Indar Singh Limited v Star Times Media Co Limited (Environment & Land Case E052 of 2020) [2024] KEELC 525 (KLR) (1 February 2024) (Judgment)

Neutral citation: [2024] KEELC 525 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E052 OF 2020

AA OMOLLO, J

FEBRUARY 1, 2024

BETWEEN

INDAR SINGH LIMITED ..... PLAINTIFF

AND

STAR TIMES MEDIA CO LIMITED ..... DEFENDANT

JUDGMENT

1. The Plaintiff initiated this suit through a Plaint dated 4th August 2020 which was amended on 26th March, 2022. By his Amended Plaint, the Plaintiff advanced the following prayers; -

    a. A declaration that the actions of the Defendant constitute breach of contract;

    b. A declaration that the Defendant is liable to pay damages for breach of the Lease Agreement being loss of rental income from the date of breach of the Lease Agreement being June, 2020 to the dated of obtaining a new tenant; which damages are to be computed upon issuance of the order;

    c. KShs. 462,608.66 and USD 38,451.48 being the rent arrears;

    d. Interest on (d) above at court rates from the date of filing this suit until payment in full;

    e. Interest of (f) above at court rates from June, 2020 until payment in full;

    f. Costs of the advertisement being KShs. 3,150/-; and

    g. Costs of this suit.

2. The Plaintiff's case is that vide leased dated 30th August, 2019 it leased Shop No. G05 on the ground floor of Gill House on LR No. 209/929 (the suit premises) to the Defendant for a period of 6 years from 1st September, 2018 to 30th June, 2024. The Plaintiff claims that the Defendant unilaterally terminated the lease before expiry of the 6 years citing bad business environment, vacated the suit premises and

removed its goods thereon in blatant breach of the said Lease. That the Lease Agreement is a long-term lease that can only be terminated through execution and registration of a Surrender of Lease. It averred that any attempt to terminate otherwise other than through the formality so laid out or by consensus of the other party is a breach of the terms, entitling the other party to seek specific performance or damages for breach, being rent for the remainder of the term.

3. The Plaintiff averred that in a bid to mitigate its loses, it advertised the property for lease, and even asked the Defendant to get another tenant to occupy the suit premises with its approval but the Defendant has failed to do so. The Plaintiff further avers that although the Defendant claims to be doing bad financially, its headquarters are housed in a bigger and more expensive location. The Plaintiff also claimed that the Defendant's rent is in arrears of KShs. 462,608.66 and USD 38,451.48 (the outstanding amount) which it has failed to settle. The Defendant's alleged breach of contract is particularised as; failure to pay rent and service charge as and when it fell due, issuing a termination notice before expiry of 6 years and failure to settle rent arrears and service charge despite reminders by the Plaintiff. The Plaintiff avers that the Defendant refused to correct the breach and in fact continues with the alleged breach, and prayed for judgment against the Defendant.

4. The Defendant entered appearance and filed its Defence dated 25th June, 2021 denying all the averments in the Plaint. The Defendant admitted the existence of the Lease Agreement dated 30th August, 2019 and that it was for a period of 6 years. The Defendant averred that the Lease contemplated eventualities that would lead to termination before expiration of the term as provided at Clauses 2(ii) and 3(k) thereof. The Defendant also stated that the parties met on 27th February, 2020 and discussed the termination of the Lease. Thereafter, the Plaintiff by letter dated 4th March, 2022 gave the option of termination of the Lease. That the termination was with consent and not unilateral as alleged and the Plaintiff has thus come to court with unclean hands. Further, that it is the Plaintiff who refused to cooperate in the execution of the Surrender of Lease.

5. In addition, the Defendant averred that it was allowed to vacate the premises, gave its notice to vacate dated 9th June, 2020 and vacated the suit premises on 30th June, 2020. It is the Defendant's case that the parties jointly inspected the suit premises on 2nd July, 2020 where the Defendant demanded that the Defendant carry out renovations as per the Lease. The Defendant did the renovations on or before 21st July, 2020 but the Plaintiff has refused to accept the keys to the suit premises in an attempt to force/coerce the Defendant to continue occupying the already vacated premises. It avers that it paid the rent via cheque and asked the Plaintiff to apply the Deposit of USD 27,196 to clear the outstanding rent of USD 34,200/- and Service Charge of KShs. 19,849.09. The Defendant denied the particulars of breach as set out in the Plaint and prayed that the suit be dismissed for lack of merit and that it is an abuse of court processes and procedure.

