Shiloah Investment Limited v Ouma t/a Nate 1 Cafe (Environment and Land Appeal E029 of 2023) [2025] KEELC 5237 (KLR) (10 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5237 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIRONMENT AND LAND APPEAL E029 OF 2023

SO OKONG'O, J

JULY 10, 2025

BETWEEN

SHILOAH INVESTMENT LIMITED ..... APPELLANT

AND

MENDEZ ATIENO OUMA T/A NATE 1 CAFE ..... RESPONDENT

(Being an appeal against the judgment and decree of Hon. J.N. Wambilyanga SPM delivered on 12th June 2023 in Kisumu CMC ELC No. 48 of 2017, Mendez Atieno Ouma t/a Nate 1 Café v. Shiloah Investments Limited)

JUDGMENT

1. This appeal is against the judgment delivered by Hon. J.N. Wambilyanga SPM, on 12th June 2023 in Kisumu CMC ELC No. 48 of 2017(hereinafter referred to as "the trial court"). The Respondent brought a suit against the Appellant at the trial court through a plaint dated 19th October 2012, which was amended on 4th October 2014. The Respondent averred that she was at all material times a tenant of the Appellant in respect of Shop No. 64 and Shop No. 65 (hereinafter referred to as "the suit property") situated on the parcels of land known as Kisumu Municipality/ Block 9/1X4 and Kisumu Municipality/Block 9/1X5. The Respondent averred that she entered into a tenancy agreement with the Appellant dated 30th May 2012 under which she was to pay a monthly rent of Kshs. 45,000/- and a refundable security deposit of Kshs. 148,500/-. The Respondent averred that on or about 3rd September 2012, the Respondent served the Appellant with a notice terminating the tenancy with effect from the end of September 2012. The Respondent averred that the Appellant rejected the termination of the tenancy and insisted that the termination of the tenancy would only be accepted if the Respondent paid rent that would be payable until the end of the lease on 1st January 2017 in the sum of Kshs. 3,761,429/-.The Respondent averred that the Appellant thereafter unlawfully locked the suit property and denied the Respondent access to the same. The Respondent averred that the Appellant also levied an illegal distress for rent against the Respondent to recover alleged rent arrears of

Kshs. 161,475/-, which was not due. The Respondent averred that the Appellant's actions were illegal and amounted to a breach of the tenancy agreement between the parties.

2. The Respondent averred that the Appellant had no right to demand future rent from the Respondent while the tenancy between the Appellant and the Respondent had been terminated. The Respondent averred that the Appellant also had no right to lock the suit property, levy distress for rent against the Respondent when there was no rent due and prevent the Respondent from handing over vacant possession. The Respondent averred that the Appellant also had no right to hold on to the refundable deposit that was paid by the Respondent at the commencement of the tenancy. The Respondent averred that following a court order made in the Respondent's favour on 16th November 2012, the Respondent was allowed to vacate the suit property unconditionally. The Respondent averred that her only outstanding claim was for a refund of Kshs. 148,500/- paid as a deposit.

3. The Respondent prayed for judgment against the Appellant for; a declaration that the tenancy relationship between the Respondent and the Appellant was determined on 3rd September 2012, a permanent injunction restraining the Appellant by itself, its employees, workers, agents and/or whomsoever jointly and severally from levying distress for rent, advertising for sale, selling, alienating, disposing, transferring, charging, dealing and/or interfering howsoever with the Respondent's items that were locked up on the suit property, Kshs. 148,500/- being a refundable deposit, costs of the suit and any other or further remedy the court would deem just and expedient to grant.

4. The Appellant filed a defence to the Respondent's claim in the trial court on 31st October 2012. The Appellant amended its defence to plead a counterclaim against the Respondent on 13th May 2013. In its amended defence, the Appellant admitted that the Respondent was its tenant on the suit property at the agreed monthly rent of Kshs. 45,000/-. The Appellant denied receiving from the Respondent a sum of Kshs. 259,734/- as security deposit. The Appellant denied that the Respondent served it with a notice of her intention to terminate the tenancy between the Appellant and the Respondent. The Appellant averred that if such notice was served then it was not enforceable. The Appellant averred further that the lease between the Appellant and the Respondent was for a term of 6 years and there was no provision for termination before the expiry thereof. The Appellant averred further that at the time it levied distress for rent against the Respondent, the Respondent was in rent arrears and had also not paid rent for October 2012. The Appellant averred that in the circumstances, the distress was lawful. The Appellant averred that the Respondent was undeserving of the injunctive relief sought.

5. In its counterclaim, the Appellant averred that under Clause 3(a) of the lease agreement dated 21st May 2012 between the Appellant and the Respondent, the Respondent was under an obligation to pay rent and service charge for the entire lease period, which lease was to expire on 31st December 2017. The Appellant averred that the Respondent was liable to pay the Appellant a sum of Kshs. 3,976,978/- as special damages comprising the actual service charge for January to June 2012 in the sum of Kshs. 46,617/-, Rent for September 2012 in the sum of Kshs. 57,420/-, actual service charge for July 2012 to December 2012 in the sum of Kshs. 54,544/-, rent for the remainder of the lease period, May 2013 to December 2017 amounting to Kshs. 3,428,429/- and VAT on the said rent amounting to Kshs. 548,548/-.

