



Delmonte Kenya Limited v Goshen Gardens Limited & another (Environment & Land Case 1245 of 2015) [2025] KEELC 5256 (KLR) (10 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5256 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1245 OF 2015**

**AA OMOLLO, J
JULY 10, 2025**

BETWEEN

DELMONTE KENYA LIMITED PLAINTIFF

AND

GOSHEN GARDENS LIMITED 1ST DEFENDANT

PIONEER INTERNATIONAL SCHOOLS LTD 2ND DEFENDANT

JUDGMENT

1. The plaintiff brought this suit against the defendants through a plaint dated 4th December 2015 and amended on 8th February 2016 seeking the following reliefs:-
 - a. A permanent injunction restraining the 1st defendant whether by itself or its agents and/or employees or otherwise whomsoever from trespassing, continuing to trespass, transferring, leasing, subletting, interfering and/or otherwise dealing with the portion of the property known L.R. No. 12XX7/2 (the suit Property) including operating a school and/or any other business on the suit property or in any other manner howsoever interfering with the plaintiff's rights over suit Property.
 - b. A permanent injunction restraining the 2nd defendant(sic) whether by itself or its agents and/or employees or otherwise whomsoever from transferring possession of the plaintiff's property being a portion of the property known L. R. No. 12XX7/2 to the 2nd defendant or any other third party.
 - c. A mandatory injunction be issued to compel the Defendants either by themselves their agents and/or employees or otherwise whomsoever, to vacate the Plaintiff's property being a portion of the property known as LR.No.12XX7/2(the suit property) and the Defendants be ordered to:



- i. Take away, pull down or otherwise remove all, fixtures, fittings, effects and/or any assets whatsoever belonging to the Defendants from the suit property and to make good to the reasonable satisfaction of the Plaintiff, all damage caused by such removal. In default of compliance with this order, the Plaintiff be at liberty to remove such fixtures, fittings and/or assets and to recover the costs of such removal from the defendants.
 - ii. To deliver vacant possession of the suit property to the Plaintiff in good and substantial repair and condition. In default of compliance of this order, the Defendants be evicted from the suit property. The Officer Commanding Ngati Police Station be directed to enforce the eviction order.
- d. Mesne profits at the prevailing rental market rate until delivery of vacant possession.
 - e. Interest on d
 - f. Cost of the suit
 - g. Any other order as this court may deem fit to grant.
2. The plaintiff averred that at all material times, the plaintiff let to the 1st defendant a portion measuring 75 acres of all that parcel of land known as L.R. No. 12XX7/2 (hereinafter referred to as “the suit property”) for a term of eight (8) years with effect from 3rd September, 2013 at a revisable monthly rent of Kshs.550,000/= and on other terms and conditions that were set out in the lease agreement dated 3rd September, 2013.
 3. The plaintiff averred that in the month of February, 2015, the 1st defendant defaulted in its rent payment obligations under the lease aforesaid following which the plaintiff served the 1st defendant with a notice dated 21st April 2015 to remedy the default.
 4. That the 1st Defendant continued with the breach and subsequently the Plaintiff issued a 30 days’ notice dated 5th May, 2015 terminating the lease in accordance with clause 13 of the lease agreement. Further, through letter dated 11th June 2015 the Plaintiff requested the 1st Defendant to surrender possession of the suit property but the 1st Defendant declined to do so.
 5. The plaintiff averred that the 1st defendant filed a suit ELC 306 of 2015 against them on 29th April 2015 alleging that the Plaintiff had violated the terms of the lease agreement in the terms that the Plaintiff had fraudulently altered the terms of the lease agreement by changing the acreage of the lease from 100 acres to 75 acres of land, trespass on the suit property without the 1st Defendant’s authorisation and exposure of the 1st Defendant to various security breaches after the said trespass and uprooting of the fence and on 2/2/2015 unknown people broke into the school premises and stole property worth Ksh.1,584,000.
 6. The Plaintiff averred that the 1st defendant’s suit against the plaintiff ELC 306 of 2015 was referred to arbitration on 15th July, 2015 and the 1st defendant was to continue occupying the suit property pending the outcome of the arbitral proceedings.
 7. That parties did not go to Arbitration because they resolved it amicably, with the 1st Defendant withdrawing the suit on 11th December 2015 and subsequently confirmed that it does not dispute the termination of the lease.
 8. The Plaintiff stated that in August 2015, the 1st Defendant director Mr David Kigwe requested them to meet with Mr.Peter Munga, the 2nd Defendant’s Chairman to discuss a possible resolution of the dispute.