6. The hearing commenced on 27th April, 2023 and the Plaintiff called Mary Ngendo Kimani who testified as PW1. She adopted her witness statement dated 31st July, 2020 as her evidence in chief and produced the documents in the Plaintiff's list of documents dated 4th August, 2020 and supplementary list of documents 26th March, 2022 as PEXB 1-10 in the descending order. PW1 stated that she was the Plaintiff's accounts assistant duly authorised and conversant with the matter. Reiterating the averments in the Plaint, she stated that the Defendant's surreptitious attempts at returning the keys have been strongly rejected. She reiterated that the Plaintiff is entitled to damages for breach of contract being rent for the remainder of the lease period.

7. On cross-examination by Mr. Kinuthia learned counsel for the Defendant, PW1 admitted that there was a meeting held at the Likoni offices of the Plaintiff where the Defendant asked for a reduction of the rent. PW1 testified that the Plaintiff wrote the letter dated 4th March, 2020 giving options which

included the Defendant vacating if they were unable to pay rent. This letter, (found at page 34 of the Plaintiff's list of documents), did not provide that the offer was subject to any negotiations. That the Defendant also wrote a letter dated 5th May, 2020 accepting the offer to vacate the premises, and stating they would do so by 30th June, 2020. PW1 was not aware if the Plaintiff responded to the Defendant's letter. She further testified that the Defendant enclosed cheques in its letter dated 30th June, 2020 which were acknowledged vide their letter dated 3rd July, 2020. PW1 confirmed their letter of 3rd July 2020 did not contest the vacation or raise any issue of outstanding rent, and that the only issue raised was renovations.

8. On re-examination, PW1 stated that there was a condition in the letter dated 4th March, 2020 of forfeiture of the deposit. However, in the letter dated 30th June, 2020 the Defendant deducted the deposit and paid only few amounts. She testified that the 2nd last paragraph to the letter dated 5th May, 2020 sought time to register the surrender of lease. That the letter dated 3rd July, 2020 was in response to the Defendant's letter of 30th June, 2020 which mentioned the issue of renovations. She concluded that the tenant had the obligation of renovating the suit premises.

9. The Defendant called Anne Maluki, its Deputy Director of Operations as their witness. She adopted her witness statement dated 9th August, 2021 as her evidence in chief. She also produced the documents in the Defendant's bundle of documents as DEXB1. DW reiterated the averments in the statement of defence adding that the Defendant approached the Plaintiff on 27th February, 2020 requesting for a rent reduction. In response, the Plaintiff wrote the letter dated 4th March, 2020 giving the option of vacating the premises, which the Defendant accepted and gave notice to vacate dated 5th May, 2020. It is her further evidence that the Defendant forwarded cheques for payment of outstanding rent and service charge, and undertook renovations as per the terms of the Lease.

10. It was DW's testimony that vide letter dated 3rd June, 2020 the Plaintiff acknowledged that the defendant had vacated and they requested further renovations, which the Defendant carried out. She stated that the suit premises were ready before 21st July, 2020 and the Plaintiff was duly informed but it ignored the Defendant's request for a final joint inspection. Futher, that the Plaintiff refused to accept the keys to the premises so as to force the Defendant to continue occupying the premises. The Defendant denied the arrears claimed by the Plaintiff being the amount of KShs. 462,608.66 and USD 38,451.48 asserting the Defendant had used their rent deposit to offset rent and service charge arrears. DW1 acknowledged that the only amount due is service charge for the months of January, May and June, 2020 and the reason they were not paid was because the Plaintiff did not provide the Defendant with invoices with ETR Receipts. That the Defendant thus vacated the suit premises with the consent of the Plaintiff.

11. On cross-examination by Miss Kendi, learned counsel appearing for the Plaintiff, DW1 stated that the Lease was for 6 years without an express termination clause. She averred that the letter dated 4th March, 2020 was conditional and they did not fulfil the conditions therein. She continued in evidence that the letter dated 5th May, 2020 was a counter-proposal to the letter dated 4th March, 2020. They did not receive a response to the letter of 5th May, 2020. She testified that in their letter, the Defendant offered a proposal on how to terminate the Lease through a Surrender of Lease, and acknowledged that the letter dated 3rd May, 2020 only refers to renovations.