6. The Appellant averred that the Respondent was under an obligation under the lease to give back vacant possession of the suit property in the same condition in which it was let to the Respondent failure to which the Respondent was to be liable to the Appellant for the costs of restoring the premises, wear and tear exempted. The Appellant averred that the Respondent refused to pay the expenses for restoring the suit property to its original state when the same was demanded by the Appellant. The Appellant claimed from the Respondent a sum of Kshs. 59,727/- as the cost of reinstating the suit property to its original state when let to the Respondent made up of Kshs. 30,000/- for purchasing paint,

painting and replacing electrical sockets and cables inclusive of labour charges, and Kshs. 29,927/- for electricity bills outstanding at the time the Respondent handed back possession of the suit property to the Appellant. The Appellant averred that the Respondent was liable to pay to the Appellant a sum of Kshs. 4,511,693/- after which the Appellant would refund to the Respondent the deposit of Kshs. 148,500/- that was paid by the Respondent at the commencement of the lease. The Appellant prayed that the Respondent's suit be dismissed with costs and judgment be entered for the Appellant in the sum of Kshs. 4,511,693/- as prayed in the counterclaim.

7. The Respondent filed a reply to defence and defence to the counterclaim on 13th March 2015. The Respondent averred that the security deposit refund being claimed from the Appellant was Kshs. 148,500/-. The Respondent averred that a lease without a termination clause was absurd and against the law of contract. The Respondent denied that it was liable to the Appellant for special damages amounting to Kshs. 3,976,978/-. The Respondent averred that she handed back possession of the suit property to the Appellant in good repair and no bills were pending to warrant to the Appellant's claim. The Respondent denied the Appellant's counterclaim of Kshs. 4,511,693/- and prayed that the counterclaim be dismissed with costs to the Respondent.

8. Together with the plaint, the Respondent filed an application dated 19th October 2012 seeking among others, an order that pending the hearing and determination of the trial court suit, the Appellant be compelled to unconditionally release to the Respondent all the Respondent's items on the suit property and an order of a temporary injunction against the Appellant restraining it from levying distress for rent, advertising for sale, selling, alienating, disposing or dealing with the Respondent's items on the suit property pending the hearing of the suit. The Respondent's application was allowed on 16th November 2012.

9. It appears from the material on record that the Respondent did not remove her goods/items from the suit property even after the court made orders on 16th November 2012 compelling the Appellant to release the said items to the Respondent unconditionally and also restraining it from levying distress against the Respondent or interfering with the said items in any manner. The Appellant moved the court through an application dated 12th March 2013 seeking an order to compel the Respondent to remove all her items from the suit property, which order was granted by the court on 20th March 2013. It was until April 2013 following this order that the Respondent handed over vacant possession of the suit property to the Appellant.

10. The trial court heard the matter and delivered a judgment on 12th June 2023. The trial court dismissed the Appellant's counterclaim with costs and entered judgment for the Respondent against the Appellant for; a declaration that the tenancy relationship between the Respondent and the Appellant was appropriately determined, Kshs. 148,500/- being a refund of the deposit paid by the Respondent and the costs of the suit. The lower court framed two issues for determination namely; whether the Respondent was entitled to the reliefs sought in the plaint and whether the Appellant's counterclaim had merit. The trial court referred to the court's earlier ruling made on 16th November 2012 on the Respondent's interlocutory application for injunction and held that the Respondent could not be forced to continue being the Appellant's tenant. The court also referred to the said ruling and held that the Respondent had paid to the Appellant the rent for September 2012. Further referring to the said ruling, the trial court found that if there was any rent in arrears, the court would have mentioned the same in the ruling of 16th November 2012. The court therefore found that the service charge from January to June 2012 and the rent for September 2012 had been paid by the Respondent. With regard to the rent and service charge claimed by the Appellant from October 2012 to December 2017 after the termination of the tenancy agreement by the Respondent, the trial court found that the lease between the Appellant and the Respondent had no termination clause and that the parties were bound by the

terms of their agreement. The court found however that the Appellant was at liberty to rent out the suit property to another tenant and as such there was no basis or merit in the Appellant's claim for rent and service charge after the termination of the lease.

11. As regards to the Respondent's claim for Kshs. 148,500/- paid as a refundable deposit and Appellant's claim for Kshs. 59,727/- for restoring the suit property to its original state, the trial court held that the Appellant did not prove its claim which was in the nature of special damages. The court held that the Appellant merely produced a list of the expenditure incurred in the restoration exercise instead of evidence of the expenditure. The court found however, that the Respondent had proved its claim for the sum of Kshs. 148,500/- which the Respondent paid as a refundable deposit to the Appellant. It was on the basis of those findings and holding that the trial court declared that the tenancy agreement between the Appellant and the Respondent was properly terminated and ordered the Appellant to refund to the Respondent the sum of Kshs. 148,500/- paid as a deposit.

