised premises failed to take off. In this regard, the witness testified that same therefore experienced difficulties in paying the rents in respect of the demised premises.
20. As a result of the foregoing, the witness stated that same was therefore constrained to and indeed issued a Notice of his intention to surrender the demised premises. In this regard, the witness pointed out that the Notice of intention to surrender was issued on the 31st January 2014.
21. Similarly, the witness added that on the 14th February 2014, same generated and issued another letter, whereby same informed the Plaintiff that he had quit the premises and effectively surrendered same back to the Plaintiff.
22. However, the witness stated that after same had vacated and surrendered the premises, same received a Letter from the Plaintiff whereby the Plaintiff was signaling that his (1st Defendant's) surrender had not been accepted.
23. Be that as it may, the witness testified that by the time the Plaintiff indicated their non-acceptance of the 1st Defendant's surrender, same had actually vacated the suit premises and handed them over.
24. On the other hand, the witness testified that as at the time of Surrender of the demised premises, same was in rent arrears of Kshs 266, 640/= only, being rents due up to and including the 17th February 2014.
25. Premised on the foregoing, the witness testified that having paid a total of Kshs 587, 634.20/= only on account of Security deposit, the Plaintiff herein was therefore obliged to deduct the outstanding arrears and thereafter release unto same the balance amounting to Kshs 280, 195/= only.
26. Nevertheless, the witness pointed out that despite the Plaintiff being aware of the refund of the said sum, the Plaintiff herein declined, refused and neglected to release the said monies unto the witness.
27. Other than the foregoing, the witness also testified that the Plaintiff also detained the 100 seats which were in the office premises, albeit without any lawful cause or basis and in any, without any Court Order.
28. In view of the foregoing, the witness thus contended that the Plaintiff herein ought to be compelled to refund the excess monies being held by same and to release the office chairs.
29. On the other hand, the witness referred to the witness statement dated the 24th March 2015 and same sought to adopt the contents thereof.
30. In this regard, the witness statement dated the 24th March 2015 was duly adopted and constituted as the witness further Evidence in chief.
31. Besides, the witness also alluded to the List and Bundle of Documents dated the 24th March 2015 and sought to adopt and rely on the Documents contained thereunder.
32. Pursuant to the request by the witness, the documents at the foot of the list dated 24th March 2015 were admitted, produced and marked as Defense exhibits 1 to 25, respectively.
33. On cross examination, the Witness stated that same faced and encountered financial challenges shortly after taking up the demised premises and that the challenges affected his ability to timely pay the requisite rents, to and in respect of the premises.
34. Further, the witness acknowledged that there existed a Contract between himself and the Plaintiff, but that the contract had no termination clause.



35. On the other hand, the witness also stated that even though same issued a notice to terminate tenancy, the Agreement to Lease did not have a Clause for termination. At any rate, the Witness added that the termination Notice was not accepted by the Plaintiff.
36. Nevertheless, the witness added that same thereafter sought for and obtained legal advice on the issue of termination of the contract and upon obtaining the requisite legal advice, same proceeded to and indeed surrendered the demised premises to the Plaintiff.
37. Other than the foregoing, the witness clarified that though the Plaintiff declined to accept the termination of the contract and surrender of the demised premises, the letter by the Plaintiff indicating the none acceptance of the termination was dated the 17th February 2014, shortly after same had vacated the demised premises.
38. In any Event, the witness further added that prior to issuing the notice to terminate, same had not encountered/met with the Plaintiff, with a view to discussing the possibility of terminating the contract.
39. Other than the foregoing, the witness also testified that after the termination of the tenancy, same also handed over the keys of the premises to the Plaintiff and essentially his obligation ceased immediately same handed over the keys of the premises.
40. Further, the witness conceded that thereafter same attended mediation proceedings between himself and the Plaintiff, but same clarified that the mediation proceedings related only to the issue concerning the period of Notice and not termination of the contract.
41. On re-examination, the witness clarified that despite issuing the notice to terminate, the Plaintiff did not acquiesce to the termination.
42. Other than the foregoing, the witness added that by the time the Plaintiff wrote back and indicated the none acceptance of the termination, same had already vacated the demised premises and handed over the keys. In this regard, the witness emphasized that same had surrendered the premises.
43. With the foregoing testimony, the 1st Defendant's case pertaining to and concerning the counterclaim was closed.

b. Defendant to the counter-claimer's case:

44. It is appropriate to restate that the Defendant to the counterclaim, was indeed the Plaintiff in the suit.
45. Having not been able to bring forth any witness to propagate the Plaintiff's case, same also did not tender or adduce evidence in defense to the counterclaim.
46. Essentially, the Defendant to the counterclaim herein therefore closed her case without adduction of any Evidence, whatsoever.