12. She was re-examined wherein she stated that there were discussions prior to the Defendant vacating the premises that is why they wrote the letter dated 30th June, 2020. The Defendant then proceeded to close its case.

13. Pursuant to the Court's directions, the Plaintiff filed its submissions dated 5th July, 2023 and submitted that since the Lease Agreement did not have a termination clause, it could only be terminated through mutual consent of the Parties, by way of a surrender of lease. Counsel relied on the case of *Kenya Commercial Bank Limited v Popatlal Mandhavji & Another* (2019) eKLR where the court held the tenant was still under obligation to pay rent for the remainder of the lease period. He submitted that courts cannot re-negotiate contract terms between parties but can only enforce them. Counsel argued that the Lease herein could only be terminated through lawful means which was by consent through the execution of a surrender of lease and anything else was a breach of the contract (*Laser Eye Centre Limited v PBM Nominees Limited* (2020) eKLR, *Wild Living Company Limited v Varizone Limited* (2019) eKLR and *Housing Finance Company of Kenya Ltd v Njuguna* 1176 [CCCK]).

14. It was Counsel's submission that since the termination of Lease was not consensual, the same remains in force. The Plaintiff argued that the Defendant needed to show that the correspondences between the parties resulted into a contract to terminate, but it did not do so and it cited the case of *County Government of Migori v Hope Self-Help Group* (2020) eKLR citing Housing Finance Co. of Kenya Ltd v Gilbert Njuguna, Nairobi HCCC No. 1601 of 1999). He submitted that in fact, the Defendant responded to the Plaintiff's various options by giving a counter-offer, which counter-offer was never accepted by the Plaintiff, hence there was no consensus.

15. The Plaintiff further submitted that the Defendant did not comply with the conditions that came with the option to vacate which means that it was still bound by the terms of the Lease. The Defendant therefore breached the Lease by vacating the suit premises on its own terms without settling outstanding arrears, and which actions the Plaintiff did not acquiesce, despite its silence. Counsel for the Plaintiff further submitted that pursuant to Section 71(5) of the *Land Act*, even if the court were to find that the Defendant vacated with the Plaintiff's approval, the Defendant was still obligated to pay rent for 1 year from 30th June, 2020. Counsel submitted that having demonstrated that the Defendant was indeed in breach of the terms of the Lease, the Plaintiff was entitled to damages for the said breach, specifically for the period that there was no tenant on the suit premises (*Jomo Kenyatta University of Science and Technology v Kwanza Estates Limited* (2022) eKLR).

16. The Plaintiff's Counsel also submitted that there was no proof of payment of the arrears or that the cheques were banked or paid and there is no evidence of payment of the 6 invoices produced by the Plaintiff. That the Lease Agreement did not provide that the deposit could be applied towards rent and service charge arrears, and in the circumstances, these arrears remain unpaid. Counsel argued that under Section 26(1) of the *Civil Procedure Act*, this court has discretion to award interest as sought, and that having been constrained to incur costs to get a new tenant due to the Defendant's breach and it was also entitled to costs of the advertisement. Counsel urged that the Plaintiff had proved its case on a balance of probabilities and the prayers in the Plaint ought to be granted. As to costs, Counsel submitted that they follow the events (*Jasbir Singh Rai & 3 Others v Talochan Singh Rai & 4 Others* (2014) eKLR).

17. In the Defendant's Submissions dated 25th September, 2023, it is submitted that the Lease contained terms such as "sooner determination" or earlier determination". Thus, as per *Council of Governors v Attorney General & 7 Others* (2019) eKLR, words must be given their natural meaning unless there is an ambiguity, and these words communicated the Defendant's option of early termination of the Lease. Counsel also cited the case of Jomo Kenyatta University of Science and Technology v Kwanza Estates Limited (supra), which determined that use of the terms "sooner determination" or "earlier determination", means that the parties agreed to give themselves an exit window from the agreed terms upon change of circumstances, and which in this case allowed for early termination of the lease.