12. The Appellant was aggrieved by the decision of the trial court and preferred the present appeal. In its Memorandum of Appeal dated 29th June 2023, the Appellant challenged the judgment of the trial court on the following grounds;

    1. The Learned Trial Magistrate erred in fact by stating that the court had made a determination on 16th November 2012 that the rent arrears had been paid by the Respondent.

    2. The Learned Trial Magistrate erred in law by concluding that an issue of fact can be determined on an interlocutory application.

    3. The Learned Trial Magistrate erred in law and fact in relying on the ruling made on 16th November 2012, which ruling was based entirely on a balance of convenience.

    4. The Learned Trial Magistrate erred in fact in failing to take into account that the Respondent had to be compelled to remove her items from the suit property, which she did only after the Appellant's application dated 12th March 2013, which the Respondent did not oppose.

    5. The Learned Trial Magistrate erred in law and fact in his finding that the lease between the Appellant and the Respondent was properly determined, although the lease had no termination clause.

    6. The Learned Trial Magistrate erred in law and fact by amending, rewriting and imputing a termination clause into a signed lease agreement which had no termination clause.

    7. The Trial Magistrate erred in law and fact in dismissing the Appellant's counterclaim for arrears of rent in spite of the fact that the Respondent remained in occupation of the suit property until she was compelled by a court order to give vacant possession to the Appellant.

    8. The Trial Magistrate erred in law and fact by finding that the lease agreement between the Appellant and the Respondent was unfair while both parties entered into the agreement freely and had an opportunity to amend the same.

    9. The Trial Magistrate erred in law and fact by dismissing the Appellant's claim for rent for the remainder of the term of the lease.

    10. The Trial Magistrate erred in law and fact by failing to appreciate that the parties entered into the lease agreement freely.

    11. The Trial Magistrate erred in law and fact by declaring the lease agreement between the parties as unfair.

13. The Appellant prayed that the appeal be allowed and the judgment and decree of the trial court be set aside and, in its place, judgment be entered for the Appellant as prayed for in the counterclaim. The Appellant also prayed for the costs of the appeal. The appeal was argued through written submissions. The Appellant filed its submissions dated 15th October 2024, while the Respondent filed submissions dated 29th November 2024.

The Appellant's submissions

14. On grounds 1, 4 and 7 of appeal, the Appellant submitted that through an order made on 16th November 2012 on the Respondent's application dated 19th October 2012, the trial court granted a temporary injunction restraining the Appellant from selling the Respondent's items and ordered the Appellant to release the same to the Respondent unconditionally. The Appellant submitted that it complied with the court order and gave the Respondent adequate time to pick up her items from the suit property. The Appellant submitted that despite the said court order allowing the Respondent to vacate the suit property, the Respondent remained in possession of the suit property until April 2013, when the Respondent was compelled by another court order made on 20th March 2013 to deliver possession. The Appellant submitted that the Respondent was liable to pay rent and service charge to the Appellant until April 2013 when she delivered vacant possession of the suit property. The Appellant submitted that the trial court erred in dismissing its claim for rent arrears and service charge.

15. On grounds 2 and 3 of appeal, the Appellant submitted that the ruling delivered by the trial court on 16th November 2012 was on an interlocutory application, and the findings made by the court were not final as the court could not go into an in-depth consideration and determination of the contested facts at that stage. The Appellant submitted that the trial court erred in taking the ruling by the court on an interlocutory application as determining the contested facts in the main suit.

16. On grounds 5 and 6 of appeal, the Appellant submitted that the trial court erred in its finding that the lease between the parties was properly determined by the Respondent. The Appellant submitted that in reaching that finding, the trial court wrongly re-wrote the lease agreement for the parties and inserted a non-existent termination clause. The Appellant cited *National Bank Ltd. v Pipe Plastic Samkolit (K) Ltd*.[2002] 2 EA 503, [2011]eKLR, and submitted that the court has no business rewriting contracts for the parties. The Appellant submitted that the parties entered into a 6-year lease commencing on 1st April 2016 and terminating on 1st April 2022(sic). The Appellant submitted that neither the letter of offer nor the lease agreement contained a clause allowing the termination of the lease before its expiry. The Appellant submitted that the lease provided expressly in Clause 3 (n) (sic) that if the Respondent terminated the lease before its expiry, the Respondent would remain liable to the Appellant for the payment of rent, service charge and any other sum payable under the terms and conditions of the lease and for the entire period of the lease. The Appellant submitted that since the lease had no termination clause as found by the trial court, the Respondent was bound by the terms of the lease for the entire period of 6 years. The Appellant cited two High Court decisions and submitted that where a fixed term lease without a termination clause is terminated before its expiry date, the termination amounts to a breach of contract for which a party at fault is liable to pay damages.

17. On ground 9 of appeal, the Appellant submitted that the Respondent breached the lease agreement between the parties by terminating it prematurely. The Appellant submitted that the Respondent was liable to the Appellant for rent for the remainder of the lease up to 31st December 2017 which she was bound to pay under the terms of the lease. The Appellant submitted that the trial court erred in dismissing its counterclaim for rent for the remainder of the lease.

