



REPUBLIC OF KENYA



**KENYA LAW**  
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**Motorline Limited v Alex Motors Limited & 2 others (Environment & Land  
Case 704 of 2015) [2025] KEELC 3952 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3952 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 704 OF 2015**

**OA ANGOTE, J**

**MAY 22, 2025**

**BETWEEN**

**MOTORLINE LIMITED ..... PLAINTIFF**

**AND**

**ALEX MOTORS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**TRIPLE N CAR CLINIC LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**ALEX NJONDE KAMAU ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff has through an Amended Plaint dated 17<sup>th</sup> March 2023, sought the following orders from this court:
  - i. An order of injunction restraining the 1<sup>st</sup> Defendant from transferring, assigning, letting or otherwise permitting the use of the suit property namely Land Reference Number 209/12499 or any part thereof by any third party.
  - ii. An order of declaration that the Plaintiff is entitled to repudiate the Agreement for Sale dated 15<sup>th</sup> July 2014 on account of fundamental breach by the 1<sup>st</sup> Defendant.
  - iii. Payment of the sum of Kshs. 10,029,000/- in unpaid rent, exclusive of penalties accruing from default rent payment due from 2014 to July 2020.
  - iv. Penalties arising from outstanding rent computed as follows:
    - a. Kshs. 3,000 per day up to the 14<sup>th</sup> day of every month that rent remains due.
    - b. Kshs. 5,000 per day from 15<sup>th</sup> up to the 30<sup>th</sup> day of every month that rent remains due.
    - c. Kshs. 10,000 per day where rent remained due beyond end of month.



- v. An order against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants jointly and severally for the payment of mesne profits in a sum equal to monthly rent at Kshs. 200,000 per month from 15<sup>th</sup> July 2015 up to the time the 2<sup>nd</sup> Defendant relinquished possession of the property in July 2020.
  - vi. Interests on iv and v above at court rate until payment in full.
  - vii. Such other order as the Honourable Court may deem fit.
  - viii. Costs.
  - ix. Such other and further orders as the court may deem just to grant.
2. The Plaintiff asserts that it is the registered owner of the suit property, LR No. 209/12499 and that by way of a lease dated 15<sup>th</sup> June 2014, it leased out the suit property to the 1<sup>st</sup> Defendant for a term of six years commencing on 15<sup>th</sup> July 2014 on the condition, stipulated under Clause 3(f) of the lease, that the 1<sup>st</sup> Defendant would not transfer, let, mortgage or part with the possession of the premises without its consent.
  3. However, the Plaintiff averred that it discovered in June 2015 that the gate of the property had been branded with the name 'Triple N Car Clinic Ltd', an entity previously unknown to it; that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants are jointly and severally in breach of a lease agreement dated 15<sup>th</sup> June 2014 by unlawfully subletting, assigning or otherwise permitting the use of the suit property by a third party, the 2<sup>nd</sup> Defendant and that while it immediately contacted the director of the 1<sup>st</sup> Defendant, Mr. Alex Njonde, the 1<sup>st</sup> Defendant's director instead chose to cut off communication with it.
  4. The Plaintiff's claim against the 2<sup>nd</sup> Defendant is that it is in trespass and it seeks mesne profits for the unauthorized use of the property from May 2015 until when it vacated the suit property in July 2020.
  5. It is further averred by the Plaintiff that the 1<sup>st</sup> Defendant is in breach of the rent payment terms and conditions of the lease and as at 15<sup>th</sup> July 2020, the 1<sup>st</sup> Defendant was in arrears of Kshs. 10,029,000/- exclusive of penalty due between July 2014 and July 2020 and that the 1<sup>st</sup> Defendant has acknowledged the indebtedness but has failed to clear the outstanding balance, and has even issued bounced cheques.
  6. It is pleaded that under Clause 1 of the lease, the 1<sup>st</sup> Defendant was under an obligation to pay monthly rent of Kshs. 190,000 on or before the 5<sup>th</sup> day of the month; that on 16<sup>th</sup> July 2014, the 1<sup>st</sup> Defendant was to pay a total of Kshs. 670,000/- which was a three months deposit as well as Kshs 100,000/- rent, as the Plaintiff agreed to give the 1<sup>st</sup> Defendant a waiver of Kshs. 185,000/- between 15<sup>th</sup> July to 30<sup>th</sup> August 2014 to allow the 1<sup>st</sup> Defendant to tidy up the premises.
  7. It contended in the Plaint that the rent was to increase to Kshs. 200,000/- from 15<sup>th</sup> July 2015 to 14<sup>th</sup> July 2016 and thereafter, the rent was to increase by 10% after every two years from 15<sup>th</sup> July 2016.
  8. Additionally, the Plaintiff averred, despite the 3<sup>rd</sup> Defendant having guaranteed the performance of the 1<sup>st</sup> Defendant's obligation under the lease, and despite being aware of the 1<sup>st</sup> Defendant's default, he has refused and neglected to ensure the said performance.
  9. In the time that the Defendants were in occupation of the suit property, the Plaintiff asserted that the Defendants refused to allow them access to the property and they were apprehensive that the 2<sup>nd</sup> Defendant was using or appropriating the suit property in a manner that was wasteful, detrimental and contrary to the terms and conditions in the lease agreement dated 15<sup>th</sup> June 2014.
  10. The Plaintiff iterated the particulars of breach by the 1<sup>st</sup> Defendant as letting, assigning or otherwise permitting the use of the property or a part thereof by a third party without its written consent;



