REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 898 of 1985

AMOS KINUTHIA & ANOTHER……..……. PLAINTIFF

VERSUS

UNGA LIMITED …….……. DEFENDANTS

JUDGEMENT

In a plaint filed in April, 1985 the plaintiffs pleaded in paragraphs 3, 4, 5, 6 and 7 as follows:-

"**3. By an agreement in writing finally concluded by a letter dated the 5.2.1985 and made between the plaintiff of the one part and the defendant of the other part and duly signed by them all it was inter alia agreed that the defendant should grant and the plaintiff should take a lease of all that godown ground floor measuring 4,707 sq.ft. and Mezzanine floor measuring 3,144 sq. ft. or thereabouts situate at Changamwe Road, in Nairobi and known as Land Reference Number 209/4140 Nairobi for a term of 5 ½ years from 1.2.1985 at a yearly rent of Kshs.120,000/= payable by monthly instalments of Kshs.10,000/= each in advance on the first day of each month of the lease; that the plaintiffs be put in possession of the demised premises on the 1st day of February 1985; the standard form of lease would include all the Clauses contained in the said letter and other terms and conditions which are normal in the leases in respect of Changamwe Road premises; the plaintiffs paying the rent as agreed and observing and performing covenants on their part to be observed and performed the plaintiffs shall be entitled to a peaceful and quiet possession of the demised premises during the said term without any interruption or disturbance from the defendant or any person or persons claiming through or under it. The plaintiffs shall refer to the said letter and standard form of the lease at the time of trial for their full effect.**

4. Pursuant to the said agreement the plaintiffs paid Kshs.10,000/= being the rent for the first month of lease and they were put in possession of the premises on or about 7.2.1985 and the plaintiffs brought in furniture, fixtures and fittings and machinery in the premises. Plaintiffs commenced their operation as planned and entered into heavy financial and contractual commitments in expectation of smooth business on long term basis.

5. The plaintiffs had been observing and performing their part of the lease without any breach whatever so far as possible and practicable but the defendant by its letter dated 6.3.1985 without any lawful excuse and in breach of contract locked up the demised premises and further by its letter dated 8.3.1985 addressed to their said firm, the defendant unilaterally and on allegation of a non-existent breach indicated that the defendant would not act and perform its part under the said

lease and further indicated its willingness to refund to the plaintiffs the rent hither to received by the defendant.

6. By reason of the said breach and the above referred unlawful acts of the defendant, the plaintiffs had been prevented from carrying on their business and meeting their commitments to third parties as planned and expected. Also the plaintiffs' business has been completely disrupted and the plaintiffs are facing claims from the customers and third parties with whom the plaintiffs had entered into heavy financial business commitments. The plaintiffs in addition are facing claims and civil suits from their employees with whom they had entered into long term contracts in expectation of continued and smooth business. Plaintiffs have lost very lucrative and profitable business from the customers; and suffered loss and damage which are continuing.

8. Despite requests to open up the demised premises and to proceed with the lease as contracted, the defendant as stated above has refused to open up the premises or to proceed with the lease, but has asked the plaintiffs to remove their properties from the demised premises."

The plaintiff prayed for the following orders:

(a) That the defendant be ordered to open up the demised premises.

(b) An injunction restraining the defendant from removing from the demised premises or disposing off or dealing in any way with the properties of the plaintiffs lying in the demised premises until determination of the suit or order of the court;

(c) Specific Performance of the Agreement of 5.2.1985;

(d) The plaintiff be authorized to prepare engrossment of the lease;

(e) Damages for loss of business and damages suffered due to wrongful closure of the demised premises.

(f) ALTERNATIVELY: damages in such sum as may be found in lieu of specific performance or for breach of contract :

(g) costs

(h) interest

(i) further or other relief."

That plaint was amended on 19.2.1995. The amendment introduced paragraphs 6(A) and prayed for special damages. It was pleaded in the said paragraph as follows:

"**6(A) In view of facts averred herein before, the plaintiffs claim general and special damages.**

<u>Particulars of special damages</u>

(i) Loss of machinery and equipment, allied accessories installed by the plaintiffs and removed by the defendants – Kshs.3,125,606.00

(ii) Loss of monies spent on the personnel Head Office expenses and allied expenses – Kshs.11,305,186.00

(iii) Loss of anticipated profits - Kshs.150,320,000.00

(iv) Loss of business and reimbursement of monies claimed from plaintiffs third

parties – Kshs.2,846,047.20

(v) Petty cash left in the office - Kshs.128,528.00

(vi) Refund of the rent paid - Kshs.10,000.00

(vii) Interest on monies withheld - Kshs.43,250,982.55

TOTAL Kshs.210,867,821.75

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And the plaintiffs' claim from the defendant the said sum of Kshs.210,867,821.75.

On 27.2.1997 the defendant filed a re-amended defence. In paragraphs 3, 5, 6, 7, 7A and 7B of the said re-amended defence, the defendant pleaded as follows:-

"**3. In answer to paragraph 3 of the Amended Plaint the defendant admits an agreement was concluded under which the suit premises were to be let to Gabriel Mwaura the 2nd plaintiff upon the terms and conditions set out in the said agreement but denies that Amos Kinuthia, the first plaintiff was a party to the said agreement. It will be contended on behalf of the defendant that Gabriel Mwaura with intent to deceive the defendant or to induce the defendant to grant the lease, falsely represented that he was the proprietor of an establishment and duly registered business called Budget Spray Works. On reliance on this information which the said Gabriel Mwaura knew or had reasonable grounds for believing to be false, the defendant was induced into granting the lease to the said Gabriel Mwaura. At no time did the defendant have any intention of getting into a contractual relationship in relation to the said premises with anyone other than Gabriel Mwaura trading under the name and style of "Budget Spray Works."**

(5) Save and except that on the 6.3.1985 the defendant wrote to Budget Spray Works rescinding the agreement for the lease with an offer for the refund of the rent each and every allegation contained in paragraph 5 of the amended plaint is denied.