9. That the meeting occurred in late August 2015 when the 1st Defendant's director indicated that the 1st Defendant was considering transferring its assets to the 2nd Defendant and asked the Plaintiff to confirm the possibility of the 2nd Defendant taking over the lease.
10. The Plaintiff averred that it made it clear that it would only consider entering into a lease with the 2nd Defendant after the dispute is resolved and after the 1st Defendant hands over possession of the property to it.
11. The Plaintiff stated that about mid October 2015, it came to their attention that the 1st Defendant appeared to have handed over possession of the suit property to the 2nd Defendant whom through their Advocate's letter dated 27th October 2015 denied the said possession.
12. That in a meeting held on 19th November 2015, the 2nd Defendant asked the Plaintiff to give an undertaking that the property would be let to it after the 1st Defendant vacates the property which they refused.
13. The Plaintiff stated that about 30th November 2015, the 2nd Defendant trespassed the suit property at behest and assistance of the 1st Defendant, erected a sign boards for "Pioneer Girls School" at the entrance of the property and along Thika Nyeri Super Highway without Plaintiff's consent to taking over possession, lease or any other arrangement. That as a result of the actions of the Defendants, the Plaintiff has suffered loss and damage and is likely to suffer irreparable and substantial loss.
14. The 1st Defendant filed statement of defence and counter claim dated 29th February 2016 seeking for the following orders;
 - a. A permanent injunction restraining the 2nd Defendant to the counter claim whether by itself or its agents and/or employees or otherwise whomsoever from trespassing, continuing to trespass transferring, leasing, subletting, interfering and/or otherwise dealing with the Plaintiff's/1st Defendant to the counter claim property being a portion of the property known as L.R No. 12XX7/2 (suit property) including operating a school and/or any other business on the suit property or in any other manner howsoever, interfering with the Plaintiff's/1st Defendant to the counter claim right over suit property.
 - b. An order of vacant possession as against the 2nd Defendant to the counter claim in default the 2nd Defendant to the counter claim to be forcefully evicted from the suit property. The Officer commanding Ngati Police station be directed to enforce the eviction order.
 - c. The 2nd Defendant to the counter claim to be ordered to pay mesne profits at the prevailing rental market rates until delivery of vacant possession.
 - d. Cost of this suit and interest at court rates to be paid by the 2nd Defendant to the counter claim.
 - e. Any other order as this Court may deem fit to grant.
15. The 1st Defendant denied the Plaintiff's averments and stated that on 30th November 2015 when it became aware of the sign posts erected by the 2nd Defendant, it wrote a letter through its advocates to the Plaintiff stating that the sign posts were erected without their knowledge or consent and demanded the said posts be removed.
16. The 1st Defendant stated that having withdrawn ELC 306 of 2015 on 11/12/2015, they did not have an intention to proceeding with contesting the termination of the lease dated 3rd September 2013 and that it has always been ready and willing to hand over possession of the suit property to the Plaintiff/ 1st Defendant in the counter claim since 11/12/2015.



17. The 1st Defendant averred that through its Advocates on 14th January 2016 they invited the Plaintiff to propose a mutual convenient date to enable the 1st Defendant hand over the suit property to the plaintiff but during inspection and inventory taking on 18/1/2016 the handing over never took place because the 2nd Defendant was in occupation without an executed lease between them and the Plaintiff.
18. They contend that despite various efforts to have vacant possession of the suit property given to it by the 2nd Defendant including closing the suit property on 13/1/2016 with an attention for everybody to know that the suit property was still under the management of the 1st Defendant, disconnecting power from the suit property and issuing notice to the 2nd Defendant on 30/11/2015 demanding that they remove sign posts from the suit property, the 2nd Defendant has refused to give vacant possession.
19. The 2nd Defendant filed a statement of defence and a counter claim dated 4/3/2016 seeking for the following orders;
 - a. An order for the rectification of the Agreement for sale and the correspondences thereof, as concern the contractual relationship between the 1st and 2nd Defendants (and/or 3rd Defendant in the Counterclaim) where they refer to the property known as LR. No.12XX7/4 to read and be acted on as L.R No.1217/2 situated in Gatanga Sub-County, Murang'a County.
 - b. A declaration that the Plaintiff holds, if the Lease agreement between it and 1st Defendant is deemed as terminated or abandoned, the reversionary term, of the Lease Agreement dated 3/9/2013 on a constructive trust or as a trustee for benefit of the 2nd Defendant.
 - c. A declaratory order that the 2nd Defendant is entitled, to enjoy a quiet possession of the land comprising the school premises, subject to compliance with the lease terms for the remainder of the Eight (8) years terms in the lease agreement dated 3/9/2013 by operation of law and/or the equitable doctrine of proprietary estoppel and/or that the Plaintiff be ordered to execute a Lease Agreement within three(3) months (and/or such other time as may be found fair and reasonable), for reversionary interest of the term in the lease agreement dated 3/9/2013, between the Plaintiff and the 1st Defendant and/or such monthly rent as may be found fair and just hereof.
 - d. Alternatively, or in addition thereto, the Plaintiff (1st Defendant together with the 2nd Defendant) in the counterclaim) are directed to execute an Assignment of the Lease Agreement (or sublease) with the 2nd Defendant for the remainder of the term aforesaid, for the appropriate land parcel being L.R No. 12XX7/2 situated in Gatanga Sub-county of Murang'a county.
 - e. In the alternative in and addition thereto, a declaration be issued that the purported termination to the extent that it affects the 2nd Defendant, of the tenancy by the notice dated 5th May 2015 is null and void and a nullity and the Plaintiff, 1st Defendant and by extension the 2nd Defendant proprietary estoppels (or sub-tenancy or underlease given clause 23 of the Lease Agreement) establishes a controlled tenancy terminable ONLY as prescribed by Sections 2(b)(ii) and 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments)Act, Chapter 301, Laws of Kenya.
 - f. Further order a permanent injunction order, subject to compliance with the lease to restrain the Plaintiff by itself, agents and/or servants from alienating, leasing, selling, letting out or offering it for sale and/or interfering with the 2nd Defendant's possession and operation of the schools in the portion of land comprising the school premises situated on LR.No 12XX7/2 or thereabouts.