failing to pay rent as agreed; failing to pay penalties arising from the rent arrears; failing to ensure that the premises are only used for the agreed purpose and vacating the premises without clearing the outstanding rent arrears and penalties.

11. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants opposed the suit through a Statement of Defence dated 5<sup>th</sup> June 2023. The Defendants denied that there was any breach of the lease agreement dated 5<sup>th</sup> June 2014 and asserted that the 3<sup>rd</sup> Defendant as the guarantor ensured to make good his obligations on the lease between the 1<sup>st</sup> Defendant and the Plaintiff.
12. The Defendants contended that the Plaintiff, through its director, was made aware of the 2<sup>nd</sup> Defendant's presence and the mode of business that was to be conducted on the suit premises; that the 3<sup>rd</sup> Defendant disclosed to the Plaintiff's director, Mr. Wamae, that he was in the process of incorporating the 2<sup>nd</sup> Defendant for purposes of operating a motor repair business and that the Plaintiff then allowed the 1<sup>st</sup> Defendant to execute the lease agreement pending the incorporation of the 2<sup>nd</sup> Defendant.
13. The Defendants denied preventing the Plaintiff from accessing the suit property and cutting off communication with the Plaintiff. The 1<sup>st</sup> Defendant further denied subletting the premises to the 2<sup>nd</sup> Defendant as the 3<sup>rd</sup> Defendant had explained to the Plaintiff's Director his intention of using the premises for the 2<sup>nd</sup> Defendant's business, which the Plaintiff's director allowed.
14. The Defendants averred that the suit premises is in a better state than it was prior to the lease agreement, as the 1<sup>st</sup> Defendant invested in improving the property, machinery and goodwill amounting to more than Kshs. 10 million.
15. The Defendants claimed in the Defence that on 21<sup>st</sup> May 2019, the Plaintiff signed and filed an affidavit waiving all penalties accruing from late payment of rent in the matter up to 30<sup>th</sup> April 2019 and that the Plaintiff should be estopped from claiming the penalties.
16. They further contended that all rents due have been paid and that the Plaintiff has suffered no loss as pleaded. The 2<sup>nd</sup> Defendant asserted that it has been paying rent to the Plaintiff.