(6) In further answer to paragraph 5 of the Amended Plaint, it will be contended on behalf of the defendant that the repudiation was justified by reason of the fact that the plaintiffs had procured the execution of the agreement fraudulently or by false pretences or alternatively that in breach of the said agreement they had sublet or parted with the possession of the premises.

(7) The defendant has no knowledge of the matters pleaded in paragraph 8 of the Amended Plaint and makes no admission thereto. If, which is not admitted but denied, the plaintiffs have suffered loss or damage then such loss or damage is remote and not legally recoverable from the defendant.

(7A) The defendant denies that the plaintiffs have suffered the special damages particularized in paragraph 6A of the Amended Plaint and puts the plaintiffs to strict proof.

(7B) The plaintiffs claim for special damages as contained in the Amended Plaint is time barred by reason of the protection of Section 4 of the Limitation of Actions Act in that it was not brought until long after the expiry of 6 years from the date on which the plaintiffs' cause of action arose."

The parties framed the following issues for determination:-

(1) Whether there was a business called "Budget Spray Works" registered under the Registration of Business Names Act at the Business Names Registry at the time the agreement was entered into.

(2) Whether the 1st plaintiff Amos Kinuthia was a party to the Agreement.

(3) Whether the plaintiffs were partners carrying on business under the name and style of Budget Spray Works.

(4) Whether the defendant leased to Budget Spray Works a godown ground floor and Mezzanine floor situate at Changamwe Road in Nairobi.

(5) Whether the plaintiffs paid Kshs.10,000/= being rent for the 1st month of the lease and were put in possession of the demised premises on or about 7.2.1985.

(6) Whether the plaintiffs procured the execution of the lease fraudulently or by false pretences.

(7) Whether the defendants were in any way justified in law or otherwise in locking up the suit premises.

(8) Whether the defendant in locking up the suit premises breached the contract.

(9) Whether the plaintiffs sub-let or parted with possession of the suit premises.

(10) Whether the plaintiffs suffered any loss of business and damages as a result of the closure of the suit premises.

(11) Whether the plaintiffs are entitled to damages as claimed in the plaint.

(12) Whom of the parties is entitled to costs?

The trial commenced before Mbaluto, J. on 6.2.2001. The Learned Judge took the evidence of the 1st plaintiff on 6th and 7th February 2001, 22nd and 23rd May 2001, 9th and 10th July 2001 and 5th and 6th November 2001. The parties agreed that I continue from where Mbaluto, J. had reached. I therefore heard further evidence of the 1st plaintiff on 13th May 2004, and 10th June 2004. PW2 William Lawrence Wachira testified on 10th May 2005 and 19th July, 2005. PW3 Njeru Gatabaki testified on 19th July 2005. The 2nd defendant gave evidence as PW4 on 20th July, 2005 and 6th October, 2005.

The defence called one witness one JOHN PAUL GIKUNGU who testified on 8th December, 2005.

At the trial, the 1st plaintiff's case was that, the plaintiffs and the defendant entered into a lease agreement with respect to the defendant's premises at Changamwe Road in Industrial Area Nairobi. The property had been advertised through the press by M/s Lloyd Masika who were agents of the defendant and who received the 1st month's rent. They took possession of the premises on 5.2.1985 and intended to operate two separate businesses in the premises: Printing and auto repairs. Their business name was Budget Spray Works. Business commenced on the same date i.e. 5.2.1985 with both PW1 and PW4 being involved in the operations.

On 8.3.1985 PW1 and their staff were out for lunch and when they returned after the lunch break they found the premises locked and guarded from outside by security guards. They sought audience with DW1 the defendant's Company Secretary then who refused to see them. The plaintiffs instructed their lawyers who wrote to the defendants giving them 7 days to open the premises. The defendants refused provoking the filing of this suit in which they inter alia sought an injunction. PW1 further testified that

their property was locked up in the premises. They had secured printing machines, garage equipment and accessories which had been installed in the premises. 6 months after the closure the plaintiffs received a small list of items from the defendant through their Advocates M/s Hamilton Harrison & Mathews. The list did not contain all the items that had been installed. It was less than 5% of the items installed. Other documents such as cash sale invoices, office files and equipment were not given back. At the time of closure the plaintiffs had between 50 and 55 employees having initially started with 10.

PW1 further testified that they had not received any motor vehicle repair work before the closure but they expected work from such companies as United Insurance Company. With respect to the printing business the plaintiffs had orders from Finance Magazine to print 10,000 copies of a publication called 20 years of independence. He further clarified that the garage equipment which had been locked in the premises was equipment which had been transferred to him by a firm called Chequered Auto and which he had transferred to their business, Budget Spray Works. The printing machinery included, stitching machines, perforating machines and accessories. These machines had been purchased in 1984 and were in the premises when they were closed. No items were returned to the plaintiffs and no explanation was given for their retention by the defendant.

The 1st plaintiff also testified that when they took possession of the premises there were no partitions. PW1 used timber from his mill to partition the premises. For loss of machinery, equipment and allied accessories, the plaintiff claimed KShs.3,125,606.00. PW1 further testified that the plaintiff claimed KShs.11,305,186.00 in respect of monies spent on personnel at the head office and allied expenses. The figure included terminal benefits paid to workers and to the Managing Director.