- g. Such exemplary and aggravated and general damages as may be assessed and found fair and just, together with interest thereon on the compounded commercial bank rate of 22% per annum thereon from the date hereof until payment in full.
 - h. Costs of the suit, and costs of the counter claim and interest thereon until payment in full.
 - i. Any other relief, or Order, that the Honourable Court may deem fair and grant to make.
20. The 2nd Defendant denied being in a lease with the 1st Defendant but expressed interest in the purchase of the school premises and agreed to enter into a sale transaction. That the said school was in a deplorable state with its assets, business and infrastructure and equipments unrepaired and in low ebb.
 21. The 2nd Defendant stated that the copy of lease between the Plaintiff and the 1st Defendant dated 3/9/2013 refers to L.R 12XX7/4 and not 12XX7/2 as pleaded and that he is not privy to the said lease.
 22. The 2nd Defendant stated that the notice of termination dated 5/5/2015 pleaded by the Plaintiff is of 15 days and not 30 days thus fatally defective making the lease agreement of the 1st Defendant subsisting.
 23. That even if the termination notice was valid, the alleged breach concerned default in payment of rent, a default that was remedied when the 2nd Defendant paid all the arrears of rent through the 1st Defendant, to the 1st Defendant's credit with the Plaintiff.
 24. The 2nd Defendant averred that the lease between the Plaintiff and the 1st Defendant is a controlled tenancy in terms of the provisions of Section 2(1) (b)(ii) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* and that in the alternative, the applicable and governing legal context provided by Sections 73 of the *Land Act*.
 25. The 2nd Defendant averred that in the course of the month of July 2015, the 1st Defendant offered the sale of school premises, assets and equipment and some designated facilities in the 1st Defendant's leased premises whose landlord was the Plaintiff.
 26. That in the course of undertaking its due diligence, the 2nd Defendant was introduced to the Plaintiff by the 1st Defendant where the Plaintiff expressed itself orally and vide letter dated 21/9/2015 that in the event the matter in court is resolved and the subsisting lease is terminated, parties will have to agree on the terms of any prospective lease before they are reduced to a document to be executed by both parties and thereafter possession of the premises can be parted with.
 27. The 2nd Defendant stated that it understood that should it proceed to purchase off, the 1st Defendant's business interest Assets, Equipment and infrastructure in the school premises, pay the outstanding rents, accruing rents as and when due, before completion, then the Plaintiff would honour the assurances and representations it had expressed, of welcoming the 2nd Defendant to the premises and entering a new lease.
 28. The 2nd Defendant added that as a result of that understanding, they continued to pay the monthly rent as and when it became due and payable and that further they agreed to purchase the school from the 1st Defendant at an additional Ksh.38,000,000, undertook rehabilitation and remedial works to the school in tarmacking access roads, foot paths, buildings and serviced and mechanically repaired the school buses and grass cutting and some landscaping works.
 29. That they understood that during the period that the 1st Defendant was effecting the termination, the Plaintiff was to simultaneously or soon thereafter, agree with it, as pledged in the written memoranda



on the terms of the lease to be reduced to a document to be executed by both parties and thereafter possession of the premises, if any on a constructive trust and/or as a trustee of the 2nd Defendant.

30. The 2nd Defendant stated that acting in reliance of the representations made by the Plaintiff and the 1st Defendant, it entered into a formal agreement for sale with the 1st Defendant through the 3rd Defendant in the counterclaim, a company acting as its agent/subsidiary.
31. That the said company duly kept its side of the bargain by having the monthly rents of Ksh. 550,000 paid to the credit of the 1st Defendant, committed and paid to the 1st Defendant Ksh.38,000,000, and renovated the premises. The 1st Defendant performed its part by filing a notice of withdrawal of the suit and since it had already allowed the 2nd Defendant to assume possession of the premises, informed the Plaintiff, pending formalization of the Lease.
32. The 2nd Defendant averred that this conduct evinced an intention not to be bound by their past representation but the Plaintiff has since attempted to rescind their representation made to the 2nd Defendant which action the 2nd Defendant claim to be fraudulent. The 2nd Defendant also averred that the Plaintiff hold the reversion of the lease term is on trust and on behalf of the 2nd Defendant pending entering a formal lease.

Evidence.