### **Hearing and Evidence**

17. The Plaintiff's Managing Director, Samuel Maina Wamae, PW1, relied on his written statement dated 21<sup>st</sup> July 2015. He also produced a bundle of documents dated 7<sup>th</sup> March 2018 as PEXB1, bundle dated 27<sup>th</sup> September 2018 which is a report, a bundle dated 9<sup>th</sup> May 2017 as PEXB2 and a further bundle dated 15<sup>th</sup> May 2023 as PEXB3.
18. In his statement, PW1 reiterated the facts stated in the Complaint which I have summarized above. PW1 further stated that the 1<sup>st</sup> Defendant is in breach of the rent payment terms and conditions of the lease, that as at 20<sup>th</sup> July 2015, the 1<sup>st</sup> Defendant was in rent arrears of Kshs. 17,218,000/- inclusive of penalties between July 2014 and June 2015 and that the 1<sup>st</sup> Defendant has acknowledged the indebtedness but has failed to clear the outstanding rent and penalties.
19. At the time the witness was swearing his statement, he stated that the Plaintiff was apprehensive that the 1<sup>st</sup> Defendant was in the process of abandoning the lease and absconding its obligations by illegally relinquishing possession of the property to a third party with whom the Plaintiff does not have a contract.



20. In cross-examination, he stated that the guarantee was not dated but it is part of the lease and that while it does not have an indicated figure, it guarantees all the rent as per the lease and guarantees the obligations of the lessee in the event of default.
21. He emphasized that the contract was with the 1<sup>st</sup> Defendant; that the 2<sup>nd</sup> Defendant is a stranger to the Plaintiff; that Alex, the 3<sup>rd</sup> Defendant, is a director of the 2<sup>nd</sup> Defendant; that the purpose of the lease was for a motor garage, which is the work that the 2<sup>nd</sup> Defendant was doing and that the 2<sup>nd</sup> Defendant was damaging the property by spilling oil, yet the lease stated that they should keep the premises in good condition.
22. PW1 stated that they did not have a claim against Triple 'N' because they eventually stopped their activities on the suit property and that they are seeking for rent arrears and were not seeking for penalties.
23. PW1 stated that the claim in the Amended Plaintiff for Kshs. 10 million and penalties accruing was an error. It was his evidence that the Plaintiff abandoned its claim for the penalties, having waived the penalties in the affidavit which is in the Defendants' Supplementary list of documents.
24. PW1 averred that the tenancy ran the entire term of six years between 16<sup>th</sup> July 2014 up to July 2020, and that the 1<sup>st</sup> Defendant vacated on 15<sup>th</sup> July 2020. He stated that the last time the 1<sup>st</sup> Defendant paid rent was in July 2017 and he never paid rent after that and that rent was being paid directly to the bank. PW1 produced the bank statements up to 2017.
25. According to PW1, the Plaintiff's claim is for Kshs. 10 million for rent only, which he stated he tabulated himself. PW1 stated that he sent auctioneers to the premises but they did not take any goods from the premises.
26. The 3<sup>rd</sup> Defendant, Alexander Njonde Kamau, (DW1) testified virtually from the United Kingdom. He relied on his statement dated 20<sup>th</sup> April 2017 and a further statement dated 17<sup>th</sup> August 2023. He produced a list of documents dated 7<sup>th</sup> April 2017 which has four documents, as DEXB 1-4. He also produced a supplementary list of documents dated 17<sup>th</sup> August 2023 which has an affidavit sworn by Samuel Wamae, produced as DEXB5.
27. In his statement, DW1 averred that he is the 3<sup>rd</sup> Defendant and the Director of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. He informed the court that the 1<sup>st</sup> Defendant was incorporated by himself and his mother and its main line of business was the facilitation of importation of second-hand motor vehicles from Japan and elsewhere in Kenya.
28. He stated that the business of the 1<sup>st</sup> Defendant became affected by the falling returns in the importation of vehicles and he developed an interest in the business of repairing of motor vehicles involved in accidents, which were referred by insurance companies. It was his evidence that he identified the suit property as a suitable premises for the intended business.
29. According to DW1, he approached the Plaintiff's Director, Samuel Maina Wamae and informed him of his intentions to conduct a business of motor vehicle repairs by a separate company, which was to commence operations upon its incorporation. DW1 stated that the Plaintiff advised him that several competitors wanted the same premises and that it would be better to expedite and register the lease in the name of the existing company and to complete formalities of using a sister company later.
30. He stated that Mr. Wamae assured him that he could register the lease in the 1<sup>st</sup> Defendant's name and be at liberty to use the other sister company for operations upon registration. According to DW1, it was on this basis that he executed the agreement in the 1<sup>st</sup> Defendant's name.