PW1 further testified that the plaintiffs claimed KShs.150,320,000.00 for loss of anticipated profits. He explained that the plaintiffs had a contract from Mea Limited to print 100,000 fertilizer bags per month. Mea Limited according to PW1 was partly owned by him. After the premises were closed the plaintiffs ceased to carry out any business.

The 1st plaintiff further testified that the plaintiffs had anticipated repairing 10 vehicles per month and this had been included in an analysis or feasibility study done by one Kibui who was now living out of the country.

According to PW1, the plaintiff also claimed money due to one James Kinyanjui for termination of his contract with the plaintiffs. The plaintiffs also claimed KShs.71,000/= which sum was being claimed by one Kimani for supplies made to the plaintiff. PW1 further testified that they had in the premises a cash sum of KShs.128,528/= when the premises were closed. The said sum was not paid to the plaintiffs.

PW1 further testified that the plaintiffs had anticipated to be in the premises for 10 years. The lease was for 5 years and 3 months with an option to renew and the plaintiffs' projection covered 10 years. PW1 further testified that the directors were to earn KShs.5,267,744/= (for DW4) and KShs.4,700,672/= (for PW1). The General Manager was to be paid KShs.79,800/=. Other employees were also to be paid their terminal benefits.

The plaintiffs entire loss was stated to be KShs210,876,821.75. The 1st plaintiff produced Part A and B of the bundle of documents as exhibits 1 and 2.

In cross-examination, PW1 confirmed that the defendant's Lawyer had written to his lawyer to verify the list of items with the defendants and retrieve the items. The plaintiffs did not respond as they hoped to get back to the premises. They made no enquiries about their goods and further made no attempt to retrieve the same. PW1 further admitted that he had no evidence regarding purchase of the items. Referring to the feasibility study made by Kibue and Associates, PW1 admitted that the study implied that the machinery had not been purchased on taking possession of the demised premises. With regard to the plaintiffs' claim for refund of rent paid, PW1 admitted that a cheque for the same had been forwarded by the defendant but was not cashed, With regard to the claim for KShs.150,320,000/= for loss of profits PW1 stated that the same was computed at the rate of KShs.15,000,000/= annually for 10 years. He also testified that whereas he tried printing he did not make any money as his heart was not in printing

business. He also confirmed that the lease agreement did not have an option to renew. He further admitted that the plaintiffs did not have a contract with Productions and Communications Limited for the production of 10,000 copies of Finance Magazine.

PW2 was William Lawrence Wachira. He testified as follows: He was a certified Public Accountant and knew the plaintiffs who had commissioned one Kibue to prepare a feasibility study for them and one – Njenga who was to prepare projections for them. The plaintiffs had a contract to print a magazine called Finance. They also had a contract from a company called Mea Limited. They also wanted to do motor vehicle repair business. The witness assisted Njenga to prepare the projections and the plaintiffs on making their claim.

In cross examination PW2 testified that he was instructed by one Njenga before the plaintiffs commenced business. The projection Njenga prepared was based on information from the plaintiffs and was made after closure of the business. In his view the projection was not realistic in the light of today's realities.

One Njeru Gatabaki gave evidence as PW2. He testified as follows:- He is a publisher and knew the plaintiffs. In or about February, 1985 he asked the plaintiffs to print 10,000 copies of a Magazine titled "**21 years of Independence."** This was at the consideration of KShs13,061,087.20. He provided the art work but the magazine was not produced and he did not get back the art work.

In cross-examination, PW3 admitted that no formal contract was prepared between him and the plaintiffs. He had no evidence of delivery of the art work to the plaintiffs. He later was informed by the plaintiffs that their premises had been closed. He however had no written communication regarding reasons for failure to produce the magazine. He had not sued the plaintiffs but waited for an amicable settlement.

Gabriel Mwaura testified as PW4. He testified as follows. He was a partner with PW1 and registered their business on 13.1.85. They got premises through Lloyd Masika who had advertised the same in the press. They both signed the lease, took possession and commenced business. He sold his property to pay for his contribution in the business. He also borrowed from the bank. They installed equipment for printing and for motor vehicle repairs. They initially had 10 employees who were increased to 30 by the time of closure. They had an order to print Finance Magazine. They also had an agreement with M/S Mea Limited. They expected other orders from companies and individuals. The premises were closed on 8/3/1985. This was discovered when they returned from lunch break and found the premises closed and security guards posted at the gate. The defendant alleged that the plaintiffs had sublet the premises which was not true. They left equipment and machinery in the premises. The defendant refused to reopen the premises and further refused to allow the plaintiffs collect their property. They knew what was in the premises and have not been compensated to date. Most of their documents were also locked in the premises. Some items had been supplied by a company called Showline Printers, Office Equip Services, Geita Saw Mills Ltd and Universal printers.

In cross-examination, PW 4 stated that PW1 did not sign the lease. He further admitted that the defendant had asked the plaintiff's to remove their property from the premises as the lease had been terminated on the basis that the premises had been sublet. They did not take their property from the premises. He further said that their advocate had received a list of items in the premises which list was inadequate but no complaint on inadequacy was made. They did not even collect the cash of KShs.120,000/= and wanted to make their complaint in court. The list sent to the plaintiffs' advocates did not contain printing machines and other equipment.

