



REPUBLIC OF KENYA



**Emerg Investment Limited v Skyline Sacco Limited (Environment and Land  
Case E048 of 2024) [2025] KEELC 5192 (KLR) (10 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5192 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND CASE E048 OF 2024**

**A OMBWAYO, J  
JULY 10, 2025**

**BETWEEN**

**EMERG INVESTMENT LIMITED ..... PLAINTIFF**

**AND**

**SKYLINE SACCO LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff commenced the present suit vide an amended Plaint dated 5th November, 2024 against the Defendant seeking the following orders:
  - a. Payment of all sums that have fallen due and payable to the Plaintiff totalling Kenya Shillings Twenty-Six Million, Seven Hundred and Twenty Five Thousand Four Hundred and Twenty KES 26,725,420/=.
  - aa) Declaration that the Defendant's purported termination of the lease dated the 30th May, 2022 over Nakuru Municipality Block 9/34 (Vickers House) was illegal, unjustified and amounted to breach of contract.
  - b. Interest on (a) above at court rates from the date of filing this suit until payment in full.
  - c. Costs occasioned by this suit
  - d. Any other relief that this honourable court may deem fit and just to grant.
2. The Defendant filed its Amended Statement of Defence and Counter claim dated 11th February, 2025 where it denied the allegations in the plaint and sought for the following orders:
  - a. A declaration that the lease agreement accepted by the Defendant (now Plaintiff) on the 26th April, 2022 was a periodic lease.



- aa) A declaration that the Defendant's termination of the periodic lease over Nakuru Municipality Block 9/34 (Vickers House) was justified, procedural and legal.
  - b. An order for refund of the balance of the security deposit being Kshs. 548, 680/=
  - c. Costs of this suit.
  - d. Interest in (b), (c) & (d) above from the date of filing the suit to the date of payment in full. Plaintiff's case
3. Nalinkumar Meghji Shah testified as PW1 where he adopted his witness statements signed in February, 2025 as his evidence in chief. He testified that he was the director of the Plaintiff company. He further testified that Mr. Amit Shah was also one of the directors in the company. He testified that he had also filed the board resolution dated 20th May, 2024 to allow them file this case. He further testified that he had filed other 16 documents which were produced as PEX 1-PEX 16 and also a supplementary list of documents which documents he produced as PEX 17-PEX 18. He also filed a further list of documents with one photograph which he produced as PEX 19.
  4. It was his testimony that he had sued the Defendant for breach of contract. He testified that they had both signed a lease for Vickers House, Nakuru /Municipality Block 9/34, Kenyatta Avenue. He produced the lease as PEX 20. He testified that that they had leased from the Defendant and that the lease was registered at the land department. He added that the lease was for 63 months from 1st June, 2022 to 31st August, 2027. He testified that the lease was registered against the title.
  5. PW1 testified that they vacated the premises on 2nd May 2024 before the lease had expired. It was his testimony that the Defendant's advocates wrote them a letter informing them that they wished to have the lease terminated. He added that they were given 2 months' notice. He testified that the leased was for 63 months without renewal. He testified that the lease was terminated in 2024 and that the lease was to run until 31st August, 2027. He further testified that the annual rent was as provided in the lease. He also testified that they left on 2nd May, 2024 to AFC building.
  6. He testified that when they left in May, they were in rent arrears of Kshs1,646,040. He added that the rental arrears was up to April 2024. It was his testimony that they paid rent quarterly in advance. He further testified that they were in arrears of 30 months.
  7. He went on to testify that they were told to use the deposit refundable to the tenant at the end of tenancy and that they were to put the lease in good state. PW1 testified that the Defendant left the premises in deplorable state. He also testified that he was yet to restore the premises which cost would be Kshs. 342,526. He testified that his claim was for Kshs. 26,725,420. He also testified that the lease showed 63 years but it is 63 months. He added that it was not de-registered.
  8. PW1 testified that they a fixed term of 5 years and 3 months. He testified that they had leased the premises to the tenants with full possession for 63 months. He added that he could not leave the property to another tenant since they had registered the lease as an encumbrance.
  9. He testified that in the event the tenants failed to pay rent in time or were under liquidation, they could re-enter. PW1 testified that there was no provision for Notice to leave. He further testified that the termination was illegal and unjustified. He testified that the deposit was refundable after successful handing over. He added that ty deducted the deposit from their claim.
  10. Upon cross examination by Kipkoech for the Defendant, PW1 stated that he had 6 properties in Nakuru CBD which included Vikers building where he had several tenants. He confirmed that he was one of the directors and shareholder. He added that his parents invested in the properties.