31. DW1 stated that he briefed Mr. Wamae on the incorporation process of the 2<sup>nd</sup> Defendant; that Mr. Wamae and the Plaintiff received cheques in payment from the 2<sup>nd</sup> Defendant without protest and by their conduct, acquiesced to the presence of the 2<sup>nd</sup> Defendant on the suit premises and that they are estopped from challenging that position.
32. DW1 denied that he sublet the premises and averred that the operations were being done by the same persons and the same business that the premises were let for, which is to operate a motor vehicle repair, as indicated under paragraph 3 of the Lease agreement. He stated that the suit property was in a better condition than it was prior to the lease agreement, as it had invested Ksh. 10 million in it.
33. DW1 averred that there are no rent arrears owing and the 1<sup>st</sup> Defendant has fully settled the rent arrears and that on 21<sup>st</sup> May 2019, the Plaintiff decided to waive all the penalties incurred up to 30<sup>th</sup> April 2019.
34. In cross-examination, he stated that while he signed the lease agreement as a Director and a guarantor, they did not pay stamp duty and did not register the lease agreement; that he only faced challenges in paying rent on one occasion in 2015 after which he paid the rent and that there were other days when he also faced challenges in the payment of rent.
35. He stated that he paid the deposit of Kshs. 670,000, which was three months' rent; that the rent was to escalate between 15<sup>th</sup> July 2015 and 15<sup>th</sup> July 2016; that he paid all the rent to the Plaintiff between July 2014-2020, although he did not have proof of the payments and that it was not possible for the rental arrears to be Kshs. 10,029,000.
36. In re-examination, he stated he was never given any receipt to prove payment of rent.

#### Submissions

37. Counsel for the Plaintiff submitted that to successfully claim damages, a Plaintiff must show that a contract exists or existed, that the contract was breached by the Defendant and that the Plaintiff suffered damages as a result of the defendant's breach, and that the Plaintiff is not required to establish the causal link between breaches of an agreement and damages with certainty, but only to establish that the wrongful conduct was probably a cause of the loss.
38. It is their submission that a Plaintiff who at the end of a trial can show no more than a probability that he would not have suffered the loss if the contract had been properly performed, will succeed unless the Defendant can discharge the onus of proving there was no such probability. Counsel relied on the case of *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) 449.
39. It was counsel's submission that remedies granted by courts are designed to give effect to what was voluntarily undertaken by parties, and that damages are intended to place the claimant in the same position as they would have been if the contract had been performed.
40. The Plaintiff's counsel argue that in the Defendant's list of documents dated 7<sup>th</sup> April 2017, the Defendants only show receipts for rent from 2014 to 2016 and exhibit 3 is an RTGS receipt for 1<sup>st</sup> September 2015; that these receipts are not sufficient because in August 2014, January, May, June and November 2015 and March and June 2016, there is no proof of payment of rent for those months by the Defendants and that there is no proof of payment of rent between July 2017 to July 2020 adduced by the Defendants.
41. The Plaintiff's counsel submitted that as the Defendants have not proved the payment of rent for the contested months, the court ought to apply the terms of the contract. They relied on the case of *Trollope Colls Ltd v North West Metropolitan Regional Hospital Board* (1973) 1 WLR 601 at 609.



42. They contended that the guarantee given by the 3<sup>rd</sup> Defendant forms part of the lease agreement and there was no need to register the guarantee. Counsel relied on *The Law of Guarantees* by Geraldine Andrews & Richard Millet 2<sup>nd</sup> Edition at page 156 and submitted that a surety undertakes to ensure that the principal performs the obligations of the contract and that the surety is under a secondary obligation which is dependent upon the default of the principal and does not arise until that point.