The defendant opened its case on 8/12/2005 and called one John Paul Gikungu Gachoya. He testified as follows:

He had been employed by the defendant in 1977 and had retired. In 1984 he was its Group Company Secretary. The defendant asked M/s Lloyd Masika to get a tenant for the suit premises. On 27.1.1985, the said agents forwarded a copy of a letter of intent signed by Budget Spray Works. The letter contained

the agreed terms of the lease. The rent payable was KShs.10,000/= per month. The person behind Budget Spray Works was PW4 and he took possession of the premises in early February 1985. After taking possession DW1 was informed by the defendant's Group Managing Director that the 4th plaintiff had sublet the premises to PW1. He called PW4 who confirmed that the premises had been sublet. He told him that he was in breach of the lease and the same would be terminated. DW1 then closed the premises on 5/3/1985 on the same day he talked to PW4. The lease was terminated. On 8.3.1985, the defendant told the plaintiffs to take their property from the premises. This was not done. He indicated to PW4 that a cheque for KShs.10,000/= would be prepared as refund of rent. The property listed by the plaintiffs was not in the premises at the time of closure.

The defendants wrote to the Registrar of Business Names to confirm whether the plaintiffs had been registered. The Registrar denied that the plaintiffs had registered any business name at the registry. The defendant attempted settlement out of court on certain conditions which the plaintiffs failed to meet. According to DW1, Budget Spray Works is not the same as Burget Spray Works and the certificate in the name of Budget Spray Works was not given at the time of the lease. DW1 prepared a list of items that were in the premises at the time of closure and forwarded the same to the defendant's Advocates for onward transmission to the plaintiffs' advocates. The defendant severally invited the plaintiffs to take their property but they did not. The plaintiffs never made a demand of the items claimed. Nor did they demand the cash alleged to have been locked in the premises. Infact, there was no money left by the plaintiffs.

In cross-examination DW1 admitted that the plaintiffs paid KShs.10,000/= by cheque which was a deposit towards rent. The monthly rent was also paid. He admitted that the tenant of the premises was Budget Spray Works. However DW1 maintained that PW4 told him that he had sublet the premises to PW1 even though according to the documents the intended tenant was Budget Spray Works. The defendant determined the lease even before they asked for a certificate of registration. DW1 stated that even if the defendant had known that PW1 was a partner of PW4 its position would not have changed. The closure was made on the instructions of the defendants' Group Managing Director. DW1 took an inventory in July, 1985.

On the conclusion of the evidence, counsel filed written submissions which I have considered. Having outlined the evidence and having considered the submissions, it is now convenient to answer the issues which the parties framed for determination.

Issues Nos.1, 2, 3, 4, 5 and 6 can be considered together. There is no dispute that a business name, "***Burget Spray Works"*** was registered on 13.1.1985. The relevant Certificate of Registration was produced by consent. The certificate shows that the 1st and 4th plaintiffs' witnesses who are the plaintiffs were carrying on business under the business name of Burget Spray Works. There is also no dispute that M/s Lloyd Masika Limited were the defendant's letting agents with respect to the defendant's property at Changamwe Road on L.R. No.209/4140 Nairobi.

M/s Lloyd Masika Limited, on the defendant's instructions offered to let the said property to a firm called "Budget Spray Works". M/s Lloyd Masika's letter written in January 1985 and addressed to Budget Spray Works containing terms of the lease was produced by consent and so were letters dated 25th January 1985 from the defendant to Lloyd Masika Limited and the one dated 5.2.1985 from Lloyd Masika Limited addressed to Budget Spray Works. The letter from the defendant to Lloyd Masika Ltd. acknowledged receipt of Kshs.10,000/= being rent for the first month and suggested a few changes to the terms of the lease. This letter acknowledged Budget Spray Works as the proposed tenants of the defendant's premises. The letter of 5.2.1985 from Lloyd Masika Ltd. addressed to Budget Spray Works incorporated the terms suggested by the defendants. The user was given as "Printing/Panel beating/Motor Vehicle repairs." The rent agreed was Kshs.120,000 per annum and possession was to be granted from 1.2.1985. The term of the lease was given as 5 ½ years from 1.2.1985. The letter of 5.2.1985 contained a condition that accepting the terms of the letter was deemed to approve the Standard Form of Lease. The letter was signed by Budget Spray Works on 7.2.1985.

On 20.2.1985, Budget Spray Works wrote to Llyod Masika referring to a draft lease dated 5.2.1985

and confirmed that they would bear all the legal costs of a formal lease. The plaintiffs' position was that their plaintiffs' business carried on as Budget Spray Works was duly registered at the Business Names Registry save that through a typing error the name "Budget" had been mis-spelt as "Burget". The defendant's position on the other hand was that the plaintiffs' business was not registered at the Business Names Registry as Budget Sprays Works is not the same of Burget Spray Works. In my view the defendant in making the distinction was creating a storm in a tea cup. The registration of Budget Spray Works or Burget Spray Works was not an issue at the time the plaintiffs and the defendant entered into the lease agreement referred to above. The plaintiffs, dealt with the defendant's agent Lloyd Masika Limited using the name "Budget Spray Works". It is Budget Spray Works who accepted the terms of the Lease. Indeed their letter dated 30.2.1985 confirming that Budget Spray Works would bear the advocates' costs of the formal lease was signed by the 1st plaintiff.

In the light of my above findings, I hold that Budget Spray Works was a registered business name, the word "Budget" being mis-spelt as "Burget" at the registry of Business Names.

Burget Spray Works as registered at the said registry is shown to be a business in the names of Gabriel Mwaura and Amos Kinuthia. It is not in dispute that these names belong to the 2nd and 1st plaintiffs respectively. The plaintiffs gave evidence of their business. Their position with regard to doing business together was not shaken in cross-examination. The documentary evidence produced supported that position.