Submissions by the parties:

a. Counter-claimer's submissions:

47. The Counter-claimer filed written submissions dated the 17th November 2021, shortly after the close of the hearing. However, it is important to observe that after the close of the hearing, the Plaintiff filed two application which were thereafter heard and determined, resting with the Ruling rendered on the 23rd June 2022.



48. Be that as it may, the Defendant has raised, isolated and amplified two issues for determination.
49. First and foremost, the Counter-claimer has contended that though the Plaintiff generated and issued an Agreement to lease dated the 23rd February 2010, no formal Lease was ever executed between the Plaintiff and the 1st Defendant.
50. To the extent that no formal Lease was ever executed and attested between the Plaintiff and the Defendant, the contractual relationship between the Plaintiff and the 1st Defendant was therefore governed by the provisions of Section of 106 of The Indian *Transfer of Property Act*, now repealed.
51. Essentially, the counter-claimer submitted that in the absence of a duly executed Lease document, the tenancy relationship between the Plaintiff and the 1st Defendant was a Month to Month tenancy, terminable by either the landlord or tenant issuing a 15 days' notice.
52. Premised on the foregoing, the Counter-claimer therefore submitted that the relationship having been a Month to Month Tenancy, same was within the law to issue and serve the termination notice dated the 31st January 2014.
53. In support of the foregoing submission, Counsel for the counter-claimer has cited and relied on the decisions in the case of *A. W Rogan- Kamper v Robert Grosvenor* (1977) eKLR and *East Africa Power & Lighting Company Ltd v Attorney General* (1978) eKLR.
54. The Second issue raised by the Counter-claimer is whether the notice to terminate the tenancy was sufficient and legally tenable. In this regard, counsel for the counter-claimer has re-emphasized the import and tenor of Section 106 of The *ITPA*, now repealed, 106 of The *Land Registration Act* and 162 of The *Land Act*, 2012.
55. In short, counsel for the counter-claimer has contended that the Notice which was issued and served by the counter-claimer was therefore sufficient and legitimate.
56. Finally, counsel for the counter-claimer has added that the Plaintiff's conduct of retaining the counter-claimer's 100 seats within the office space was illegal, unlawful and uncalled for.
57. In the premises, the counter-claimer has implored the court to decree an award of General Damages arising from such unlawful detention/conversion. In this regard, the Counsel contended that the detention could not have been effected without a Court Order to that effect.

b. Submissions by the plaintiff:

58. Despite having been afforded due opportunity to file and serve written submissions, Learned counsel for the Plaintiff did not find it fit, just and expedient to file any written submissions.
59. For emphasis, it is important to note that the Plaintiff herein was afforded the latitude to file written submissions on the 23rd June 2022 and 29th September 2022, respectively. However, no such submissions were filed.
60. At any rate, the subject matter was listed for delivery of judgment on the 13th October 2022, but the judgment was not ready. Nevertheless, further latitude was availed to the Plaintiff to put in written submissions.
61. Notwithstanding the foregoing, no submissions were ever filed and hence the Judgment herein has been crafted without the benefit of the written submissions by and/or on behalf of the Plaintiff/ Defendant to the counterclaim.