### **Analysis and Determination**

43. This court has given due consideration to the pleadings and evidence adduced by the parties. The following issues are for this court's consideration:

- a. Whether the 1<sup>st</sup> Defendant breached the lease agreement by conducting business in the name of the 2<sup>nd</sup> Defendant.
- b. Whether the 1<sup>st</sup> Defendant is in rental arrears of Kshs. 10,029,000.
- c. Whether the Plaintiff is entitled to mesne profits from the 2<sup>nd</sup> Defendant.

44. It is not in dispute that the Plaintiff is the registered owner of the suit property, Land Reference Number 209/12499. The parties equally acquiesce that the Plaintiff and the 1<sup>st</sup> Defendant company executed a six-year lease agreement with respect to the suit property, which ran between 15<sup>th</sup> July 2014 and July 2020.

45. The Plaintiff's claim is that during the duration of the lease, the 1<sup>st</sup> Defendant sublet the suit property to the 2<sup>nd</sup> Defendant in breach of the lease agreement. The Plaintiff also claim that the 1<sup>st</sup> Defendant owes it rental arrears amounting to Kshs. 10, 029,000 which accrued between 2014 and 2020, when the Defendants exited from the suit premises.

46. While the Plaintiff had initially claimed for the penalties which had purportedly accrued due to the late payment of rent, its director, Samuel Wamae, PW1, adopted his affidavit dated 21<sup>st</sup> May 2019, in which he waived all the rent late payment penalties incurred up to and including 30<sup>th</sup> April 2019.

47. In the affidavit, the Plaintiff's Director emphasized that the Plaintiff continues to demand actual rental arrears as per the lease, which is specified in the Plaint as Kshs. 10,029,000.

48. The Defendants, on their part, deny that the suit property was ever sublet to a third party. They assert that the 3<sup>rd</sup> Defendant is a director of both the 1<sup>st</sup> Defendant company and the 2<sup>nd</sup> Defendant company.

49. They claim that the Plaintiff was at all times aware that the 3<sup>rd</sup> Defendant intended to carry out a motor repair business in the name of the 2<sup>nd</sup> Defendant company, and that the lease agreement was in the name of the 1<sup>st</sup> Defendant company, only because at that point in time, the 2<sup>nd</sup> Defendant company was yet to be incorporated. The Defendants further assert that there are no rental arrears as the Plaintiff was duly paid all the rent owing under the lease agreement.

50. At the point of judgment, it is clear to the court that the lease agreement had terminated by effluxion of time, and the Defendants had vacated the suit property in July 2020, in accordance with the terms of the lease agreement. The only issues remaining for this court's consideration are whether there was material breach of the terms of the lease agreement by the Defendants and whether there are rental arrears owing to the Plaintiff by the Defendants.

51. It is a fundamental principle that all persons have freedom of contract, which refers to the freedom to choose with whom to contract and on whatever terms. Once parties enter a contract and a dispute



arises, such as the one in this matter, it is the duty of the court to give effect to the terms of the contract as agreed by the parties, and not to redraft the said contract.

52. The Plaintiff has rightly relied on the case of *Trollope Colls Ltd v North West Metropolitan Regional Hospital Board* (1973) 1 WLR 601 at 609, where Lord Person held as follows:

“The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.”

53. This principle was aptly stated by the Court of Appeal in *National Bank of Kenya Ltd v Pipe Plastic SamKolit (K) Ltd & Another* (2001) eKLR, where the court stated 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.”

54. This court is duly guided by this principle. Now to the first issue for determination, which is whether indeed the 1<sup>st</sup> Defendant sublet the suit property to the 2<sup>nd</sup> Defendant in breach of the lease agreement.