33. PW1, confirmed adopted the witness statement as evidence in chief which statement also adopted the facts in the affidavit of 4/12/2015. The witness testified that the 2nd Defendant has possession of the suit premises and that the lease between them and the 1st Defendant was for a period of 8 years starting September 2013, expiring on 2nd September 2021.
34. He stated that the 2nd Defendant never handed over the property to them nor have they communicated on the same hence they are seeking for vacant possession and compensation for the period of their occupation. On cross examination, the witness confirmed that the lease in contention provided that upon termination, the lease would become month to month.
35. The witness confirmed there was a meeting that the 1st Defendant was considering leasing the premises to the 2nd Defendant but continued to receive rent from the 1st defendant until 26/6/2015. He stated that he is not aware that the 1st Defendant offered the 2nd Defendant its assets for sale.
36. That at par 26 of affidavit, the sign post of the school had changed so they had reason to believe that the 1st Defendant was not in possession but cannot confirm whether as at 30/11/2015, the 1st Defendant was in arrears of rent. That the issues in dispute in ELC 306/15 was charging high rent for small space while for them, they were demanding accrued rent and that the said issues had not been determined before this instant suit was filed.
37. PW 1 also confirmed that the title referred to in the lease is different from the one given here and that the property was leased for the purposes of running a school. That as per Clause 5 of the lease, the lessee was to sort out itself and anyone reading the lease would presume structures on the land belonged to the 1st Defendant.
38. That clause 11 of the lease provided for subletting without lessor's consent and clause 23 provided for termination notice of 3 calendar months in writing. The witness stated that the notice of termination was by dint of clause 13 on breach not in accordance to clause 23 and they have not invoked clause 23 against the 2nd defendant.



39. That he is not aware if the 2nd Defendant had paid the 1st Defendant for equipments and structures it had put up because he had not seen the sale agreement between the 1st and 2nd defendants. PW 1 affirmed that;
- “That the 2nd defendant has been making remittances which the Plaintiff has been receiving without prejudice and for mesne profit.”
40. He confirmed that at page 153 of the 1st Defendants bundle, is a notice of withdrawal dated 10/11/2015 and filed on 11/11/2015 of ELC 306/15 after an agreement at page 146 was reached.
41. That they filed this suit on 4/12/2015 after ELC 306/15 was withdrawn but the premises had not been handed to them. He stated that they had not entered into any lease agreement with the 2nd Defendant and that when the 1st Defendant made a request to sublet to which request they responded to that they had to have the possession before the consent is given.
42. DW1, David Waiganjo Kigwe, director of the 1st Defendant testified adopting his witness statement dated 20/3/2023 as his evidence in chief and produced the filed list of documents dated 20/3/2023 as Dexh 1-9.
43. He stated that the 1st Defendant sold the school to the 2nd Defendant which they left the premises to and are no longer interested in the same as they were fully paid. That the Plaintiff owes them a deposit of rent in the sum of Ksh.1,650,000.
44. During cross examination he confirmed that the 1st Defendant had leased the suit premises from the Plaintiff. They received a notice of termination but had a dispute of non-payment, having found that the premises leased was 75 acres and not 100 acres as per the lease. He stated that the documents at page 132-136 set out the terms of settlement between the Plaintiff and 1st Defendant and that he was aware of the correspondences at page 129.
45. The witness added that clause 11 of the lease in his understanding the reason why they had a meeting concerning the transfer of the school to the 2nd Defendant. That although there was no authority in writing granted by the Plaintiff, they consented orally when he verbally handed over the school to the 2nd Defendant in the meeting of October 2015. That the Plaintiff and the 2nd Defendant were to conclude later because the Plaintiff did not know how much they would charge them for rent. He stated that he did not hand over the school to the Plaintiff but a representative of the Plaintiff named David inspected the school and said everything was in order.
46. During cross examination, the witness stated that he wrote to the Plaintiff raising the issues on acreage, lease and monies used for repairs and requested for a meeting that by the time he had filed ELC 306/2015, they had not resolved the issues.
47. That one of the matters raised was that rent was disproportional to the size of land and had written to the Plaintiff to amend clause 1 & 4 of the lease but the letter was not responded to DW I admits the 1st Defendant was served with 3 letters immediately he served them with pleadings in 306/2015 and given 15 days to leave yet the school, Choice Imani was running. It is his evidence that the buildings were handed them him but they incurred costs in repairing them with the summary of the items repaired found at page 107 of their bundle.
48. The witness introduced the 2nd Defendant to the Plaintiff and to his understanding there was already an agreement to lease the school to the 2nd Defendant, what was remaining were the terms of that lease. He avers that he withdrew the suit filed to pave way for agreement with the Plaintiff and the 2nd defendant