18. On grounds 8, 10 and 11 of appeal, the Appellant reiterated that the parties entered into the lease agreement freely and that the Respondent had the opportunity to amend any clause of the lease. The Appellant submitted that the Respondent, having freely agreed to be bound by the terms of the lease, the trial court erred in its finding that the terms of the lease were unfair. The Appellant submitted that a court would decline to enforce a contract sparingly and only in the clearest of cases of harm being occasioned by the enforcement.

19. In conclusion, the Appellant prayed that the appeal be allowed.

The Respondent's submissions

20. The Respondent framed two issues for determination by the court namely, whether the trial court erred in its finding that the Appellant was not entitled to the arrears of rent sought in the counterclaim, and whether the trial court erred in finding that the lease agreement had been properly determined. The Respondent submitted that upon being served with a notice of termination of the tenancy, the Appellant served the Respondent with an invoice for Kshs. 57,420/- being rent for the month of September 2012 which the Respondent paid in full. The Respondent submitted that the agreed monthly rent was Kshs. 45,000/- and the service charge was Kshs. 4,500/- for the period 1st January 2012 to 31st December 2012. The Respondent submitted that the monthly rent, inclusive of service charge, was to be Kshs. 49,500/-. The Respondent submitted that having settled the said invoice for Kshs. 57,420/-, she was not in arrears of rent or service charge for September 2012. The Respondent submitted that she was unable to remove her items from the suit property after the expiry of her termination notice because the items were attached by the auctioneers who had levied distress for rent against her on the instructions of the Appellant. The Respondent submitted that it was not until 16th November 2012 that the distress for rent was lifted. The Respondent submitted that the trial court did not err in its finding that the issue of the service charge arrears claimed by the Appellant for January 2012 to June 2012 had been settled by the court in its ruling of 16th November 2012. The Respondent submitted further that the agreed service charge from 1st January 2012 to 31st December 2012 was Kshs. 4,500/- per month. The Respondent submitted that the service charge that was claimed by the Appellant was exaggerated. The Respondent submitted that all the payments which were in arrears were invoiced by the Appellant and settled by the Respondent.

21. On the second issue, the Respondent submitted that although the lease agreement had no termination clause, there was a clause in the lease which provided that any notice under the lease should be in writing. The Respondent submitted that she served a notice in writing, the notice was received and responded to on the same day by the Appellant. The Respondent submitted that she could not be forced to continue leasing premises whose rent she could not afford. The Respondent submitted that the Appellant was at liberty to lease the suit property to another tenant once the Respondent vacated. The Respondent submitted that she could not be condemned to pay for what she was not using. The Respondent submitted that such a requirement rendered the lease agreement unconscionable. The Respondent submitted that there was no error in the trial court's finding that the lease agreement was unfair and unconscionable. The Respondent submitted that the lease was lawfully terminated. The Respondent submitted that no valid grounds had been put forward by the Appellant to warrant interference with the judgment of the trial court. The Respondent prayed that the appeal be dismissed with costs to the Respondent.

Analysis and Determination

22. I have considered the pleadings filed before the trial court, together with the proceedings and the judgment of the court. I have also considered the Memorandum of Appeal filed by the Appellant

against the said judgment and the submissions by the advocates for the parties. I agree with the submissions by the Appellant on the powers and the role of this court as the first appellate court. This being a first appeal, the court has to reconsider and re-evaluate the evidence on record and draw its own conclusions on the issues that were raised for determination before the trial court. In *Bwire v Wayo & Sailoki* (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR), cited by the Appellant, the court stated that:

> " A first appellate is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand."

23. In *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212, the Court of Appeal stated that:

> " On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

24. In *Makube v Nyamuro*[1983] KLR 403, it was held that the appellate court will not interfere with the findings of fact by the trial court unless they were not based on evidence at all or they were based on a misapprehension of the evidence, or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See also, *Peter v Sunday Post Ltd*. [1958] EA 424.

25. I am of the view that the Appellant's eleven (11) grounds of appeal can be summarised into three (3) grounds namely; whether the trial court erred in its finding that the Respondent had proved her case against the Appellant on a balance of probabilities, whether the trial court erred in dismissing the Appellant's counterclaim, and whether the appeal should be allowed and if so, on what terms.

Whether the trial court erred in its finding that the Respondent had proved her case against the Appellant on a balance of probabilities.

26. In *Kurshed Begum Mirza v Jackson Kaibunga* [2017] eKLR, the court stated as follows:

> " (16) Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden."

27. In *Halsbury's Laws of England*, 4th Edition, Volume 17, at paras 13 and 14, the authors have stated as follows on the burden of proof:

> " 13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues."

28. The Respondent's case as pleaded was that the Respondent and the Appellant entered into a lease (tenancy) agreement dated 30th May 2012 in respect of the suit property on terms and conditions that were set out in the agreement, the Respondent paid to the Appellant a sum of Kshs. 148,500/- as a refundable deposit under the terms of the lease, the Respondent terminated the lease in accordance with the terms thereof, the Appellant refused to allow the Respondent to hand over vacant possession of the suit property and levied an illegal distress against the Respondent, following the court's intervention on 16th November 2012, the distress was lifted and the Respondent was allowed to vacate the suit property, and that even after the Respondent vacated the suit property and complied with the other terms and conditions of the lease, the Appellant refused to refund to the Respondent the deposit of Kshs. 148,500/-.