55. According to the Plaintiff, the 1<sup>st</sup> Defendant sublet the suit property to the 2<sup>nd</sup> Defendant in breach of Clause 3(f) of the Lease Agreement. Clause 3(f) of the Lease Agreement reads as follows:

“3. The Lessee to the intent that the obligations hereinafter set out may continue throughout the continuance of the terms hereby granted covenants with the Lessor as follows:

f) Not to transfer, let, mortgage or part with possession of the premises or any part thereof without the written consent of the Lessor first had and obtained Provided Always that the Lessee being a person running a motor repair business then for the purpose of this sub-clause transfer of the beneficial interest in more than fifty per cent of the business interest of the lessee shall constitute an assignment of this lease and it is hereby expressly agreed and declared that upon any breach by the lessee of this covenant the lessor may re-enter upon the premises without notice and thereupon the term hereby created shall terminate absolutely.”

56. The Defendants do not deny that the 2<sup>nd</sup> Defendant, Triple N Car Clinic Limited, which was not a signatory to the lease, conducted a motor repair business on the suit property. They however contend that the 2<sup>nd</sup> Defendant was not a third party which paid rent to the 1<sup>st</sup> Defendant, but is instead a sister company to the 1<sup>st</sup> Defendant Company, as the 3<sup>rd</sup> Defendant is a Director of both entities.

57. They further contend that the Plaintiff was at all times aware of the 1<sup>st</sup> Defendant's intention to conduct business on the suit property in the name of the 2<sup>nd</sup> Defendant. They assert that the lease agreement was executed in the name of the 1<sup>st</sup> Defendant because at that time, the 2<sup>nd</sup> Defendant was yet to be incorporated.

58. The Defendants have presented the Articles of Association and the Memorandum of Association of the 1<sup>st</sup> Defendant, Alex Motors Limited, which shows that the 3<sup>rd</sup> Defendant, Alex Njonde, is one of



the directors of the company, the other director being one Mary Wangari Njonde. The Defendants have, however, not presented details of the directors of the 2<sup>nd</sup> Defendant Company, which would have established the Defendant's claim that they are sister companies, and that the 3<sup>rd</sup> Defendant is also a Director of the 2<sup>nd</sup> Defendant.

59. In any case, even if the Defendants had established that the directors of the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant were identical, the two companies are not one and the same. The principle that a company is a separate legal entity from its shareholders is central to company law.
60. Although two companies may have the same directors, they remain separate and distinct. This was well stated in the case of *Kenyariri & Associates Advocate/Applicant v Hans Jurgen Langer* [2016] KEHC 5943 (KLR), where the court stated as follows:

“In law, the fact that two or more companies have the same shareholders does not make such companies the same.

Even when the shareholders of 2 companies are the same, that does not make such companies the same.

The reason for that legal position stems from the fact that duly incorporated companies are distinct from both its members or shareholders, and also from its directors. That position was restated by Gikonyo J. in *Litein Tea Factory Limited & Another v Davis Kiplagat Mutai & 5 Others* Hccc No. 483 of 2014, when the learned Judge said;

“The principle that a company is a legal person separate from those who compose it, is the greatest legal innovation that we have seen in company law. The company sues or is sued on its name; it owns its own properties and bears its liability. The company is not even an agent of its members. And as a general rule, the directors are not liable for omissions and actions of the company.”

61. The only exception to this principle, where the corporate veil may be lifted or pierced, is where it is shown that the companies have been used to commit fraud or illegal acts. In such cases, it is in the public interest for the corporate veil to be lifted for the directors of the company to be held liable for the fraudulent and illegal acts of the company.
62. In the matter before this court, no basis was laid for this court to lift the corporate veil, as there is no claim that there was a fraudulent or illegal scheme perpetuated by the Defendants. The Defendants were instead calling upon this court to recognize that the two companies were one and the same, on the basis of similar directorship, which this court has found is not legally acceptable.
63. As to the plea that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants had obtained the consent of the Plaintiff to allow the 2<sup>nd</sup> Defendant trade on the suit property before signing the contract, the Defendants have not presented any written consent of such an arrangement issued by the Plaintiff. Indeed, there is no mention in the lease agreement of a third party being established to conduct business on the suit property and no express approval by the Plaintiff to such an arrangement was granted.
64. Having found that the 2<sup>nd</sup> Defendant was a third party to the lease between the Plaintiff and the 1<sup>st</sup> Defendant, and that the 1<sup>st</sup> Defendant had given possession of the suit property to the 2<sup>nd</sup> Defendant without the written consent of the Plaintiff, this court finds that the Defendants were in breach of the covenants of the lease agreement.
65. According to the terms under Clause 3f, the breach of the covenant not to sublease accorded the lessor the right to re-enter into the property and to terminate the lease. The Plaintiff/lessor did not exercise