The fact that the letter of offer was signed by the 2nd plaintiff and not by the 1st plaintiff, in my view, did not change the position. Lloyd Masika Limited dealt with Budget Spray Works and not exclusively with the 2nd plaintiff. In fact it is clear from the letter of offer and acceptance that Llyod Masika Limited appreciated that the offer to let the defendant's premises was made and accepted by a business firm and not an individual. From the evidence, I have come to the conclusion that the 2nd defendant signed the letter of offer and acceptance for and on behalf of the firm. The letter dated 20.2.1985 confirming that Budget Spray Works would bear the legal costs of the formal lease put the issue beyond controversy that the 1st plaintiff Amos Kinuthia was the 2nd plaintiff's partner.

My above findings do not disclose any fraud in the execution of the lease on the part of the plaintiffs. In fact, the amended defence merely alleged deceit and false representation against the 2nd plaintiff alone. No fraud is alleged and no particulars are given. When DW1 testified, he did not allege fraud and did not give evidence of particulars of the same. He was however categorical that it was M/s Lloyd Masika Limited who were instructed by the defendant to get a tenant to their premises. With regard to who were behind Budget Spray Works, DW1 stated that he had been told that it was the 2nd plaintiff. He did not disclose who told him. Later DW1 was told by the defendant's Managing Director that the 2nd plaintiff had sublet the premises to the 1st plaintiff. He then called the 2nd plaintiff who admitted that he had indeed sublet the premises. I did not believe DW1 on this aspect of his evidence as the evidence flew directly in the face of the documents produced with respect to the lease. The 2nd plaintiff was of course categorical that Budget Spray Works could not sublet the premises to itself.

The defendant did not call any witness from M/S Lloyd Masika Limited to support its allegation of subletting. Nor did the defendant's Managing Director who was stated to have originally alleged that the premises had been sublet testify for the defendant.

Having found that the plaintiffs carried on business as Budget Spray Works which was by a typing error registered at the Business Names Registry as Burget Spray Works and having been unpersuaded that the defendant's premises were sublet by the 2nd plaintiff to the 1st plaintiff it follows that the defendants were not justified at all in any way in closing the suit premises. As the plaintiffs were not in breach of any term of the Lease, the locking up of the premises by the defendant was in breach of the said lease.

My above findings clearly show that – the answers to issues Numbers 1,2,3,4,5,8, and 9 are in the affirmative and the answers to issues Numbers 6 and 7 are in the negative.

I turn now to issues Numbers 10 and 11 as to whether the plaintiffs suffered any loss of business and damages and whether the plaintiffs are entitled to damages as claimed in the plaint as a result of the closure of the suit premises. With regard to the claim for loss of business, the plaintiffs founded their claim upon what they called contracts between them and M/S Mea Limited and M/s Productions and Communications Limited. The plaintiffs further expected to undertake motor vehicle repairs and related motor vehicle garage business. The basis of the contract between the plaintiffs and Mea Limited was a supply Agreement between them made on unknown date in February,1985. However, that supply agreement described Budget Spray Works as a limited liability Company incorporated according to the Laws of Kenya. In my view that description does not fit the plaintiffs. In any event the agreement was not produced in evidence. I will return to this aspect of the plaintiffs' claim a little later on in this judgment.

With regard to the purported contract between the plaintiffs and M/s Productions and Communications Limited, the foundation for the same was a letter dated 31/1/1985 from the plaintiffs to M/s Productions and Communications Limited. This letter was in effect a quotation by the said plaintiffs to M/s Productions and Communications Limited and asked for artwork for the production of 10,000 copies of Finance Magazine. No other document was produced to support the contract. PW3 Njeru Gatabaki was the publisher of the said magazine and testified that indeed his company had accepted the plaintiffs' quotation of 31.1.1985. However he did not offer any documentary evidence of a concluded contract and stated that the contract could have been oral. On this aspect, of their claim PW1 testified in cross examination that they did not receive any contract documents from M/s Productions and Communications Limited and specifically confirmed that they had no contract with them at all. They expected the contract but never got one.

PW3 testified on 19.7.2005 and by then his company had not lodged any claim in court against the plaintiffs.

With respect to the claim of loss of business based on failure by the plaintiff to undertake motor vehicle repairs and painting, the plaintiffs placed reliance upon their letter dated 11.2.1985 addressed to M/s Blue Shield Insurance and another one dated 7.2.1985 addressed to M/S East African Industries. Those letters in my view were introducing the plaintiffs to various possible customers. There was no evidence of concluded contracts for repair or painting of any motor vehicles. Infact no single motor vehicle was repaired and/or painted by the plaintiffs for the entire period they were in the defendant's premises.

The Law is now settled that special damages must not only be specifically pleaded but must also be strictly proved. There is a pleathora of authorities on this point. See **Hahn –vs- Singh [1985] KLR 716** relied upon by the defendant and **{Jiranji –vs – Sanyo Electrial Co. Ltd (2003) 1EA 98** relied upon by the plaintiffs. The original plaint in this suit did not have a claim for quantified special damages in the body of the plaint and in the prayers. The amended plaint however, pleaded special damages of KShs.210,867,821.75. Indeed that is the primary claim apart from general damages and costs in the amended plaint. The amended plaint was filed on 9.2.1995. The defendant contended that the plaintiffs claim of special damages was statute barred as it was not filed within six (6) years from the date of the closure of the demised premises. The authority for that proposition was Section 4(1)(a) of the Limitation of Actions Act. The plaintiffs' reply to that contention was that as the said claim of **KShs.210,867,082.75** was brought by way of amendment on an existing cause of action it was not time barred. I agree with the plaintiffs that amendments to pleadings take effect from the date of the original pleadings unless the effect is limited by the order allowing the amendments. In the present case, there is no dispute that the original cause of action was commenced within the period of limitation. Being of that view, I hold that the said claim of special damages of **KShs.210,867,082.75** was not time barred under Section 4(1) (a) of the Limitation of Actions Act.