11. He stated that the Defendant's advocate served them with the notice dated 20th February, 2024 and that he responded on 28th February, 2024. He further stated that the tenant handed over the property on 2nd May, 2024 but that the premises were not in good state. He stated that;
  - a. There were billboards and branded logos
  - b. Names written all over
  - c. The panting was not in good condition.
  - d. Electricals were poor.
12. He stated that it was as a result of usual usage by a tenant and that it required repair. He stated that the lease was a fixed term lease and that the Defendant ran a Co-operative SACCO. He stated that when the business collapses, he takes over the premises. He stated that according to the agreement, the Defendants should not have left as they could have had a negotiation. He stated that they started looking for a tenant from 2024 May and that the letter of offer was dated 26th April, 2024. He denied that the agreement was forced upon the tenant but stated that they were negotiating. He added that they had several meetings before letter of offer. He admitted that he did not have evidence of the meetings and negotiations. PW1 stated that the suit premises were specifically made for a Financial institution due to its special features. He admitted that the tenant had not stopped them from getting other tenants. He also admitted that they were in the process of discussion with
13. another tenant where they have reduced the charges by Kshs125,000 plus VAT 145,000. He added that he had offered the same for kshs375,000 plus VAT. He stated that he had expenses.
14. Upon re-examination, he stated that they would have considered a reprieve had the Defendants approached him. He stated that the Respondent never requested but that they ignored everything and left. He stated that the tenants approached them and implored them to lease their premises. He added that the lease was registered at the cost of tenant because the original title was required. He added that the standard practice was that the tenant paid for registration while the Defendant benefited from the encumbrance.

That marked the close of the Plaintiff's case. Defence case
15. Allan Kiplagat Mutei testified as DW1. He testified that he was the Chief Executive Officer of the Defendant. He produced his statement dated 11th February, 2025 which was adopted as his evidence in chief. He also testified that he had filed a list of documents which documents he produced as follows: a letter of offer dated 26th April, 2022 DEX1, termination of lease dated 20th February, 2024 DEX 2, letter dated 12th April, 2024 DEX 3, letter dated 29th April, 2024 DEX 4, letter dated 7th June, 2024 DEX 5, certificate of incorporation DEX 6 and board resolution DEX 7 It was his testimony that he sought for a refund of Kshs. 548,680. He testified that they paid a 3- month deposit to the landlord when they entered the building. He testified that they had used two months' rent and that the balance was for the current month which they requested the landlord to refund the same. He testified that they left since the activities of the SACCO went down and they acted so as to safeguard the interest of their members. He testified that they were hosted by AFC where they pay a rent of Kshs. 198,000/=.
16. Upon cross examination by Kisila, DW1 stated that the Defendant was a limited liability Corporation. He added that they hoped to make profit and not make losses. He stated that he joined the Defendant on 1st February, 2004 and that he was part of the board. He added that he participated in the decision. He stated that they left before the letter of offer and during execution of lease agreement. He stated that the term in the letter of offer was to be the terms of the lease. He admitted that they accepted the offer.



17. He stated that the rent was graduated depending on location of premises. DW1 admitted that they did not have any letter that requested reduction of rent. He stated that he had called PW1 before he wrote the notice. He further stated that he had occupied the premises from May 2022 to May 2024 before he wrote the notice. He admitted that they had not given reasons for termination.
  18. He stated that their letter referred to the lease. He also admitted that the lease had no provision for early termination. He stated that they gave a 2 months' notice as advised by their legal team. He added that they paid rent quarterly in advance and that they only had rent arrears for March and April 2024.
  19. He also stated that notice was given on 20th February, 2024 and that it was to lapse by end of April. We relocated to AFC building. He stated that if they would be given time, they could demonstrate that they wrote letters. He denied that he saw any bill of quantity. He also denied removal of the branding on the premises. He stated that they did not have a report on estimate on costs of removal of the brandings since they were not given the opportunity to remove the brandings
  20. Upon re-examination, DW1 stated that when they went for inspection, they requested for a date to remove the brandings but they were not given a chance. He stated that at termination, they were in the final quarter for the year being from February/March /April. He stated that the landlord did a standard lease document. He further stated that after thorough assessment, the board requested him to call the landlord and negotiate for rent and they were able to pay Ksh. 200,000 and not Kshs. 325,000/=
- That marked the close of the Defence case.