Issue for determination:

62. Having reviewed the counterclaim filed by and on behalf of the 1st Defendant, the witness statement and the Bundle of Documents attached thereto and having evaluated the evidence tendered on behalf of the 1st Defendant; and having similarly considered the written submissions, the following issues are pertinent and worthy of determination.
- i. Whether the Termination Notice issued by the 1st Defendant in respect of the Tenancy was lawful, legitimate and valid.
 - ii. Whether the 1st Defendant herein is entitled to refund of Kshs 283, 195.= only, or any other sums from the Plaintiff.
 - iii. Whether the 1st Defendant is entitled to General Damages for unlawful detention of the 100 seats by the Plaintiff.
 - iv. Whether the 1st Defendant is entitled to Loss of Business and Loss of user resulting from the unlawful detention of the seats.

Analysis and Determination

Issue number 1

Whether the Termination Notice issued by the 1st Defendant in respect of the Tenancy was lawful, legitimate and valid.

63. It is common ground that the Plaintiff indeed offered to and in favor of the 1st Defendant office premises situate on LR No 209/5575, namely, Cambrian Building within the City of Nairobi. For clarity, the offer was conveyed and contained vide agreement to lease dated the 23rd February 2010.
64. Similarly, it is imperative to point out and underscore that the agreement to lease, details in terms of the preceding paragraph, was duly accepted and executed by the 1st Defendant and thereafter returned to the Plaintiff.
65. On the other hand, it is also imperative to observed that the plaintiff herein had signaled that upon acceptance and execution of the agreement to lease, the Plaintiff would generate, craft and forward the requisite lease agreement for execution, engrossment and thereafter registration.
66. Be that as it may, it is apparent and evident that the intended lease agreement was never generated, executed and registered. Consequently, the relationship between the 1st Defendant and the Plaintiff was regulated and guided by the agreement to lease dated the 23rd February 2010.
67. Premised on the foregoing, the question that then arises is whether the agreement to lease, otherwise known as letter of offer, would constitute a lease between the Plaintiff and the 1st Defendant and if not, what then is the nature of the relationship between the Plaintiff and the 1st Defendant.
68. To my mind, a lease agreement over and in respect of an Interest in immovable property, the one herein not excepted, must be reduced into Writing, contain all the terms agreed upon, be executed by both parties chargeable therewith and thereafter, the signatures of the Parties must be attested by an attester, who was present and witnessed the execution of the Lease. See Section 3(3) of the [Law of Contract](#), Chapter 23, Laws of Kenya.



69. In respect to the subject matter, the only document that was executed was the Agreement to lease. In any event, the said document was said to be a pre-cursor to the intended Lease agreement, the latter, which was to be generated thereafter.
70. Essentially, both the Plaintiff and the 1st Defendant conceded that a Lease agreement would arise and ensue for purposes of execution and appropriate registration, in the usual manner.
71. At any rate, it is common ground that despite containing some/most of the terms which would be included in the formal lease, the Lease Instrument, was never executed and attested in the manner prescribed vide and by dint of the Provisions of Section 3(3) of The Law of Contract Act.
72. Notwithstanding the foregoing, it is also important to state that the said document, namely, the Agreement to Lease, which I have found and held was not a Lease, was similarly not registered.
73. In my humble view and in the absence of a Formal and executed Lease, the relationship between the Plaintiff and the 1st Defendant was therefore by law reduced to a periodic tenancy governed and regulated by the provisions of Section 106 of The Indian Transfer of Property Act, now repealed.
74. For ease of reference, the provisions of Section 106 of the ITPA provides as hereunder;

[106. Duration of certain leases in absence of written contract or local usage.—

- (1) In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice.
 - (2) Notwithstanding anything contained in any other law for the time being in force, the period mentioned in sub-section (1) shall commence from the date of receipt of notice.
 - (3) A notice under sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.
 - (4) Every notice under sub-section (1) must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.]
75. Other than the foregoing provisions, whose terms and tenor are explicit, it is imperative to underscore the point that the issue pertaining to the legal implication of a scenario where no formal lease was prepared, executed and engrossed was considered and addressed vide the decision in the case of A. W Rogan Kamper v Robert Grosvenor (1977) eKLR.
76. For coherence, the Honourable Court of Appeal observed as hereunder:

“Chanan Singh J correctly stated the law that section 107 of the Transfer of Property Act does not permit the operation of the equity in *Walsh v Lonsdale*. No equitable rule can



override the express provisions of the Act (*Ariff v Jadunath* (1930) 58 Cal 1235, 91; *Souza Figuerido & Co Ltd v Moorings Hotels Co Ltd* [1960] EA 926). Thus a lease of immovable property, from year to year, or for any term exceeding one year, or reserving a yearly rent, can only be made by a registered instrument; all other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. The problem then arises regarding the effect of an agreement for a lease. It is necessary to distinguish those agreements which operate as a present demise from those that are executory. If the agreement operates as a present demise for more than a year and remains unregistered, it may operate as a lawful lease for one year; and then by holding over, to operate as a monthly tenancy determinable on fifteen days' notice, in the case of premises like those in this case, as provided in sections 116 and 106 of the [Transfer of Property Act.](#)”

77. Additionally, the issue before hand was similarly canvased and deliberated upon by the Court of Appeal in the famous case of [Bachelor's Bakery Ltd v Westlands Securities Ltd](#) [1982] eKLR, where the court observed as hereunder;

“In my opinion, Section 106 is intended to regulate the giving of notice prior to determination of the lease by parties who have not themselves provided for it. It has no application to the period of the lease which is agreed by the parties in the agreement and therefore prevails. I agree that such a contract is valid inter partes even in the absence of registration, but it gives no protection against the rights of third parties *Grosvenor v Rogan-Kamper* [1974] EA 446.”

78. From the authorities cited and alluded to in the preceding paragraphs, I come to the conclusion that even though the agreement to lease did not contain or stipulate the duration of termination notice, nevertheless either party would have been at liberty to terminate the Tenancy, upon issuance of the notice articulated and envisaged under the Provisions of Section 106 of The [ITPA Act](#), now repealed.

79. Before departing from the issue herein, it is appropriate to stated that the provisions of Section 106 and 107 of the [ITPA](#), remained in force and are thus applicable to contracts/leases or tenancies that were entered into prior to the coming into force of the [Land Act](#) 2012.

80. For the avoidance of doubt, the provision of 162(1) of the [Land Act](#) are apt, succinct and relevant. For convenience, Section 162(1) of the Act provides as hereunder;

162. (1) Unless the contrary is specifically provided in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.

Issue number 2

Whether the 1st Defendant herein is entitled to Refund of Kshs 283, 195.= only or any sums, from the Plaintiff.

81. Notwithstanding the fact that no formal lease agreement was entered into and executed between the Plaintiff and the 1st Defendant, it is appropriate to observe that the 1st Defendant herein nevertheless executed the Agreement to lease.

82. It is also important to recall that the said Agreement to lease contained and stipulated certain conditions, which the 1st Defendant was obliged to comply with and adhere to, inter-alia payment of security deposit equivalent to the rent for the last quarter of the lease period, as well as additional charges including the legal fees.



83. On the other hand, the agreement to lease also stipulated that the rent for and in respect of the demised premises would be payable quarterly in advance. In this regard, the 1st Defendant covenanted that same would indeed be paying such rents quarterly in advance, without any deduction whatsoever and exclusive of any outgoings.
84. The foregoing being the position, what now becomes important to address before determining whether or not the 1st Defendant is entitled to a refund of Kshs 280, 195/= only, is whether the 1st Defendant had indeed paid the Quarter rent in respect of the period between January to March 2014.
85. If indeed, the 1st Defendant had not paid the rent for the said Quarter, then the next issue that arises is whether indeed same was obligated and obliged to pay the said rents, namely, the Rents for the Months of January, February and March 2014.
86. To my mind, even though no formal lease agreement was entered into and executed, the terms of the agreement to lease were explicit and binding. Consequently, the 1st Defendant herein, despite the notice to terminate which was issued on the 31st January 2014, would still be under obligation to pay the Quarterly rent which had accrued and arisen.
87. In this respect, I am guided by the holding of the Court of Appeal in the case of *Chon Jeuk Suk Kim & Another v E.J. Austin & 2 Others* [2013] eKLR, where the court held as hereunder;

Those two decisions show that an agreement of a lease or unregistered lease where the statute requires registration, though not conferring any legal or equitable estate is nevertheless enforceable as a contract between the parties for the period stated in the document and non-registration does not preclude the use of the document to show the terms of contract between the parties. Although those decisions relate to the construction of the provisions of the Registration of Titles Ordinance Act they apply with equal force to the legal effect of an agreement for a lease of unregistered lease of a period of two years under the *Registered Land Act* as Section 47 thereof is similar to the provisions under consideration in those decisions.