- and that by the time he was handing over the school to the 2nd Defendant he did not owe any rent to the Plaintiff.
49. That he brought the Plaintiff a customer to buy the school and besides the notice issued after filing the suit, there was no other notice served. That at page 110-121 of the 2nd Defendant's bundle is the sale agreement between him and the 2nd Defendant and that he paid the full purchase price.
 50. At page 12, the 2nd defendant purchased the lease and things where applicable but noted the aircraft was not operating as it was used during aviation class.
 51. DW 1 also confirmed the 2nd Defendant paid rents for the period September-December 2015 with letter of 4/11/2015 referring to cheques forwarding to him rent for the premises. He stated that for the period he was there, two meetings were held at Plaintiff's premises. This marked the close of the 1st Defendant's case.
 52. DW2, the 2nd Defendant through Peter Kahara Munga who testified as DW 2 continued in cross examination where he stated that he met 1st Defendant and Del monte in August 2015. According to him, the agreement to lease the property to him was conditional on the 1st Defendant clearing the arrears and withdrawing the case in court.
 53. That it was not a condition that the 1st Defendant vacate the property before a lease was given to the 2nd Defendant. DW 2 admitted that he did not receive anything in writing allowing for their taking of possession of the premises.
 54. He stated that he was introduced to the Plaintiff in their office by the 1st Defendant and that he is not aware of the contents of the letter dated 6/10/2015 (at page 154 of Plaintiff's bundle dated 26/10/2020). However, he admitted receiving the letter dated 27/10/2015 at page 158 which asked him to exit from the suit premises but confirmed that they held a meeting on 19/11/2015. That by the time he received the letter dated 30/11/2015, they already had staff in the school.
 55. He further confirmed that he was held in contempt by Justice Okong'o which decision was upheld by the Court of Appeal in its judgement dated 21/1/2024. He added that they have filed a notice of appeal at the Supreme Court.
 56. He contended that before the 1st Defendant withdrew his suit, there was an order protecting the 1st Defendant's possession of the suit premises and that the 2nd Defendant took possession on 27/11/ 2015 before lapse of the lease between the Plaintiff and the 1st Defendant.
 57. That after taking possession, the 2nd Defendant was directly paying rent to the Plaintiff as per clause 1.10 at Ksh.550,000 which they continue to pay to date as evidenced by cheques at Pg 129-130 drawn by their Advocate in October 2015 and proof payment proof at page 131.
 58. He also pointed out that Clause 11 and 15 of the lease allowed placing of sign boards and that terminating of schools can create problems to stakeholders if not given sufficient time, thus 15 days' notice to terminate the school was not in the public interest. That at page 135 of his documents is a letter dated 17/11/2015 from his Advocates to the Plaintiff stating that they are waiting for a lease.
 59. The witness stated that the Plaintiff had never told them verbally that their offer to be given a lease had been withdrawn.
 60. DW3, Martin Mamicha Mugi, an Advocate of the high court of Kenya testified by adopting his witness statement dated 25/10/2021. He stated that he was instructed to act for Pioneer International School in November 2015 and met with the parties at the Plaintiff's premises. That the agenda of the meeting



was how the 1st Defendant would relinquish their tenancy in favour of the 2nd Defendant and on arrival was met by Mr. David Pearson for the Plaintiff.

61. That the said David set the conditions to be met which were withdrawal of suit before execution of a new lease in favour of the 2nd Defendant. Accordingly, the Advocate acting for 2nd Defendant drew an agreement executed between the two defendants and took inventory of what the 1st Defendant was selling.
62. That he wrote a letter to the Plaintiff dated 17/10/2015 asking for a lease but never received any correspondence, calling off the arrangement and his office forwarded the consideration money to the 1st Defendant and the rent cheques. It was DW3's evidence that his involvement ended on 14/12/2015 when he wrote the letter and that the letter dated 30/11/2015 was copied to him but does not remember replying to the same.

Submissions:

63. The Plaintiff in support of their case filed written submissions dated 2/4/2025. The 1st Defendants submissions were filed late on 4th July 2025 albeit with leave of the Court. Similarly the 2nd Defendant filed theirs late on 2nd July, 2025 with leave.
64. The Plaintiff submitted that the dispute arises from the unlawful occupation of the suit property by the 2nd defendant without any valid lease agreement. That initially, the Plaintiff had leased the Suit Property to the 1st Defendant under a lease dated 3rd September 2013, which was to expire in September 2021.
65. The Plaintiff highlighted that the lease was terminated earlier due to rent default, and a suit filed ELC 306 of 2015, during which the 2nd defendant unlawfully took possession of the premises. It is their case that they declined all requests to commit to a lease with the 2nd defendant and consistently asserted that such discussions could only occur after the 1st defendant vacated the premises and surrendered vacant possession.
66. The Plaintiffs cited the position by the Court of Appeal in *Kasturi Limited v Nyeri Wholesalers Limited* [2014] eKLR, which held that a tenant cannot impose themselves on a landlord once a lease has expired or been terminated. They submit that the 2nd defendant argument on entitlement to possession on grounds of proprietary estoppel and the creation of a controlled tenancy is without merit.
67. That owing to the evidence adduced, including correspondence and testimonies from both the plaintiff and the 2nd defendant's own advocate, indicated that no lease agreement was concluded and no representations were made by the plaintiff to support the doctrine of estoppel.
68. Further, the Plaintiff avers that in the case of *Kenya National Capital Corporation Ltd v Albert Mario Cordeiro & another* [2014] eKLR, for proprietary estoppel to be established, there must be a belief, encouragement, and detrimental reliance, none of which were proven.
69. The Plaintiff submit that the claim of a controlled tenancy under the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* is equally untenable as the Act does not cover school premises, and no lease, oral or written, was proven. In support cited the Supreme Court's position in *Kwanza Estates Limited v JKUAT* [2024] KESC 74 (KLR) which reiterates that no party can force a tenancy relationship in the absence of mutual agreement.
70. The Plaintiff posited that given the 2nd defendant's continued occupation of the Suit Property without consent, the act constitutes trespass under Section 3(1) of the *Trespass Act* and Section 152A of the