### **Submissions.**

21. Counsel for the Plaintiff filed his submissions dated 7th April, 2025 where he gave a summary of the case and identified four issues for determination. The first issue was whether the Defendant violated and/or impinged the terms of the subject lease dated 30th May, 2022 over Nakuru Municipality Block 9/34 "vickers House". While submitting in the affirmative, he argues that the Defendant's purported termination of the lease was illegal, unjustified and amounted to a breach of contract. He further argues that the lease dated 30th May, 2022, for the property "vickers House," was for a period of Sixty-Three (63) months, effective from 1st June, 2022, to 31st May, 2027. It was his submission that the Defendant's termination letter dated 20th February, 2024, purporting to give two (2) months' notice of intention to terminate, was not a valid termination clause within the lease agreement. He submits that the lease did not contain a termination clause prior to its expiry. He relied on the case of National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR. He also relies on the principle of "Pacta Sunt Servanda," which emphasizes that parties are bound by the terms of their contract unless there is coercion, fraud, or undue influence, or where equity might require a party to escape from a bad bargain. Counsel submits that the Defendant's unilateral termination of the lease was unlawful and unjustified.
22. He also relied on the Supreme Court case in Kwanza Estates Limited V Jomo Kenyatta University of Agriculture and Technology (Petition E001 OF 2024) [2024] KESC 74 (KLR) and submits that the economic hardship does not absolve parties from their contractual lease obligations. Counsel submits that after the Defendant's unlawful termination of the subject lease, the Plaintiff moved with speed to mitigate its losses in line with operative principle of mitigation. He cited the case of Joseph Mwangi Gitundu V Gateway Insurance Co. Ltd (2015) eKLR and submits that through its consultants Golnvest Property Consultants Ltd, they have marketed the suit property for lease to prospective lessees.



23. The second issue was whether the Plaintiff is entitled to the reliefs sought in the amended Plaint dated 5th November, 2024. It was counsel's submission that the Plaintiff seeks compensation for the illegal, unjustified and termination. He further submits that the same included the Defendant's cumulative rent arrears for March, April, and May 2024 and distress for rent. It was his submission that the security deposit and expenses incurred was due to the Defendant's failure to restore the premises to its original state and for damages. He submits that a security deposit of Kenya Shillings Five Million, One Hundred and Sixty Thousand (Kshs. 5,160,000/-) was paid at the commencement of the lease. He further submits that the Defendant failed in its duty to mitigate its own losses. He relied on the Supreme Court case, as cited in Joseph Mwangi Gitundu Vs. Gateway Insurance Co. Ltd. (2015) eKLR and African Highland Produce Limited v John Kisoroi (2001) eKLR.
24. The third issue for determination is whether the Defendant's counter claim is merited. Counsel submits in the negative and argues that the Defendant's contention that the lease was not a fixed-term lease without an early termination clause, but rather allowed for early termination by notice was misplaced. He also submits that the Defendant basing its claim on the frustration doctrine due to the COVID-19 pandemic does not hold water.
25. On the final issue of costs, it was his submission that as the general rule, costs usually follow the events. He urged the court to find that the Plaintiff proved its case and thus ought to be awarded costs.
26. Counsel for the Defendant on the other hand filed his submissions dated 22nd April, 2025 where he identified three issues for determination. The first issue was whether the Defendant breached the lease agreement with the Plaintiff. He submits in the negative and argues that no breach occurred since the lease was lawfully terminated due to unforeseen circumstances and proper notice. It was his submission that due to financial constraints and the country's harsh economic conditions, the Defendant could no longer sustain the hefty rent, which had increased by 10% every successive
27. year. He relied on the doctrine of frustration as grounds to excuse the Defendant from further performance. He submits that the said doctrine applied when circumstances appear from the nature of the contract and its surroundings, or some future event, make the contractual obligation impossible or fundamentally different from what was contemplated. He relied on the case of Kwanza Estates Limited V Jomo Kenyatta University of Agriculture and Technology (Petition E001 OF 2024) [2024] KESC 74 (KLR) and argues that the lease performance was subject to fund availability, and the economic depression and the Finance Act 2023's increase in interest rates made it impossible to meet their obligation. He further submits that the lease was a periodic tenancy and was properly terminated under Section 57 (4) of the *Land Act*, which allows termination by either party giving notice equivalent to the period for which rent is payable. He cited that case of Chimantal Meghji Naya Sha & another vs Oxford University Press (EA) Ltd [2007] KEHC 3030 (KLR)
28. The second issue is whether damages are payable to the Plaintiff for breach of contract. He relied on the case of African Highland Produce Ltd V Kisorio [2001] EA 1 and submits that the Plaintiff had a duty to take all reasonable steps to mitigate its loss. He argues that due to the harsh economic situation and the Finance Act 2023, the Plaintiff should have reduced the rent to make it more attractive to new tenants. He submits that the law imposes a duty on the Plaintiff to mitigate loss and debar claims for damage due to the Plaintiff's neglect. He relied on the case of Kiptoo vs Attorney General [2010] IEA 201. He further submits that the Plaintiff has not provided sufficient evidence to show damages or demonstrate mitigation efforts. He relied on the case of Douglas Odhiambo Apel & Another vs Telkom [2014] eKLR. He also submits that requiring the Defendant to pay rent for the remainder of the lease term would amount to unjust enrichment for the Plaintiff, especially since the Defendant provided two months' notice to allow the Plaintiff to find a new tenant.