18. Counsel for the Defendant further submits that the Defendant was within its right to exercise its option of early termination of the Lease and the Plaintiff never raised an objection to the early exit, instead focusing on the renovations. They aver that the Plaintiff must be deemed to have waived any right to do so and is estopped from seeking any relief through these proceedings. The Defendant relied on *Sita Steel Mills Ltd v Jubilee Insurance Co. Ltd* (2007) eKLR and *Dodge v Kenya Canners Ltd* (1989) KLR 127 as cited in Odunga's Digest on Civil Law and Procedure 2nd Ed. Vol. 2 at pg 1764 (page 40 LoA) among other decisions.

19. On estoppel, Counsel argued that if a party acquiesces to a position, it cannot be heard to complain if prejudice is caused to the other party. Further, that it is not necessary for the other party to show that he acted to his detriment. It is the Defendant's position that the alleged waiver and estoppel were sufficiently pleaded. Counsel argued that in any event, it is not necessary to plead equitable estoppel and that in *Haas v Wainaina* (1982) eKLR it was held that equitable estoppel applies in cases of silence. Counsel was of the opinion that the circumstances herein are comparable to those in the *Haas Case* (*supra*) and that because of the Plaintiff's conduct, the Defendant was released from all obligations under the Lease.

20. Counsel submitted that breach of contract occurs when a party refuses, without lawful excuse to perform its part under the contract. However, in this case, the Plaintiff has not demonstrated its entitlement to the declaratory order at prayer (c) of its reliefs (*Jackline Njeri Kariuki v Moses Njung'e Njau* (2021) eKLR). In addition, that the Defendant is not liable for damages for loss of income. That in any event, the Plaintiff had not shown that it is entitled to such an award as it is a special damage claim, which should have been specifically pleaded and proved.

21. Counsel relied on the cases of *Capital Fish kenya Limited v The Kenya Power & Lighting Company Limited* (2016) eKLR, *Union Bank of Nigeria PLC v Alhaji Adams Ayabule & Another* (2011) JELR 48225 (SC) (SC 221/2005), *Pyramid Hauliers Ltd v Nehemiah Kinyanjui* (2021) eKLR and *Hahn v Singh*, Civil Appeal No. 42 of 1983 (1985) KLR 716. Counsel also argued that the Defendant having exited the premises, is not liable to pay the rent arrears, interest and costs of advertising, and further that the Plaintiff was not entitled to costs. Counsel prayed that the suit does not disclose any cause of action and it ought to be dismissed with costs.

Analysis and Determination

22. From the foregoing summaries, I do frame the following questions for determination of the dispute before me:

    a. Whether the Lease could be terminated before expiry of the term of 6 years

    b. Whether the Defendant breached the Lease entitling the Plaintiff to damages thereof

    c. Whether the Plaintiff is entitled to damages for loss of income

    d. Whether the Plaintiff is liable for the rent arrears as claimed

a. Whether the Lease could be terminated before expiry of the term of 6 years

23. Having gone through the Lease Agreement, it is true that there is no express termination clause. According to the Plaintiff, this means that the Lease could only terminate at the end of the 6 years, and formally. The Defendant has however argued that several clauses therein do indicate that the parties had anticipated a scenario where the Lease could be terminated otherwise than by effluxion of time. Clause 2(j) for instance reads "Immediately after the determination of the term, (however that determination

may arise)...", which statement, according to the Defendant, shows that the Lease could in fact be terminated in other ways before the expiry of the term. In addition, Clause 2(ee) thereof also reads:

> " At the expiration or sooner determination of the term, to yield up the premises to the Landlord with the fixtures and fittings thereon..."

24. The phrase "sooner determination" is repeated at Clause 2(n), 4(o) and 4(r) while at Clause 2(ii), the term "earlier determination" is used. Arguing that the Lease had no termination clause and thus could only run for the full duration of the fixed term, the Plaintiff relied on *Kenya Commercial Bank Limited v Popatlal Madhavji & another* [2019] eKLR where the Court of Appeal held that:

> " This meant that termination of the lease mid term was not available to the appellant. The consequence of this was that the notice of termination of 25th March 2002 could not validly terminate the lease, with the result, we find that, the appellant was obligated to continue to occupy the suit premises for the entire period of the lease, and to pay the agreed rent and service charge for the period upto the date of expiry, that being the 31st December 2003."