Land Act, 2012, as clarified in *Rhoda S Kiilu v Jiangxi Water and Hydropower Construction Kenya Ltd* [2019] Eklr.

71. The plaintiff stated that they are entitled to the remedies sought, including permanent injunction, vacant possession, mesne profits, and costs. They relied on the case of *Sisto Wambugu v Kamau Njuguna* [1983] eKLR, where it was held that a registered proprietor is entitled to exclusive possession and protection from trespassers.
72. They also urged that the 2nd defendant's counterclaim should be dismissed in its entirety, as it lacks any legal or factual foundation.
73. In their submissions, the 1st Defendant said it relies on the summary of the pleadings and evidence already set out in the submissions of the Plaintiff and the 2nd Defendant. It also set out facts which it argued are not in dispute inter alia that it had a valid lease with the Plaintiff and that they objected to the termination vide notice issued on 5th May 2015.
74. The 1st Defendant set out two issues which they regarded to be in dispute: Tenancy by estoppel and who pays the costs of the suit. They aver that the prayers sought in the plaint cannot issue against them inter alia because it does not have any assets on the suit property following the sale executed with the 2nd Defendant. The remainder prayers (c) and (d) relates to the Defendant.
75. On the doctrine of estoppel, the 1st Defendant argues that there was a meeting held on 19th November 2015 where the Plaintiff's representative said the two defendants should sort out their issues before the 2nd defendant could be granted a lease. That it is this representation that made them enter the sale agreement dated 27th November 2015. Thereafter, the Plaintiff has been receiving rents from the 2nd Defendant and by conduct they (plaintiff) cannot deny landlord-tenancy relationship.
76. The 2nd Defendant filed very lengthy submissions running into 35 pages and I confirm reading the same. I will not repeat the contents of the said submissions but summarise them in the following three (3) paragraphs. On whether this court's jurisdiction is ousted because the tenancy was controlled, the 2nd Defendant relies on the provisions of section 2 and 12(4) of Cap 301 which governs controlled tenancies.
77. Submitting on their counter-claim, the 2nd Defendant submitted that the notice of termination dated 17th June, 2015 was illegal, invalid and contrary to section 75 as read with section 76 of the Land Act hence possession was lawful. The 2nd Defendant also submits that there is no basis for the claim for trespass since the Plaintiff's lease from the government has lapsed and the new/extended lease has not been exhibited.
78. The 2nd Defendant further argues that the estoppel, whether proprietary or promisory has arisen. They relied on the English case of *Fibrosa Spolka Vs Faibairm Lawson Combe Barbour* (1943)AC 32 to distinguish the case of *Katsuri wholesalers* cited by the Plaintiff. They also submitted that a meeting was held where the 1st Defendant introduced the 2nd Defendant to the Plaintiff. It was in this meeting where it was agreed the 1st Defendant was to sell its assets to the 2nd Defendant to offset the rent arrears and thereafter the 2nd Defendant would assume possession.
79. It is the 2nd Defendant's contention that in view of the assurance that they executed an agreement for sale of the assets with the 1st Defendant and the subsequent withdrawal of ELC 306 of 2015 that had been filed against the Plaintiff. The 2nd Defendant avers that the Plaintiff did not call David Parson or any other witness to contradict this piece of evidence. The 2nd Defendant then submitted substantially on the terms of the lease dated September, 2013 and in particular on the legality of the notice to terminate that lease served on the 1st Defendant.



Analysis & Determination:

80. Having reviewed the pleadings filed, the evidence adduced and the submissions on record, I frame the following questions for determination:
- a. Whether or not a contract of lease exists between the plaintiff and the Defendants.
 - b. Whether or not the 2nd Defendant is entitled to remain in occupation under the doctrine of estoppel.
 - c. Is the Plaintiff entitled to vacant possession of the suit property 12XX7/2?
 - d. Are mesne profits due and payable?
 - e. Who bears the costs of the suit?
81. There is no dispute that there was an executed lease agreement between the plaintiff and the 1st Defendant and on the face of it, the lease period was 8 years commencing from 3rd September, 2013. It is also not disputed that the 1st Defendant did not stay on the suit premises for the duration of the lease. From the evidence presented, the plaintiff accused the 1st Defendant for rent default and served the contested notice to terminate the said tenancy in May 2015. While the 1st Defendant argued that the size of the land leased was 100 acres but on the ground size was 75 acres.
82. In the process of their so-called dispute, the 2nd Defendant came into the picture courtesy of the 1st Defendant. The 1st Defendant in their testimony stated that they introduced the 2nd Defendant to the Plaintiff as a customer taking over from them. There is no dispute as to the transactions undertaken (sale of assets) between the two defendants.
83. The lease which joined the plaintiff and 1st defendant and may be 2nd defendant (whether legally or otherwise) expired on 2nd September, 2021 during the pendency of this suit. Other than the said lease executed on 3rd September, 2013, there was no lease executed thereafter between the plaintiff and the 2nd Defendant. During the pendency of the impugned lease and this suit, the 2nd Defendant has been paying monthly rents. The Plaintiff avers that the rents were received on a without prejudice basis.
84. The lease having come to an end due to effluxion of time, does the 2nd defendant currently on the suit premises have any legal basis to deny the plaintiff vacant possession demanded? The pleadings by the 2nd Defendant as contained in the counter-claim, were hinged on the remainder term of the impugned lease agreement.
85. Despite the impugned lease having expired, both Defendants have submitted that there was a landlord-tenancy relationship created under the doctrine of estoppel. It is trite law that courts do not re-write contracts between parties. This was the holding in the often-cited of National Bank Ltd Vs. Pipe Plastic Samkolit (K) Ltd (2002) E. A. 503 that a court of law cannot re-write a contract between parties.
86. The 2nd Defendant was not a party to the impugned lease hence it had the burden to prove the basis from which it could derive rights. This is in view of the holding in the case of Savings & Loan (K) Ltd vs Kanyenje Karangaita Gakombe & Another (2015) eKLR which held that;
- “In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligation on any other person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party.”



87. Amongst the evidence relied on by the 2nd Defendant is a letter dated 28/9/2015 from the 1st Defendant's advocate to the Plaintiff to assert that there was a promise to enter into a lease. This letter was in response to the Plaintiff's letter dated 18th September, 2015. It stated at paragraph 2, 3 and 4 thus;

“Our client instructs us that the proposed settlement involves the performance of certain obligations by three parties namely; Goshen Gardens Limited, Del Monte Kenya Limited and Pioneer International School. The general background of the aforesaid agreements being that Pioneer International School would purchase the remainder of Goshen Gardens Limited's term of the lease and that they would enter into a fresh lease agreement with your client. It is clear from the foregoing that the performance of the terms of the agreement between Goshen Gardens Limited and Pioneer International School would precede the execution of any settlement Agreement between our respective clients.”

88. There is no response from the Plaintiff confirming that such an arrangement existed. Thus, the contents of that letter on the face of it remained a proposal that did not materialize. The 2nd Defendant equally relies on the meeting which they say took place in the premises of the Plaintiff which discussed the intention to buy off the 1st Defendant. According to the Defendants, what was discussed in the said meeting that was now being expressed in the letter of 28th September 2015 quoted above.

89. Despite the conversations alluded to have taken place in the meeting, the Plaintiff had written to the 2nd Defendant vide a letter dated 27th October, 2015 warning it against trespass on the suit property. The letter in part acknowledged that the 2nd Defendant was to get into a lease with the Plaintiff once the 1st Defendant handed over vacant possession amongst its other obligations. At paragraph 5, the Plaintiff demands that the 2nd Defendant cease trespassing on the suit property or legal action would be taken against them.

90. In a rejoinder, the 1st Defendant wrote the letter dated same date (27.10.2015) denying the alleged trespass. It stated that all the staff in the suit premises were their employees and forewarned against any misguided legal suit. A further letter dated 28th October, 2015 addressed to the 1st Defendant reiterating the accusation of trespass. In this letter, the Plaintiff writes as follows;

“In the event the above is denied, we will need a written confirmation from the 2nd Defendant that they have not indeed taken possession of the premises within 24 hours. We are in any event copying this letter to them.”

91. The doctrine of equitable estoppel is a defense that is raised when there is evidence of conduct or representation that has been relied on by another party, with the result that the other party has suffered a detriment or injury. See in this regard the decisions by the Court of Appeal in *John Mburu vs Consolidated Bank of Kenya* (2018) eKLR and *Kenya National Assurance Company vs Kimani Another* (1987) eKLR.

92. The court of Appeal in the case of *Dhanjal Investments Limited v Shabaha Investments Limited* (Civil Appeal 80 of 2019) [2022] KECA 366 (KLR) (18 February 2022) (Judgment) held thus;

“There is an intertwined connection between the application of the concepts of affirmation, estoppel and waiver in the law that applies to performance and discharge of contracts. Affirmation and estoppel both arise from clear and unequivocal representations or conduct by a party that they will not exercise their right to treat a contract as repudiated, which if proven, then leads the other party to rely on waiver as a defence to any purported termination of a contract. Affirmation will lead to the application of the defence of waiver by



election, while waiver by estoppel is also raised as an application of the principle of equitable estoppel. The only difference between the two waivers is that unlike in a waiver by election, no knowledge of the facts giving rise to the exercise of the right to waiver and of its effects is required in a waiver by estoppel” (underline mine for emphasis).