29. The third issue was whether the Defendant's Counterclaim is merited where counsel submits in the affirmative and argues that the counterclaim for KShs. 548,680/= plus interest is merited. On the final issue of costs, he relied on Section 27 of the *Civil Procedure Act*, which grants discretion to the court regarding costs. He submits that the Defendant's submissions, evidence, and the merits of its counterclaim should lead to the dismissal of the Plaintiff's suit, thus shifting the cost burden to the Plaintiff.

### **Analysis and Determination**

30. I have considered the pleadings, evidence on record and submissions and I am of the view that the following issues arise for determination:
- a. Whether or not the impugned Lease Agreement was terminable vide a notice of termination.
  - b. Whether the termination notice dated 20th February, 2024 constituted and amounted to breach of the Lease agreement.
  - c. Whether the Plaintiff is entitled to the orders sought in its amended plaint.
  - d. Whether the Defendant is entitled to refund of the security deposit which was paid at the onset of the lease agreement.

### **Whether or not the impugned Lease Agreement was terminable vide a notice of termination.**

31. It was the Plaintiff's case that the lease did not have a termination clause as it was for a fixed term. The Defendant on the other hand gave a termination notice of two months to the Plaintiff vide the letter dated 20th February, 2024. The Defendant argues that the same could be validly terminated by issuance of a two months' notice due to frustration of the lease agreement arising from the COVID period which gave them a financial constraint thus unable to keep up with the quarterly rent. It is imperative to point out that where a dispute arises from a duly executed contract, it behooves this court to interpret the impugned contract by relying on the express terms contained therein.
32. In the case of *Samuel Kamau Macharia V Daima Bank Limited* [2008] KECA 68 (KLR) the court held that:
- “A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”
33. In the case of *Five Forty Aviation Limited v Erwan Lanoe* [2019] KECA 763 (KLR) the court held as follows:
- “. the doctrine of frustration operates to excuse further performance where it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the foundation of the contract will take place, and before breach performance becomes impossible or only possible in a very different way to that contemplated without default of either party and owing to a fundamental change of circumstances beyond the control and original contemplation of the parties. The mere fact that a contract has been rendered more onerous does not of itself give rise to frustration.(See also Halsbury's Laws of England (3rd Edition) Volume 8 page 185(i), on the doctrine of frustration para 320) and *Davis Contractors Ltd v Fareham U.D.C.* [1956] A.C.696 for the observations inter



alia that:“Frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because, the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. ”

34. In the instant case, the question this court needs to answer is did the COVID pandemic make it impossible for the lease agreement to be accomplished? It is not in dispute that the Covid pandemic was declared in 2020 and the lease agreement was entered into on 30th May, 2022, 2 years after the Covid period had subsided. It is this court’s view that the same did could not be a concrete reason to have affected the substratum of the lease. In light of the same, it is my opinion that the ingredients for the doctrine of frustration as outlined in the aforementioned case have been not been fulfilled.