25. This decision is however distinguishable from the instant suit because the Lease therein was inferred from the parties' correspondence. There was nothing in the said correspondence to indicate the intention to terminate the Lease before the term expired, whether by express provisions or through the terms used in the Lease herein.

26. The Defendant, on the other hand, is of the view that these phrases gave the parties a right to terminate the Lease before expiry of the term. In *Jomo Kenyatta University of Agriculture and Technology v Kwanza Estate Limited* (Civil Appeal 64 of 2022) [2023] KECA 700 (KLR), the Court of Appeal dealing with a similar dispute held that:

> " 31. A break clause in a tenancy agreement allows a party to terminate the contract before the end of its term. The phrase "sooner determination" on the other hand was illustrated by the Indian High Court at Calcutta in the case of Sri Ashwin Bhanulal Desaiv.Bijay Kumar Manish Kumar [2019] in the following terms;
>
> > '66. In the present case, although the registered lease deed was entered in the year 1992 for a period of 99 years, it was not allowed to run its full course but was terminated sooner by issuance of a notice on the ground of forfeiture under Section 111 (g) of the 1882 Act, although not by invoking any "sooner determination clause". Since the expression "sooner determination" need not be confined, nor was confined in any of the cited judgments, to invocation of a specific clause in the lease deed to that effect, but also contemplates any mode of determination sooner than its full tenure, including forfeiture as envisaged in Section 111(g) of the 1882 Act, even applying the principle of Prakashwati Chopra (supra), the instant case can be said to be governed not by the 1882 Act but under the 1997 Act'."

27. The court went on to find that:

> " 33. The phrase "or sooner determination" means early termination before full term and is contained in a contract that spells out the obligations of each

> of the parties. In our view, the contract contents should be read, in context and not as separate clauses but as clauses that make up part of a whole. In essence therefore, clause 5 should be read in relation to all the other clauses in which it is used. It is not disputed that the lease agreement was entered into for a fixed term of 6 years. However, the inclusion of the clause "or sooner determination" in the contract makes it apparent that the parties agreed to give themselves an exit window out of the agreed terms upon change of circumstances."

28. In the ordinary sense, the terms "sooner determination" or earlier determination" mean a determination before the appointed time. Going by the conclusion in *Council of Governors v Attorney General & 7 others* [2019] eKLR, English words should be given their natural meaning, unless there is an ambiguity. Since there is no ambiguity in the manner the two phrases were used, the only meaning that can be assigned to them is that they meant the determination of the contract before the expiry of the agreed term of the Lease. In *Jomo Kenyatta University of Agriculture and Technology v Kwanza Estate Limited* (*supra*), the court further held that:

> "Furthermore, as pointed out by the respondent, the parties herein negotiated the terms of the contract and voluntarily bound themselves to the terms therein. Therefore, the respondent bound itself to the terms of the agreement which allowed for the interruption of the lease agreement prior to the expiry of the fixed term. Having given the English terms and phrases employed in the following clauses;
>
> "5.5; immediately prior to the expiration of the said term or on the sooner determination thereof...
>
> 5. to yield up at the expiration or sooner termination of the said term...
>
> 26. 5. The lessor's right to vacant possession at the expiry or sooner determination
> 27. of this lease,"
>
> their ordinary meaning and interpretation, we conclude that the effect of the phrase "or sooner determination" in those clauses, was to allow the parties to opt out of the lease agreement prior to the fixed term of the lease and therefore, the trial Judge erred in finding that the phrase did not amount to a break clause entitling the parties to determine the contract before the expiry of the lease term."

29. Similarly, the Lease Agreement herein does in fact contain the terms 'sooner determination' and 'earlier determination' and guided by the holding of the Court of Appeal that the two phrases do indicate that the Lease could be terminated before expiry of the term of 6 years. This finding does not amount to the court attempting to rewrite the contract between the parties, rather, the court enforcing the terms of the contract as negotiated and signed by the parties.

30. It is important to reproduce the contents of the Plaintiff's letter dated 4th March, 2020 for purposes of discussion on whether or note the parties effectually determined the Lease by consent. The letter stated thus:

> "We refer to our meeting on 27/12/2019 held at our Likoni Road offices. Startimes Media team expressed their concern on the rent of the shop given the current economic conditions if their business and requested a reduction in rent. We explained why this was not possible given that we have a legal contract in place and all rent charged is standard for all our ground floor tenants.