The legal character of the document under consideration in this appeal is from its form and contents an agreement of lease. It is common ground that the formal lease was not executed. From the authorities although the document does not conform legal or equitable estate to the appellants the covenants therein would be enforceable as between the parties if it is ultimately found to be an enforceable contract. The non-registration does not result in a periodic tenancy under the *RLA* as the learned Judge erroneously held. [Emphasis mine]

88. Having found and held that the agreement to lease created terms that were binding and having found that the 1st Defendant was obliged to pay the Quarter rent between January to March 2014, the next issue that arises is what was the rent that was due and payable for the said Quarter.
89. In ascertaining the rent that was due and payable for the Quarter running between January to March 2014, it is imperative to state that the 1st Defendant herein adduced before the Honourable court letters dated the 28th January 2014, 7th February 2014 and 11th March 2014 respectively.
90. For clarity, the final letter dated the 11th March 2014 signaled that the 1st Defendant remained in arrears of Kshs 407, 813.87/= only, inclusive of rents for the 1st Quarter of the year 2014.
91. Despite receiving the letters under reference, there is no evidence that the 1st Defendant challenged or contested the Quantum of rent arrears. In this regard, I find and hold that the outstanding rent arrears remained Kshs 407, 813.87/= only.



92. On the other hand, the 1st Defendant testified that same paid a total of kes.587, 634.20/= only on account for Security for deposit, which had been sought for and demanded. To this end, there was no contest by and on behalf of the Plaintiff.
93. Suffice it to point out that the 1st Defendant's evidence was never challenged nor impeached. In the premises, I proceed on the basis that the Plaintiff herein holds the sum of Kes.587, 634.20/= only, whereas what is lawfully due and payable in their favor amounts to Kes.407, 813.87. See letter dated the 11th March 2014 which was produced as exhibits D21.
94. Consequently and in the premises, it is my finding and holding that the 1st Defendant is entitled to the difference amounting to Kshs 179,820.33/= only.

Issue number 3

Whether the 1st Defendant is entitled to General Damages for unlawful detention of the 100 seats by the Plaintiff.

95. The 1st Defendant testified that in readiness to commence and operationalize his business in the demised premises, same moved in 100 office seats. For the avoidance of doubt, the evidence herein was not disputed.
96. On the other hand, the 1st Defendant also testified that by the time same surrendered the demised premises to and in favor of the Plaintiff, same did not remove the 100 seats. For clarity, the 1st Defendant added that the seats remained in the demised premises.
97. Be that as it may, the 1st Defendant also testified that his efforts to retrieve and take possession of the 100 office seats were not fruitful. Consequently, the seats were detained by the Plaintiff.
98. However, vide the submissions filed on behalf of the 1st Defendant same has since conceded that the seats were thereafter released unto him during the pendency of the suit. In this regard, the 1st Defendant proceeded to and abandoned the claim for release of the seats.
99. Nevertheless, what is critical as pertains to the issue herein is whether or not the 1st Defendant is entitled to General Damages for unlawful detention of the seats/conversion, which were detained by the Plaintiff, albeit without a Lawful Court Order.
100. To my mind, the Plaintiff herein had no lawful or legal mandate or authority to detain the 1st Defendants seats, even if the Plaintiff was convinced that the manner in which the 1st Defendant terminated the Tenancy, was unlawful and illegal.
101. For coherence, what the Plaintiff ought to have done was to file or to commence civil proceedings (which she did) and prosecute her claim for (sic) breach of contract and recovery for rent arrears, if any.
102. Certainly, the Plaintiff herein could not become law unto herself and seek to exercise lien over the 1st Defendant's properties, albeit without any lawful authority or at all.
103. Arising from the conduct by the Plaintiff to detain the 1st Defendants seats, I come to the conclusion that indeed the 1st Defendant was denied and deprived of the right to enjoy and benefit from the impugned seats.
104. In a nutshell, I find and hold that the 1st Defendant is entitled to General Damages for the unlawful detention of their 100 seats, which were ultimately released during the pendency of the suit.