35. In the case of Ramji Meghji Gudka Limited v Kisii University [2019] KEHC 6223 (KLR) the court held as follows:

It is not in dispute that both parties duly entered into and executed a lease agreement dated the 30th May, 2022. It is worthwhile to note that the lease agreement stipulated the totality of the terms and conditions upon which the parties agreed to be bound. Moreover, there is no gainsaying that the lease agreement was for a specified duration of 63 months from 1st June, 2022 to 31st August, 2027. It is this court’s view that both parties having entered into and executed the lease agreement, they agreed to be bound by the terms contained therein.

36. Section 57(4) of the *Land Act* provides as follows:

“a periodic tenancy may be terminated by either party giving notice to the other, the length of which shall not be less than the period of the tenancy and shall expire on one of the days on which rent is payable.”

37. It is this court’s view that termination of the lease mid-term was not available to the Defendant in this case as the said position advanced by the Defendant only applies to periodic leases.

38. This court thus finds that the lease between the parties in this case was not a periodic lease and therefore the notice issued by the Defendant was of no consequence. I find that the Defendant could not validly terminate the lease agreement.

#### **Whether the termination notice dated 20th February, 2024 amounted to breach of the Lease agreement.**

39. Having established that the Defendant did not have an option to terminate the lease before it ended, it is this court’s view that the termination notice amounted to breach of the lease agreement.

40. In the case of Ramji Meghji Gudka Limited V Kisii University [2019] KEHC 6223 (KLR) the court held that:

“the fact that the agreement between the parties was for a fixed term of 6 years did not exclude the possibility of termination. It only means that termination would amount to a breach for which the party at fault would have to pay damages.”

#### **Whether the Plaintiff is entitled to the orders sought in its amended plaint.**

41. It is this court’s view that having found that the Defendant breached the terms of the lease agreement, the Plaintiff is entitled to damages for breach. However, the Plaintiff in its amended Plaint computed



the damages payable as the rent remaining unpaid for the entire period of the lease and damages for alleged damages by the Defendant on the suit property. The Defendant submits that they gave the Plaintiff adequate notice in the circumstances of the tenancy as evidenced from the Defendant's letter dated 29th April, 2024.

42. Moreover, even though there was breach of contract, the Defendant took the reasonable step of issuing the Plaintiff a notice and thus the Plaintiff consequently was entitled to take immediate steps to mitigate its losses.
43. In the case of *Consolata Anyango Ouma v South Nyanza Sugar Co. Ltd* [2015] KEHC 4426 (KLR) the court held as follows:

“As a general principle, the purpose of damages of breach of contract is subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach contained of had not occurred. This is the principle encapsulated in the Latin phrase *restitution in integrum*.”

44. The Defendant submitted that it cleared the rent arrears for March and April, 2024 using the deposit a fact which the Plaintiff did not deny. In the case of *Caltex Oil (Kenya) Ltd V Evanson Njiiri Wanjihia* (2017) eKLR the court held that:

“in calculating damages in such circumstances, the court must take a reasonable approach. Unjust enrichment is always frowned upon by the court. There is also the expectation by the law that the aggrieved party must mitigate its loss and not fold its hands and expect to reap a windfall by way of an award of damages by the court.”

45. Notably, the Defendant in mitigation of loss did not state any specific figure that should be awarded to the Plaintiff. It instead sought for refund of the balance of the deposit.
46. In the circumstance it would be unfair for the Plaintiff to be awarded the rent for the entire period of the lease yet the Defendant vacated the premises in April. I am of the view that an award of rent payable for 10 months since arrears accrued only for the year 2024 would be fair, reasonable and adequate compensation to the Plaintiff for the breach of contract by the Defendant.
47. The rent payable is from 1st March, 2024 to 31st December, 2024 @ Kshs. 430,000 per month. Total amount payable is therefore Kshs. 430,000 x 10= Kshs 4,300,000/=
- Less deposit held of Kshs. 1,496,400/=
- Total amount to be awarded to the Plaintiff as damages is therefore Kshs. 2,803,600/=

**Whether the Defendant is entitled to refund of the security deposit which was paid at the onset of the lease agreement.**

48. This court already having found that the Defendant breached the terms of the lease agreement, it is therefore not entitled to the claim of refund in its Counter claim. The Defendant's counter claim is thus dismissed with costs.
49. Consequently, this court finds in favour of the Plaintiff and enters judgment against the Defendant in the sum of Kshs. 2,803,600/= together with costs and interest of the suit. It is so ordered.

**SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO**



**THE JUDICIARY OF KENYA. NAKURU ENVIRONMENT AND LAND COURT  
ENVIRONMENT AND LAND COURT**

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