This was agreed on and below options were offered:
Should Startimes not be in a position to continue with the current lease and opt to vacate, they will lose their rent deposit held since due to the high demand of the ground floor space it will take us time to vet the many applications for a suitable tenant.We offered an option of relocating to the upper floors i.e on 3rd or 4th floor and again for the above reasons startimes will also forfeit the rent deposit and be required to put down relevant deposit for the new space taken up.Available space on the third floor and fourth floor range from 18.5 sq meters to 54.4 sq meters as per single units at a rate of USD 10 per sq meter. However, we are willing to offer you a combination of offices of your choice from the available space that will best suit your operations. Please note most of our top floor offices have connecting doors to single usage viewing of the offices can be arranged on request.

Kindly note, should you choose to relocate to the upper floors, all the terms and conditions remain as per your current leases except for the rent charged and a new agreement will be executed and registered at your cost.

Kindly let us know the way forward.

Yours sincerely,

Indar Singh Gill LTD"

31. The Plaintiff's letter clearly states that the options reproduced above were agreed upon. It is my understanding that what was required of the Defendant was to communicate which option they were settling for and which they did vide their letter of 5th May 2020. This letter said in part thus;

> " After thorough internal deliberations and meetings with our financial advisors. We have had to come to the painful conclusion that we are not be able to afford the rent of the premises at its current retailing rates and still manage to keep the company afloat. This is due to the current state of affairs of not county but of the world. Therefore, in a quest to keep the company afloat, we unfortunately have to seek early determination of the lease.
>
> In light of the above and on the basis of the subsisting Lessor and Lease relation that has subsisted for the past years. Kindly indulge us and allow for a discussion on registration of a surrender of Lease. We understand the implications of having a Lease registered and hence propose to have a surrender of Lease registered.
>
> We also stand guided by your letter and would like to take up option offered of vacating the premises. Further to this, we would like to propose the following terms of surrender in guidance with early determination as provided for in the Lease."

(b) Whether the Defendant breached the Lease entitling the Plaintiff to damages thereof

32. Damages for breach of contract are compensation to the aggrieved party and a restitution of what he has lost as a consequence to the breach. Breach of Contract is defined by the Black's Law Dictionary 9th Ed. at page 213 as:

> "Violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance."

33. A claimant for general damages for breach of contract who does not prove that he suffered loss is all the same entitled to damages, though nominal. In the Anson's Law of Contract, 28th Edition at pg 589 and 590 states that:-

> " Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal".

34. By the letter dated 5th May, 2020 the Defendant informed the Plaintiff that "they would take up the option offered of vacating the premises" and proposed to vacate the premises by 30th June, 2020. They also undertook to pay rent, utility and service charges for the months of May and June, 2020. The Defendant further sought a refund of the deposit and indicated willingness to allow viewing of the premises by any potential new tenant. The Defendant did vacate, the premises on 29th June 2020 and forwarded the keys to the Plaintiff. It would appear from the Plaintiff's letter dated 3rd July, 2020 that the Keys were returned to the Defendant for purposes of carrying out renovations as per clause 22 (ee) and (ii) of the Lease.

35. Subsequently, the Defendant through its advocate wrote to the Plaintiff's advocate vided a letter dated 22nd July 2020 stating that the renovations were complete and the parties could do a joint inspection. The keys were also forwarded vide the Defendant's letter dated 23rd July 2020 but which keys were returned. Counsel for the Plaintiff in their letter dated 23rd June 2020 wrote thus: "Kindly note that we have no authority to accept the return of the keys which were attached to your letter. We are not the real estate agents of the landlord, we are lawyers. Therefore, it is mischievous for you to attach keys to your correspondence to us"

36. The correspondences referred to above indicate that the Plaintiff was not only aware, but consented to the Defendant's choice to terminate the Lease and the reason the keys were returned was for the Defendant to carry out the renovations. The turn-around expressed in the Plaintiff's advocates letters post the date of renovations could not change the provision in the lease which gave a rider for sooner determination as well as the meeting held on 27th December 2019 which was communicated in the letter of 4th March 2020. I therefore come to a finding that the termination was not in breach of the Lease hence the Plaintiff is not entitled to the head of damages for breach of contract as claimed.