29. The lease (sub-lease) agreement between the Appellant and the Respondent provided that the lease period was 6 years with effect from 1st January 2012. The lease was to expire on 31st December 2017. The Respondent was to pay a monthly rent of Kshs. 45,000/- from 1st January 2012 to 31st December 2012, Kshs. 49,500/- from 1st January 2013 to 31st December 2013, Kshs. 54,450/- from 1st January 2014 to 31st December 2014, Kshs. 59,895/- from 1st January 2015 to 31st December 2015, Kshs. 65,885/- from 1st January 2016 to 31st December 2016 and Kshs. 72,475/- from 1st January 2017 to 31st December 2017. The lease provided further that the Respondent was to pay a deposit of Kshs. 148,500/- which was to be held by the Appellant "during the period of the lease free of interest as security for the payment of service charge, undertaking repairs that may have to be carried out within the demised premises and performance of all the Lessee's obligations and covenants...". The Respondent was also to pay to the Appellant a service charge monthly, together with the rent, at a minimum of 10% of the monthly rent. The lease provided that if the minimum service charge paid by the Respondent was less than the actual service charge paid by the Appellant for maintaining the suit property as determined by the Appellant's auditors in the Appellant's annual audited accounts, the Respondent was to reimburse the Appellant the difference between the minimum service charge paid and the actual expense incurred by the Appellant in servicing the suit property. The Respondent was to pay a monthly minimum service charge of Kshs. 4,500/- from 1st January 2012 to 31st December 2012, Kshs. 4,950/- from 1st January 2013 to 31st December 2013, Kshs. 5,445/- from 1st January 2014 to 31st December 2014, Kshs. 5,990/- from 1st January 2015 to 31st December 2015, Kshs. 6,590/- from 1st January 2016 to 31st December 2016 and Kshs. 7,245/- from 1st January 2017 to 31st December 2017.

30. Before the trial court, the Respondent sought a declaration that the lease agreement between the Respondent had been lawfully terminated by the Respondent and a refund of Kshs. 148,500/- paid as a deposit. The questions that I need to answer are: Whether the lease between the Appellant and the Respondent was lawfully terminated, and whether the Respondent was entitled to a refund of the deposit of Kshs. 148,500/-.

31. In the judgment delivered by the Supreme Court on 6th December 2024 in the case of *Kwanza Estates Limited v Jomo Kenyattta University of Agriculture and Technology*, Supreme Court Petition No. E001

of 2024, which concerned termination of a fixed-term lease with no termination clause like in the present case, the court stated as follows;

> "(83) The principle of *pacta sunt servanda* is one of the oldest most fundamental principles of international law that requires parties to honour their agreements and obligations. This is why the doctrine of frustration is interpreted narrowly to maintain the certainty of contracts. It is only when the frustration is substantial and the contract's purpose becomes meaningless, that the courts should step in to apply the doctrine of frustration and discharge the parties. This intervention is intended to provide reprieve to a party where it would be unjust and unreasonable to hold them to their contract. Further, as is evident from the cases we have cited and expounded on hereinabove, a party is not absolved from performing their obligations under a contract simply because it has become more expensive or more difficult.
>
> (97) Further, as we have found, the impugned lease lacked a termination clause, making the respondent's actions constitute a unilateral termination. By proceeding with a unilateral termination, the respondent effectively breached the terms of the lease, rendering the termination notice void."

32. It was common ground before the trial court and this court that the lease dated 30th May 2012 between the Appellant and the Respondent had no termination clause. According to the above decision of the Supreme Court, such a lease cannot be unilaterally terminated by one party before the date of its expiry. According to the court, unilateral termination of such a lease before the expiry of its fixed term amounts to a breach of contract. In the circumstances, the purported termination of the lease dated 30th May 2012 by the Respondent through an undated letter signed on 3rd September 2012 was unlawful and amounted to a breach of the lease. I therefore agree with the Appellant that the trial court erred in its holding that the lease between the Appellant and the Respondent was appropriately terminated.

33. As I mentioned earlier, the Respondent paid to the Appellant a deposit of Kshs. 148,500/- to be held by the Appellant during the period of the lease as security for the payment of service charge, undertaking repairs that may have to be carried out within the leased premises and general performance of all the Respondent's obligations and covenants under the lease. This means that the deposit of Kshs. 148,500/- was to be refunded to the Respondent by the Appellant subject to the Respondent fulfilling all her obligations under the lease, which included paying rent and service charge, and returning the suit property to the Appellant at the expiry of the lease in such a state of repair, order and condition as the same were at the commencement of the term of the lease, fair wear, tear and acts of God excepted. In this case, the Respondent did not fulfil all her obligations under the lease. As I have found earlier, the Respondent unilaterally terminated the lease agreement with the Appellant and as such was in breach of the lease and was liable to the Appellant in damages for such breach. From the evidence on record, particularly, the Ledger Account of the invoices raised by the Appellant and the payments made by the Respondent between 1st December 2011 to 19th October 2012 produced by the Appellant before the trial court as Exhibit 2, I agree with the Respondent that as at 19th October 2012, the Respondent had paid the rent and minimum service charge together with 16% VAT up to September 2012 when her tenancy was to terminate according to her notice. However, the Respondent was still liable to pay the difference between the minimum service charge and the actual service charge plus VAT that was incurred by the Appellant for the period 1st January 2012 to 30th June 2012, which had already been demanded by the Appellant through a demand notice dated 31st August 2012 in the sum of Kshs. 46,617/-. There was also the difference between the minimum service charge and the actual service