this remedy; neither did it give notice to the 1<sup>st</sup> Defendant of its intention to take possession of the suit property due to the said breach.

66. In the circumstances, and considering that the Defendants have vacated the leased premises, the Plaintiff cannot claim for damages for the breach.
67. The next issue for determination is whether the 1<sup>st</sup> Defendant is in rental arrears of Kshs. Kshs. 10,029,000, or at all. The following are the terms of payment of the rent with respect to the suit property:

“In consideration of the rent hereinafter reserved and of the covenants and agreements herein contained the Lessor hereby leases unto the Lessee the stipulates premises to hold the same unto the Lessee as tenants for a term of six years commencing on the 15<sup>th</sup> day of July Two Thousand and Fourteen subject nevertheless to determination as hereinafter provided, yielding and paying therefore and thereout the monthly rent of Kenya Shillings One Hundred and Seventy Thousand (Kshs. 190,000) payable monthly in advance in cash not later than on the fifth day of the month. If the rent is not paid by the fifth of the month due, a late payment penalty of Kshs. 3000 shall be payable for every day of default up to the 14<sup>th</sup> day of the month and Kshs. 5,000 per day from the 15<sup>th</sup> day up to the 30<sup>th</sup> day and Kshs. 10,000/- per day thereafter until payment in full. These penalties may be negotiated.

The payment schedule will be as follows:

1. The lessee shall pay Kshs. 100,000/- (one hundred thousand) rent and three months deposit on 16<sup>th</sup> July 2014 making a total of six hundred and seventy thousand shillings (Kshs. 670,000) in cash. The lessor shall give the lessee a waiver of Kshs. 185,000/- for the period of 15<sup>th</sup> July to 30<sup>th</sup> August 2014. This waiver is given to allow the lessee tidy up the premises for his purposes.
  2. The rent will be Kshs. 200,000/- from 15<sup>th</sup> July 2015 to 14<sup>th</sup> July 2016.
  3. The rent shall be increased by a factor of 10<sup>th</sup> after every two years from 15<sup>th</sup> July 2016.
  4. The Lessee shall pay the Lessor and maintain a deposit equivalent to three months rent payable during the relative year. The deposit shall be held by the lessor as security for the due performance and observance of the Lessee’s covenants such sum or balance thereof to be refunded to the Lessee without interest at the end of the term hereby created and it is hereby agreed and declared that the Lessor shall have an absolute right to appropriate any or all the said sum in the discharge of the Lessee’s obligations under this lease without the Lessee objecting to such appropriation. The deposit shall not be used in lieu of rent.”
68. While the clause as drafted contains a discrepancy between the monthly income as stated in words versus in figures, a reading of the rest of the clauses indicate that the agreed initial monthly rent was to Kshs. 190,000. The Defendants have not disputed that this was the agreed rent.
69. This court has considered the tabulated schedule of rent payments indicative of the rental arrears owed by the Defendants, as against the payment receipts and bank slips produced by the Defendants in their bundle of documents. Notably, all the payment slips presented by the Defendants are with respect to payments made between 2014 and 2016.