The special damages are pleaded in paragraph 6(A) of the amended plaint. That paragraph is set out at the beginning of this judgment. At 6(A) (i) the plaintiffs pleaded as follows:-

"***(i) Loss of machinery equipment allied accessories installed by the plaintiffs and removed by the***

defendants …… KShs.3,125,606.00".

It would have been better if this loss was further particularized. However as the defendant conceded that the pleading was proper nothing turns on the same. The plaintiffs sought to particularize the loss by evidence. Pages 42,44,45,46 and 47 of Exhibit 2 were relied upon by the plaintiffs to show how the loss was arrived at. Page 44 has a list of items titled Workshop's Furniture and clothing whose value is given as KShs.112,700/=. This list according to the 1st plaintiff was prepared 6 months after the closure of the premises. No evidence of payment for the items was produced. Infact the figure of KShs.112,700/= was exaggerated by about KShs.1590/=.

At page 45 of Exhibit 2 details of particulars of printing press machinery and equipment are provided. The total value of the items is KShs.1,399,000.00. There was again no evidence of payment for these items nor were any invoices and/or delivery notes for the same produced. This figure claimed is exaggerated by about KShs.684,400/=.

At page 46 of the same exhibit 2 under the heading Stationery and Miscellaneous Office Equipment and at page 47 is a list of items under the heading Summary of Office Furniture in the Vehicle Workshop and Printing workshop offices. This list again was prepared about 5 or 6 months after the closure. No supporting documents were produced.

In the end, I am not persuaded on a balance of probabilities that the plaintiffs strictly proved they had all the items listed at pages 44, 45, 46 and 47 of exhibit 2. I will consider items listed at pages 42 and some of the items listed at pages 46 and 47 in as short while.

At paragraph 6A(ii) the plaintiffs claimed loss of monies spent on personnel Head Office expenses and allied expenses all amounting to KShs.11,305,186.00. The 1st plaintiff testified that Head Office expenses related to the Central Office at Pan African Insurance Building – 5th floor. The details of items delivered to the Head Office were given at pages 71 to 74 and personnel expenses were given at page 74 of the Common bundle of documents. Other expenses were listed at page 75. These lists were not produced. The plaintiffs did not also produce evidence of any payments made to staff. The 1st plaintiff promised to produce vouchers for the payments. But he never did. There was also no evidence that any payments were made to the plaintiffs. In the premises, I find on a balance of probabilities that the claim for loss of monies spent on personnel, head office expenses and allied expenses was not established.

With respect to the claim for anticipated profits amounting to KShs.150,000,000/= the plaintiffs relied upon particulars given at pages 81-100 of the common bundle of documents. The foundation of this claim was anticipated business to print 100,000 fertilizer bags for Mea Limited and 10,000 copies of a special edition of the Finance Magazine with prospects of further business from the publishers. I have already found that there was no supply agreement between the plaintiffs and Mea Limited. The supply agreement relied upon by the plaintiffs was between Mea Limited and a Limited liability company called Budget Spray Works. The agreement was in any event not produced in evidence.

With respect to the business to print 10,000 copies of Finance Magazine, I have already found that there was no concluded contract between the plaintiffs and PW3 the publisher of the said magazine.

The plaintiff further expected the mechanical workshop section to bring in KShs.41,390,000.00. I have already found that the plaintiffs did not have a concluded contract with its anticipated customers M/s Blue Shield Insurance and M/s East African Industries and for a whole month no single motor vehicle had been worked upon.

In the light of my above findings, the plaintiffs' claim for KShs.150,320,000.00 for loss of anticipated profits cannot succeed. Even if I had found that there indeed existed contracts between the plaintiffs and their customers I would have held that the plaintiffs' basis for arriving at the said loss was without foundation. The plaintiffs had not proved on a balance of probabilities that they had the capacity to perform the alleged contracts. Besides, there was no reason why the loss was computed on the basis of a ten year Lease when there was no option for renewal.

With regard to the plaintiffs' claim for KShs.128,528.00 being the sum allegedly left in the demised premises when they were closed, I am afraid, I have not been persuaded that such cash was left in the premises. The reason, is that it is not believable that such a sum of money would have been left behind and the plaintiffs say nothing about it even when they were asked to verify the list of items furnished by the defendant way back in 1985. I did not believe the 1st plaintiff's explanation that they always had a lot of money with them before the premises were closed. No attempt was made to show how the money had been obtained, whether by withdrawal from a bank account or a payment by a customer.

With regard to the claim for KShs.43,250,982.55 being interest on monies withheld, I am afraid, this too is without basis at all. The 1st plaintiff in fact had no idea how the figure had been arrived at. PW2 William Lawrence Wachira a Certified Public Accountant who was called as a witness for the plaintiffs denied that he had advised the plaintiffs on their claim for the said interest. I find and hold that the plaintiffs have not established the same on a balance of probabilities.