charge plus VAT for the period July 2012 to September 2012. It was not disputed before the trial court and this court that the Respondent was allowed by the trial court to vacate the suit property and handover possession to the Appellant on 16th November 2012 and that the Respondent remained in possession of the suit property until April 2013 when it was compelled by a court order to vacate the premises. The Respondent was liable to the Appellant for the rent and service charge from December 2012 to April 2013 when it remained in possession of the suit property even after she had been allowed to vacate the property in terms of her notice of termination of the lease. It was also not disputed that the Respondent did not hand over to the Appellant possession of the suit property in the same state in which it was let to the Respondent. For the foregoing reasons, it is my finding that the Respondent was not entitled to a refund of the deposit of Kshs. 148,500/- paid to the Appellant at the commencement of the lease.

34. Having held that the Respondent was in breach of the lease agreement dated 30th May 2012 and that she was not entitled to a refund of the deposit of Kshs. 148,500/-, I agree with the Appellant that the trial court erred in its finding that the Respondent had proved her case against the Appellant on a balance of probabilities and as such was entitled to the prayers sought in her amended plaint.

Whether the trial court erred in dismissing the Appellant's counterclaim.

35. As mentioned earlier in the judgment, the Appellant's case was that by unilaterally terminating a 6-year fixed-term lease before its date of expiry, the Respondent had breached the terms of the lease and, as such, was liable to the Appellant in damages for such breach. The Appellant's particularised damages came to Kshs. 3,976,978/-. The claim included actual service charge from January 2012 to June 2012, rent for September 2012, rent from October 2012 to December 2012, actual service charge from July 2012 to December 2012, rent from January 2013 to April 2013, rent for the remainder of the lease term, May 2013 to December 2017 and VAT thereon. The Appellant also claimed a sum of Kshs. 59,727/- for restoring the suit property to the same state it was when leased to the Respondent. In its counterclaim, the Appellant claimed Kshs. 4,511, 693/- together with interest. It is not clear whether this figure was erroneous because the damages amounting to Kshs. 3,976,978/- claimed under paragraph 16 of the amended defence and counterclaim, and the sum of Kshs. 59,727/- claimed under paragraph 18 of the same defence and counterclaim do not add up to Kshs. 4,511, 693/-. Erroneous or not, that was the Appellant's claim. The question that I need to answer is whether the Appellant proved its claim before the trial court to the required standard.

36. I have already made a finding that the Respondent breached the lease agreement that she entered into with the Appellant by terminating the 6-year lease in its first year, while it had no termination clause. I have also held that the Appellant was entitled to damages flowing from that breach. The issue remaining for determination is the quantum of the damages that was due to the Appellant from the Respondent. It was not disputed that the Respondent vacated the suit property without painting same and handing it over to the Appellant in the same condition in which it was let to her in accordance with the terms of the lease. The Respondent also never disputed the Appellant's claim that she left an outstanding electricity bill of Kshs. 29,727/-. From the evidence that was adduced before the trial court, I am satisfied that the Appellant proved that he purchased paint at a cost of Kshs. 28,545.50 for painting the suit property and that the Respondent vacated the suit property, leaving an outstanding electricity invoice from Kenya Power & Lighting Company Ltd. in the sum of Kshs. 29,727/-. I am therefore satisfied that the Appellant proved that he incurred an expense of Kshs. 28,545.50 in restoring the suit property in the same state in which it was when let to the Respondent and that the Respondent was liable to pay Kshs. 29,727/- being the outstanding electricity bill incurred during her occupation of the suit property. I am also satisfied that the Appellant was entitled to the sum of Kshs. 46,617/- claimed as actual service charge incurred between January to June 2012. This claim was based on the lease