93. It is on account of the meetings (denied by the Plaintiff) and the correspondence mentioned that the 2nd Defendant wants the court to find that a contract was initiated by estoppel between them and the Plaintiff. Did the conduct of the Plaintiff represent intention to enter a lease with the 2nd Defendant? From the documentary evidence, the letters exchanged between the Plaintiff and the 1st defendant were not cordial. For instance, before the 2nd Defendant came into the picture, the Plaintiff had already served the 1st Defendant with notice to terminate the tenancy because the 1st Defendant had defaulted in paying rent.
94. The 1st Defendant took the matter to court to challenge the notice and it is during the pendency of that suit that they looked out for the 2nd Defendant. The 1st Defendant admits that it is they who introduced the 2nd Defendant to the Plaintiffs. It also confirms that it settled the rent arrears from sale of its assets to the 2nd Defendant. In their agreement for sale, the Plaintiff was not a party and therefore in law, they cannot say the sale was on condition that the 2nd Defendant would be granted a lease.
95. As already stated, there is no correspondence produced to that effect. Though the 2nd Defendant accuses the Plaintiff of failing to call Mr Parson to confirm what was discussed in the meeting between the three parties, nothing stopped them from summoning the said Mr Parson to appear in court to clarify matters. Further, as soon as the 2nd Defendant took occupation, the plaintiff wrote a letter dated 26th October, 2015 where they accused them of trespass and threatened legal action and indeed legal action was taken in the form of these proceedings filed on 4th December, 2015.
96. The Plaintiff went further to write that any rents that were to be received would be on a without prejudice basis to protect the disputants’ over the claim for mesne profits. Thus, it is this court’s holding that none of the actions of the plaintiff can be construed as misrepresenting to the 2nd Defendant that a lease agreement would be executed.
97. In any event, if this court was to construe that the correspondence exchanged pointed to an intention to execute a lease between the plaintiff and 2nd Defendant, it remains just that: an intention. As already stated earlier, this court lacks power to compel parties to take that intention further by translating it into a lease.
98. The summary of the facts of this case are:
 - i. that the impugned lease executed between Plaintiff and the 1st Defendant having ended by effluxion of time
 - ii. There being no lease between Plaintiff and the 2nd Defendant it follows that the 2nd Defendant can only remain in possession of the suit premises with the consent of the plaintiff.
 - iii. There are no facts to support the defense of estoppel.
99. That consent has been denied by virtue of the Plaintiff sustaining the current proceedings to the end. Consequently, I hold that the Plaintiff has proved its case on a balance of probabilities and is entitled to vacant possession. However, it is not entitled to mesne profits as the monies equivalent to mesne profits has been paid by the 2nd Defendant during the pendency of this suit.



100. Further, based on the analysis hereinabove stated, I find and hold that there is no merit in the counter-claims mounted by each of the Defendants. The same are dismissed.
101. The 2nd Defendant operates as a school on the suit property therefore while making my final orders, I take regard to the best interest of the child. The best interest herein is to let the school calendar for this year run to an end before the students' learning is disrupted. It is on this account that although I make an order for vacant possession, the 2nd Defendant shall surrender such vacant possession on the 10th of December 2025. Between now and the 10th December, 2025, the 2nd Defendant shall continue to pay the monthly rents due to the Plaintiff.
102. In conclusion, judgement is entered for the Plaintiff against the Defendants jointly and severally as follows:
- a. A permanent injunction restraining the 1st and 2nd defendant(sic) whether by itself or its agents and/or employees or otherwise whomsoever from transferring possession of the plaintiff's property being a portion of the property known L. R. No. 12XX7/2 to any other third party (with effect from 10th December, 2025)
 - b. A mandatory injunction be issued to compel the Defendants either by themselves their agents and/or employees or otherwise whomsoever on 10th December, 2025 to vacate the Plaintiff's property known as LR.No.12XX7/2(the suit property). The Defendants jointly and severally are ordered to:
 - I. Take away, pull down or otherwise remove all fixtures, fittings, effects and/or any assets whatsoever belonging to them from the suit property and to make good to the reasonable satisfaction of the Plaintiff, all damage caused by such removal. In default of compliance with this order, the Plaintiff be at liberty to remove such fixtures, fittings and/or assets and to recover the costs of such removal from the defendants.
 - II. To deliver vacant possession of the suit property on 10th December, 2025 to the Plaintiff in good and substantial repair and condition. In default of compliance of this order, the Defendants be evicted from the suit property and the Officer Commanding Ngati Police Station is directed to supervise the eviction exercise.
 - c. Costs of the suit awarded to the Plaintiff. No costs awarded in the counter-claim.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JULY, 2025

A. OMOLLO

JUDGE