I now turn to one aspect of the plaintiffs claim that I think should be considered separately. This is in respect of loss of the property that was in the demised premises when the plaintiffs were locked out. There is no doubt that at the time of the closure on 5th or 6th.3.1985 the plaintiffs had some property in the demised premises. What is not crystal clear is what property: the type of property and the value of such property. The defendant admitted that the property listed at pages 16 and 17 of exhibit 1 was the only property that was in the demised premises when they were closed. These were: <u>On the 1st floor</u>:

1. 1 Mecol type desk with wood top with 3 metal drawers on right side and 2 metal drawers on left side.
2. 1 Executive Chair
3. 2 Chairs
4. 2 Push-button telephones
5. 2 Pocket Calculators – Casio Model HL – 807
   - Sanyo Model CX110
6. 2 Diaries
7. 1 Writing Pad
8. 2 Ash-trays – one square (glass)
   - one triangular (ceramic)
9. 1 Paper-punch
10. 3 1985 Telephone Directories
11. 1 Telephones and addresses Recorder
12. 4 Pens – felt type
13. 2 1985 Calendars
14. 1 Heater (2 bars)
15. 1 Binks Bullows item

16. 1 Rexel stapler
17. 1 Rubber stamp – Kenugan Pride Agencies
18. 1 Spring file
19. 1 waste paper straw basket
20. 1 Disc plate – about 4" in diameter
21. 1 Wooden timber – 23 ½ " x 64 ½ "

On the Ground Floor:

22. 1 Heavy duty Jack with lever
23. 1 Wolf type 13 m/m Drill
24. 3 Discs of different sizes
25. 1 Bench Grinder – Black & Decker

Model BG/8m

26. 1 Blue Generator
27. 1 Yellow Pump
28. 1 Blue gas cylinder – Harrtz & Bell

Engineers Job No.C.89494 of 21.79

29. 5 Iron rods of different sizes
30. 1 Electric measuring equipment
31. 2 Heavy levers – one a "Record" type
32. 1 Grill
33. 1 – shaped block
34. 1 4ft high 2 level stand (yellow)

The defendant did not give its valuation of these items.

The plaintiffs contended that the above list was not even 5% of their property that was locked in the premises. I have already found on a balance of probabilities that the plaintiffs did not leave the items listed at pages 44 and 45 of exhibit 2 in the premises when they were locked out.

However with respect to the list of items at page 42, of the same exhibit I have found as follows:- The 1st plaintiff produced the agreement between himself and James N. Kinyanjui, James Njire and Mwangi Thinji regarding the sale of his investment and interest in a Company called Chequered Auto Kenya Limited. By that agreement the garage equipment listed at page 42 of the said exhibit was transferred to the 1st plaintiff who in turn converted the same as his equity contribution in the business he was setting up

with the 2nd plaintiff. The 2nd plaintiff acknowledged the equipment by his letter dated 14/2/85 which is at page 43A of Exhibit 2. The 2nd plaintiff however noted that the following items were missing:

1) Compressor motor and switch

2) 6 Gloves

3) 2 spray guns

4) 7 stands

5) 5 canvas aprons

6) 10 Helmets

I am satisfied on a balance of probabilities that the garage equipment listed at page 42 of exhibit 2 less the items found missing by the 2nd plaintiff were indeed in the demised premises when it was locked by the defendant. The garage equipment proved to my satisfaction to have been in the premises at the material time is as follows:-

1. 1 Body Jack

2. 4 Vice

3. 3 Lifting Jacks

4. 23 vehicle stands

5. 4 Drilling machines

6. 4 Table Grinders

7. 5 Bench Grinders

8. 4 Revet Guns

9. 1 Welding cylinder

10. 1 Electrical Welder

11. 1 Compressor

12. 1 Jig Jack

13. 3 Spray guns

14. 8 Clamps

15. 1 Battery charge

16. 4 Spanners Tool Kit

17. 15 Canvas Aprons

The plaintiffs valued the above items at KShs.566,530/=. This is the same valuation that was given by

M/s James N. Kinyanjui, James Njire and Mwangi Thinji. The defendant did not proffer any other valuation. I see no reason why I should not accept that valuation. In the end I find that the plaintiffs lost Garage Equipment valued at KShs.566,530.00.

In addition to the above loss the plaintiffs also lost the items listed at page 16 of Exhibit 1. Some of the items are also listed at page 47 of Exhibit 2. These are:

1. 1 Mecol type desk with wood top with 5 metal drawers

2. 1 Executive Chair

3. 2 chairs

4. 2 Push – button telephones

5. 2 Pocket calculators

6. 1 Writing pad

7. 2 Ash trays

8. 1 Rexel Stapler

9. 1 spring file

10. 1 waste paper straw basket

Using the valuation given by the plaintiffs these items were worth a total of KShs.47,199.75. It is nearly 21 years since the closure of the subject premises. The defendant's witness did not state in his evidence that the items are still available. In the premises I find that the plaintiffs lost the said items valued at KShs.47,199.75.

I now turn to the last item on special damages i.e the plaintiffs' claim of KShs.10,000.00 being refund of rent. The defendant's contention is that this claim should fail because the defendant issued a cheque for the said sum but the plaintiffs refused to encash it way back in 1985. On my part I did not detect any waiver by the plaintiffs. If the defendant desired to avoid liability with respect to that claim, it would have tendered the said sum into court when the plaintiffs particularized their claim. The defendant itself offered that payment, the plaintiffs are entitled to it.

I turn now to the plaintiffs' claim for general damages. The defendant's submission on this claim was that the plaintiffs had not claimed the same and none were proved. I was rather surprised at the first limp of that submission.