agreement and was supported by the Appellant's audited accounts of the service charge for the period 1st January to 30th June 2012 prepared by PFK Accountants, the Ledger Account for 1st December 2011 to 19th October 2012 and demand note to the Respondent dated 31st August 2012 which were produced in evidence at the trial court. The Respondent did not produce any evidence showing that she had paid the service charge for this period. With regard to the rent for September 2012 in the sum of Kshs. 57,420/-, I am satisfied that this rent was paid by the Respondent on 19th October 2012. The payment is reflected in the Ledger Account for 1st December 2011 to 19th October 2012, which was produced in evidence by the Appellant. Concerning the rent from October to December 2012, I am of the view that the Appellant was not entitled to rent for October and November 2012. Once the Respondent served the Appellant with a notice terminating the tenancy at the end of September 2012, the Appellant levied distress for rent against the Respondent on 29th September 2012 for the recovery of a sum of Kshs. 161,457/-, which was claimed to be due from the Respondent on account of rent and service charge. The effect of the distress for rent was that the goods of the Respondent stood attached and she could not remove them from the suit property. From the Ledger Account that was produced in evidence by the Appellant, as at 29th September 2012, when the Appellant levied distress against the Respondent, the only payment that was due from the Respondent to the Appellant was the rent for September 2012 in the sum of Kshs. 57,420/- and the actual service charge for January to June 2012 in the sum of Kshs. 46,617/- making a total of Kshs. 104,037/-. This means that the sum of Kshs. 161, 457/- for which distress for rent was levied was not due from the Respondent. The distress for rent levied by the Appellant against the Respondent was unlawful in the circumstances and was rightly lifted by the trial court on 16th November 2012. The Appellant was not entitled to the rents for October and November 2012 when the illegal distress was in force. Since the Respondent was allowed to vacate the suit property on 16th November 2012 but was still in occupation of the premises in December 2012, the Respondent was liable to pay rent for that month to the Appellant. The Respondent was also liable to pay the actual service charge for July, August, September and December 2012, during which period the Respondent was in occupation of the suit property. As I mentioned earlier, the Respondent was allowed by the trial court to vacate and hand over possession of the suit property to the Appellant on 16th November 2012. The Respondent, however, continued to be in possession and did not move out until April 2013, following another order by the trial court issued on 20th March 2013 compelling the Respondent to vacate the suit property. The Respondent is therefore liable to the Appellant for the rent and service charge from January 2013 to April 2013.

37. With regard to the rent for the remainder of the period after the Respondent vacated the suit property claimed from May 2013 to December 2017 in the sum of Kshs. 3,428, 429/- plus 16% VAT amounting to Kshs. 548,548/- the following is my view: In *Kwanza Estates Limited v Jomo Kenyatta University of Agriculture and Technology*, Supreme Court Petition(*supra*), the Supreme Court stated as follows:

> "(98) Finding the termination notice to be void, and the respondent having vacated the suit premises in January, 2021, thereby breaching the lease, what remedies lie to the petitioner?
>
> [104] We find persuasive value in the Court of Appeal's finding in the case of *Kasturi Limited v Nyeri Wholesalers Limited* [2014] eKLR where it very aptly held that: "A tenant cannot impose or force him/herself/itself on a landlord." The converse is equally true that a landlord cannot impose or force themselves on a tenant. This delicate balance is the cornerstone of harmonious co-existence and mutual respect in the rental world.

[105] Similarly, as Warsame J. (as he then was) articulated in *Chimanlal Meghji Shah & Another v Oxford University Press* (EA) Limited (*supra*) , we concur that it is unconscionable to compel a tenant to continue in occupation of a premises or for a landlord to demand full rent for the remaining portion of the tenancy when the tenancy has been terminated and the tenant vacated the premises. Both parties bear a responsibility to mitigate any losses incurred. Whereby landlords should actively seek new tenants to minimize potential financial harm, tenants must communicate any challenges that may affect their ability to fulfill their lease obligations. This mutual duty to mitigate loss underscores the importance of collaboration in navigating contractual challenges. This duty to mitigate was elaborated in *African Highland Produce Limited v John Kisorio* [2001] eKLR, where the Court of Appeal held that;

> "It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect."

[107] For avoidance of doubt, it is our considered finding that, where the parties are compelled to disengage without mutual agreement, resulting in the termination of the lease either by the tenant vacating the premises voluntarily or by eviction initiated by the landlord, this shall be deemed a breach of contract. Consequently, we take the position that, notwithstanding the absence of a termination clause, it would be unconscionable to compel a tenant to remain in premises they no longer wish to occupy. Equally, it would be unreasonable to claim rent for the unexpired lease term after the tenant has vacated. Therefore, the remedy for such termination is rent due up to the date of vacating and damages for breach of contract. In such a case, the remedy is for the party responsible for the breach to be liable to pay damages.

(111) The respondent vacated the premises on 31st January 2021, with a year and two months (14 months) remaining on the lease. Had the respondent not vacated the property, then the petitioner would have received the rent for these 14 months. However, we cannot turn a blind eye to the inordinate period that is 14 months that the respondents would have been expected to pay rent for premises that it was not in occupation of. Therefore, invoking the principles of mitigation, we find that it was the petitioner's obligation to attempt and endeavour to market and find an alternative tenant for the suit premises rather than let the premises lie unoccupied for a period of 14 months. It is why, in exercise of our discretion, while also considering that we cannot predict the future, we find it reasonable to limit the petitioner's claim to rent for a three-month period. We consider this time sufficient to conduct necessary renovations and actively market the premises to prospective tenants in a competitive market."