70. The Defendants have not produced any proof of rent paid between August 2017 and 2020, when the lease terminated.
71. This court has also compared the tabulated schedule of rental payments to the bank statements annexed to the Plaintiff's bundle of documents dated 7<sup>th</sup> March 2018.
72. From these statements, it is clear that the 1<sup>st</sup> Defendant serially breached the terms of rental payment by making partial payments, failing to pay rent in some instances and making bulk payments in other months.
73. In ascertaining the quantum of unpaid rent, this court has calculated the rent that was due to be paid under the lease agreement, less the amount that was in fact paid by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. This court is guided by Clause 1 on the Lease Agreement which sets out the rental amount, and its periodic increments, which are detailed above.
74. The rental amount owing under the lease agreement is as below:
- Deposit Kshs. 570,000
- Rent 15<sup>th</sup> July & 30<sup>th</sup> August 2014  
(less Kshs. 185,000 discounted in Lease) Kshs. 195,000
- Rent @ 190,000 (September 2014- 14<sup>th</sup> June 2015) Kshs. 1,805,000
- Rent @ 200,000 (15<sup>th</sup> July 2015-15<sup>th</sup> July 2016) Kshs. 2,400,000
- Rent @ 220,000 (15<sup>th</sup> July 2016- 14<sup>th</sup> July 2018) Kshs. 5,280,000
- Rent @ 242,000 (15<sup>th</sup> July 2018- 15<sup>th</sup> July 2020) Kshs. 5,808,000
- Total KSHS. 16,058,000
75. The rent paid by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is as below:
- 2014 Kshs. 1,209,000
- 2015 Kshs. 2,917,000
- 2016 Kshs. 2,260,000
- 2017 Kshs. 1, 360,000
- Total KSHS 7,746,000
76. The rental arrears owed by the Defendants to the Plaintiff are Kshs. 16,058,000 less Kshs 7,746,000, which amounts to Kshs.8,312,000.
77. The Plaintiff has sought the remedy of mesne profits from the 2<sup>nd</sup> Defendant. It is not disputed that the 2<sup>nd</sup> Defendant was in occupation of the suit property from sometime in 2015 until July 2020, when the lease expired. However, the bank statements produced by the Plaintiff indicate that the 2<sup>nd</sup> Defendant did in fact make some payments to the Plaintiff.
78. From the Plaintiff's Bank Statements, the 2<sup>nd</sup> Defendant began paying rent from 1<sup>st</sup> July 2015 and also paid rent on intermittent dates including on 8<sup>th</sup> October 2015, 9<sup>th</sup> October 2015, 10<sup>th</sup> November 2015, 11<sup>th</sup> November 2015, 11<sup>th</sup> January 2016, 11<sup>th</sup> May 2016, 9<sup>th</sup> August 2016, 18<sup>th</sup> January 2017,13<sup>th</sup> April 2017. In other months, rent was paid by the 1<sup>st</sup> Defendant.



79. Section 2 of the *Civil Procedure Act* Cap 21 of the Laws of Kenya defines mesne profits as follows:-

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.”

80. Mesne profits are the pecuniary benefits deemed to be lost to the land owner by reason of being wrongfully excluded therefrom.

81. In this matter, the Plaintiff did in fact receive some payments from the 2<sup>nd</sup> Defendant as well as from the 1<sup>st</sup> Defendant, during the time that the 2<sup>nd</sup> Defendant was unlawfully in possession of the suit property. These payments are well listed in the Plaintiff's schedule of rental arrears which it submitted as evidence before this court.

82. This court has already calculated the rental arrears due to be paid to the Plaintiff, less the sums that have already been paid. Should this court allow this remedy as prayed, it would result in a double payment, which would unduly enrich the Plaintiff. On this basis, the Plaintiff is not entitled to the remedy of mesne profits.

83. In conclusion, the Plaintiff's suit is found to be merited and is allowed as follows:

- a. The Plaintiff is awarded the sum of Kshs. Kshs.8,312,000 as rental arrears which accrued between July 2014 and July 2020 to be paid by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants jointly and severally.
- b. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants shall, jointly and severally, pay interests at court rates on the rental arrears awarded from the date of judgment until payment in full.
- c. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants shall, jointly and severally, pay the costs of this suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 22<sup>ND</sup> DAY OF MAY, 2025.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mr. Thuita for Defendants

Mr. Ochieng for Plaintiff

Court Assistant: Tracy