In my view the plaintiffs sufficiently pleaded general damages at paragraph 6A and at prayer (f) of the amended plaint. I now proceed to consider whether or not the same have been proved. Normally general damages are not awarded for breach of contract. But there is no inexorable rule that general damages can never be awarded for breach of contract. Indeed, our courts have awarded and in my view will continue to award general damages for breach of contract in appropriate cases, each case being considered on its own peculiar facts. For instance Mayers, J. in **V.R. Chande and Others vs. East African Airways Corporation [1967] EA 78** awarded general damages to plaintiffs for their disappointment at not being received by their friends at various airports because they did not get their scheduled flights and Musinga, J. in **Michael Danson Mahugu vs. Dilip Harachand and Another: H.C.C.C. No.460 of 1996 (UR)** awarded general damages for breach of a tenancy agreement.

In the case at hand the plaintiffs and the defendant entered into a tenancy agreement by which the defendant leased its godown on Changamwe Road, Nairobi to the plaintiffs for 5 ½ years with effect from

1.2.1985. The plaintiffs accepted the terms of the lease and were put into possession by the defendant on or about 7.2.1985. On or about 5th or 6th March 1985 while the plaintiffs and their staff were out for lunch, the defendant, through its Company Secretary, DW1 locked the said premises and posted security guards at the gate. DW1 had been informed by his Managing Director that the plaintiffs had sublet the premises. He told the plaintiffs that the lease would be terminated. That was in fact, done and the initial attempts to get back to the premises failed. Their property remained locked in the demises premises. The defendant initially took the untenable position that they had leased the premises to the 2nd plaintiff who had in turn sublet the premises to the 1st plaintiff. There was absolutely no basis for that position because the defendant's letting Agents had dealt with Budget Spray Works, a firm registered in the name of the two plaintiffs. The defendants changed that stance and argued that because Burget Spray Works was the firm registered, it was different from Budget Spray Works merely because at the Registry of Business Names, Budget has an "**r"** and the plaintiffs leased the premises as Budget Spray Works: letter "**d"** replacing the "**r".** The difference in the spelling had not been a concern when the defendant locked the demised premises. In my view the defendant realized that they had goofed and were trying to clutch at straws. I have no doubt in my mind that the defendant's action to lock the demised premises without establishing what the true position was clearly high handed. The plaintiffs were treated with contempt by the defendant. They had met their part of the bargain and expected to enjoy quiet possession of the demised premises. This was not to be thanks to the wrongful actions of the defendant. Indeed shortly after the closure of the premises, the plaintiffs believed that they would only be out of the premises for a short while. This is captured in their initial claim against the defendant and their reluctance to take back their property locked up in the demised premises. The defendant's actions were not only wrongful but were also traumatic, embarrassing, humiliating and callous. The plaintiffs' loss on this score cannot be pecuniary. In the premises, I am persuaded that the plaintiffs are entitled to an award of general damages. In considering the sum awardable, I bear in mind the fact that I should not expand recoverable damages for non-pecuniary losses beyond reasonable limits. As I have already stated this is not absolutely novel. The English courts are way ahead of us and there are no self set limits any more in recovery of non-pecuniary losses in actions for breach of contract. In Contract Cases and Materials by **H. G. Beale WD Bishop and MP Furmston 4th Edition page 666** the Learned authors quote Lord Denning MR as follows:-

"**What is the right way of assessing damages? It has often been said that on a breach of contract damages cannot be given for mental distress thus in Hamlin –vs- Great Northern Railway Co., Pollock CB said that damages cannot be given for the disappointment of mind occasioned by the breach of contract …….**

The courts in those days only allowed the plaintiff to recover damages if he suffered physical inconvenience, such as having to walk five miles home as in Hobbs case or to live in an overcrowded house; see Bailey –vs- Bullock.

I think that those limitations are out of date. In a proper case damages for mental distress can be recovered in contract, just as damages for shock can be recovered in tort. One such case is a contract for a holiday, or any other contract to provide entertainment and enjoyment. If the contracting party breaks his contract, damages can be given for the disappointment, the distress, the upset and frustration caused by the breach …."

I also bear in mind the fact that the plaintiffs despite all indications from the defendant that possession would not be restored declined to mitigate their loss. In the special circumstances of this case and doing the best I can I award the plaintiffs general damages in the sum of KShs.100,000/=.

Before penning off, I have a word about the plaintiffs' claim for KShs.650,000/= as damages for breach of covenants of the lease calculated on the guidelines set out in McGregor on damages 16th Ed. At paragraph 1025. The Learned author writes:

"**The normal measure of damages where the lessee is evicted from the whole property …. Is the value of the unexpired term which will be calculated as the rental value of the premises less the**

contractual rent which would have fallen to be paid in the future …. Further principle dictates that the value of the unexpired term should be taken at the time of eviction which is the moment of the breach ….”

I am unable to agree with the plaintiffs as such a claim is clearly one for special damages which must be specifically pleaded and strictly proved which the plaintiffs did not.

With regard to costs, the same follow the event. Having found for the plaintiffs in part they are entitled to the costs of the suit.

In summary, judgment is hereby entered for the plaintiffs as follows:-

(a) Kshs.566,530.00 for lost garage equipment.

(b) Kshs.47,199.75 for other lost items.

(c) Kshs.10,000/= being rent refund.

(d) Kshs.100,000/= as general damages.

(e) Interest on (a), (b), (c) and (d) at court rates from the date hereof until payment in full.

(f) Costs plus interest thereon at the usual rates from the date of agreement on costs or from the date of taxation.

DATED and **DELIVERED** at **NAIROBI** this **14th** day of **June 2006.**

F. AZANGALALA

JUDGE

Read in the presence of:- Saende for the plaintiffs and Kairaria for the defendant.

F. AZANGALALA

JUDGE

14/6/06