38. In the foregoing case, the court held that it would be unconscionable to compel a tenant to remain in the premises he no longer wishes to occupy and also unreasonable to claim rent for the unexpired term of the lease after a tenant has vacated. The court held that the landlord has to mitigate his losses by looking for another tenant and that the remedy for a landlord under a fixed-term lease which has

been prematurely terminated by a tenant is rent due up to the date of vacating and damages for breach of contract. In that case, the court found three (3) months' rent as adequate damages. I am of the same view. The Appellant could not claim rent from the Respondent after the Respondent vacated its premises. The Appellant referred to Clauses 1(p), 2(a) and 2 (m) of the lease as giving it such a right. Clause 1(p) provided that the suit property would be used by the Respondent only for Cyber Café and Resource Centre, and if the Respondent breached the condition, the Appellant had the right to re-enter the premises and bring the lease to an end. The clause provided that in the event of such termination, the Respondent was to remain liable to the Appellant for payment of all rent, service charge and/or any other sum payable under the terms and conditions of the sublease and for the entire period of the sublease. This clause cannot confer upon the Appellant a right to claim from the Respondent rent for the remainder of the lease. First, the Respondent herein did not breach the user condition in the lease and secondly, it would be unconscionable and would amount to unjust enrichment if the Appellant would forfeit the lease on account of breach by the Respondent and then turn around to claim rent and service charge from the Respondent who has vacated its premises for the remainder of the lease term under a terminated lease. The proviso to Clause 2 of the lease is on the same terms but provides for the forfeiture of the lease for failure to pay rent or the tenant going into liquidation. Again, the lease in this case was not terminated on any of those grounds, and as I have already stated, it would be unconscionable for the Appellant to demand rent for the remainder of the term of the lease after terminating the lease itself. The court cannot enforce such a term in a contract. Clause 2 (m) of the lease provided that if the lease was terminated prior the expiry of its term, the Respondent would remain liable to the lessor for the payment of the all rent, service charge and any other sum payable under the terms and conditions of the lease and for the entire period of the lease. As held by the Supreme Court, the remedy for a landlord under a fixed-term lease which has been terminated prematurely is damages. Once a lease has been terminated lawfully or otherwise and the tenant has vacated the leased premises, the landlord and tenant relationship comes to an end and save for rent arrears, rent can no longer be claimed by the landlord. I find Clause 2(m) of the lease unjust, unconscionable and unreasonable. It is also against the well-established law on mitigation of loss.

39. I am of the view that three (3) months was sufficient for the Appellant to repair and renovate the suit property and let it to a new tenant. In fact, by the time of the hearing of the suit before the trial court, the Appellant's case was that it had already restored the suit property to the state in which it was when the premises were let to the Respondent. The trial court should have awarded the Appellant damages for breach of contract. I would award the Appellant damages equivalent to three (3) months' rent in the sum of Kshs. 172,260/-. Such damages would, however, not attract VAT since the same is not rent. In *Kwanza Estates Limited v Jomo Kenyatta University of Agriculture and Technology*, Supreme Court Petition(*supra*), the Supreme Court stated as follows:

> "(115) Briefly addressing the question of VAT, on further perusal of the record, we note that the appellant failed to plead the issue of Value Added Tax in its statement of defence and counterclaim. That notwithstanding, our award pertains not to rent arrears, but rather to an award of damages. Consequently, the issue of VAT falls by the wayside."

40. From the said sum of Kshs. 172,260/-, I will deduct Kshs. 90,227.50 being the balance of the service charge refund due to the Respondent after deduction of Kshs. 58,272.50 incurred by the Appellant in painting the suit property and settling the electricity bill that was left outstanding by the Respondent. The damages payable to the Appellant would therefore be Kshs. 82,032.50.

41. Due to the foregoing, it is my finding that the trial court erred in dismissing the Appellant's counterclaim.

Whether the Appeal should be allowed and if so, on what terms.

42. I have made a finding that the Respondent did not prove her claim against the Appellant, and as such, the trial court erred in entering judgment in her favour against the Appellant. I have also held that the trial court erred in dismissing the Appellant's counterclaim. It follows from the foregoing that the Appellant's appeal has merit and should be allowed. The court will set aside the trial court's judgment and substitute the same with an order dismissing the Respondent's suit and entering judgment for the Appellant for special and general damages proved as found above.

Conclusion

43. In conclusion, I find merit in the Appellant's appeal. The judgment of the trial court delivered on 12th June 2023 is set aside and substituted with the following orders;

    1. The Respondent's suit in the lower court is dismissed.

    2. Judgement is entered for the Appellant against the Respondent for;

        (a) Kshs. 46,617/- for the actual service charge from January to June 2012.

        (b) Kshs. 57,420/- for the rent for December 2012.

        (c) Kshs. 36,362/- for the actual service charge for July, August, September and December 2012.

        (d) Kshs. 252,648/- for the rent from January to April 2013.

        (e) Kshs. 39,999/- for the actual service charge for January to April 2013.

        (f) Kshs. 29,727/- for the electricity bill left unpaid.

        (g) Kshs. 28,545.50 for the costs of painting the suit property.

        (h) Kshs. 82,032.50- for damages for breach of contract after the deduction of the service charge refund due to the Respondent.

    3. The Appellant shall have the costs of the appeal and the lower court suit.

DELIVERED AND SIGNED AT KISUMU ON THIS 10TH DAY OF JULY 2025

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Saro h/b for Mr. Qeu for the Appellant

Mr. Odeny for the Respondent

Ms. J.Omondi-Court Assistant