105. In respect to this claim, which is essentially a claim for conversion, I find and hold that the 1st Defendant is entitled to Kshs 200, 000/= only, on account of General damages.
106. To this end, it is appropriate to understand that conversion denotes wrongful possession or disposition of another person's property. For clarity, the detention of the 1st Defendant's properties was unlawful and wrongful.
107. To buttress the import and tenor of the claim founded and anchored on conversion, I take succor in the definition supplied vide *Black's Law Dictionary*, which provides as hereunder;

“Detinue is a common law action to recover personal property wrongfully taken or withheld by another. A claim for detinue lies at the suit of a person who has an immediate right to the possession of the goods against a person who is in actual possession of them and who upon proper demand fails or refuses to deliver them up without lawful excuse.

Conversion is the wrongful possession or disposition of another's property as if it were one's own an act or series of acts of willful interference without lawful justification with an item of property in manner inconsistent with another's right whereby that other person is deprived of the use and possession of the property it is an act that interferes with the dominion of the true owner's right and depriving him of the possession of the goods to an extent as to be inconsistent with the rights of the owner”.

Issue number 4

Whether the 1st Defendant is entitled to Loss of Business and Loss of user resulting from the unlawful detention of the seats.

108. The 1st Defendant herein had also pleaded and laid a claim for loss of business and loss of user arising out of the unlawful detention of the impugned seats. However, despite laying a claim for loss of business and loss of user, it is common ground that the 1st Defendant neither particularly pleaded nor particularized the nature of the loss and the amount, if any, that arose from the loss complained of.
109. I beg to point out that the claim at the foot of loss of business and loss of user, are by their nature, claims for special damages and hence it was incumbent upon the 1st Defendant not only to particularly, plead (which was not done), but also to specifically prove.
110. In short, even though the 1st Defendant would have been entitled to recover the Full value of the seats, that is, if same had not been returned, together with special loss, however, it was incumbent upon the 1ST Defendant to particularly, plead and thereafter prove the Claim as envisaged under the Law.
111. To this end, it is sufficient to adopt and reiterate the dictum of the Court of Appeal in the case of *Patrick Muturi v Kenindia Assurance Company Ltd* [1993] eKLR held: -
- “In all these cases, a plaintiff who has been deprived of his chattel is ordinarily entitled to its full value, together with any special loss he may have suffered as the result of the unlawful detention or conversion or destruction or loss”.
112. In a nutshell, I find and hold that the 1st Defendant is not entitled to Compensation on account of loss of business and loss of user of the seats, insofar as no particular pleadings were tendered. Besides, no evidence was placed before the court to show the extent of the loss that was suffered, if any.



Final disposition

113. In conclusion, it is my finding and holding that the 1st Defendant herein has been able to prove and establish a lawful claim for Refund of the excess monies that are being held and retained by the Plaintiff.
114. On the other hand, the 1st Defendant has also been able to satisfy the Honourable court as pertains to his entitlement to General Damages on account of the tort of conversion .
115. Consequently and in the premises, I enter judgment in favor of the 1st Defendant in the following terms;
- i. Refund of Kshs 179,820.33/= only being the excess monies retained by the Plaintiff beyond what was/is lawfully due to the Plaintiff.
 - ii. Kshs 200, 000/= only on account for General Damages for conversion.
 - iii. The other claims not specifically granted are deemed to be denied.
 - iv. Interests at court rates on (i) from the 24th March 2015.
 - v. Interests on (ii) at court rates from the date of Judgment.
 - vi. Costs of the counterclaim.
116. For completeness, the 1st Defendant herein had hitherto been awarded costs of the suit vide court order made on the 3rd November 2021.
117. In the premises, it is appropriate to underscore that the 1st Defendant shall therefore be entitled to costs of the suit ,as well as Costs of the counterclaim.
118. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Mr. Mito h/b for Mr. Muchiri for the Plaintiff

Ms. Teresia Mbuki h/b for Dr. Ben Musau for the Defendants