b. Whether the Plaintiff is entitled to damages for loss of income

37. Loss of income is a special damage, which is in the nature of restitution and, where proved, it is meant to restore the claimant to the position it would have been save for the action complained of. The law is settled that a claim for special damages must not only be specifically pleaded but must also be strictly proved with as much particularity as circumstances permit. The Court of Appeal in *Capital Fish Kenya Limited v Kenya Power & Lighting Company Limited* (2016) eKLR as follows:-

> " Starting with the first issue, it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See National Social Security Fund Board of Trustees v Sifa International Limited (2016) eKLR, Macharia & Waiguru v Muranga Municipal Council & Another (2014) eKLR and Provincial Insurance Co. EA Ltd v Mordekai Mwanga Nandwa, KSM CACA 179 of 1995 (UR). In the latter case this Court was emphatic that "... It is now well settled

that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract..."

38. Only the particulars for breach of contract was pleaded in the Plaint and the alleged loss of income was not specifically pleaded as required. The Plaintiff mentions that it mitigated its losses by advertising for a new tenant and asking the Defendant to obtain another tenant to replace it. Option 1 on its letter dated 4th March, 2020 indicated that the reason for forfeiture of the Defendant's deposit was because the ground floor space was on demand. Thus, the Plaintiff anticipated it would take a lot of time to sort through and vet the applications to find a suitable tenant. Further, its letter of 5th May 2020, the Defendant had expressed its willingness to allow viewing by any prospective tenants even before they vacated the impugned premises. The Plaintiff vide its letter dated 6th July, 2020 demanded for admission of liability for breach of contract. However, they advertised for the premises one year later on 20th August 2021

39. The Plaintiff wants to be paid for damages to cover this period until when the new tenant took over the premises but it did not explain why they did not act with reasonableness in advertising the premises. That aside, the Plaintiff's own actions of refusing to accept the return of the keys to the suit premises in an attempt to restrict the Defendant's exit curtailed its chances of entering into business arrangements with other entities and earning an income. As indicated above, the Plaintiff had initially accepted the keys for the premises from the Defendant, but vide a letter dated 3rd July, 2020 returned them back to the Defendant to allow the Defendant renovate the premises as required under the Lease. Upon completion of the renovations, the Defendant attempted on various occasions to return the keys, including forwarding them to the Plaintiff's advocate on record through as evidenced by the letters dated 22nd July, 2020 and 23rd July, 2020.

40. Instead, the Plaintiff and its Advocate declined to receive the keys evidenced by the letters dated 23rd July, 2020, 29th July, 2020 and 3rd August, 2020 where the said Advocate indicated that they had no authority to receive the keys and in fact returned them. This state of affairs prevailed until the Plaintiff's Advocate wrote to the Defendant's Advocate on record vide letter interestingly dated 16th July, 2020 found at page 1 of the Plaintiff's supplementary list of documents asking for the key to be released to it. This letter is stamped received by the Defendant's Advocate on 19th July, 2021 and the keys were released through the letter dated 28th July, 2021.

41. The Plaintiff cannot thus burden the Defendant to pay for loss that it suffered as a result of its own calculated actions. The Plaintiff has indeed incurred an expense/actual damage, but the damage herein arises not from the Defendant's wrongful act, but from the conduct of the Plaintiff. In *Joseph Mwangi Gitundu v Gateway Insurance Co. Ltd.* (2015) eKLR the court held that "In law a claimant is expected to mitigate his losses by taking such measures which will bring down his losses". The Plaintiff's conduct does not reflect any effort to mitigate its losses. In *African Highlands & Produce Ltd v John Kisorio* (2001) eKLR the court held thus;

> " The guiding principle; 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. The duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best he may, not only in his own interests but also in those of the defendant. He is, however, under no obligation to injure himself, his character, his business, or his property, to reduce the damages payable by the wrongdoer. He need not spend money to enable him to minimise the damages, or embark on dubious litigation. The

question what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being upon the defendant. See Halsbury's Laws of England Vol 11, Page 289, 3rd Edn 1955"

42. By refusing to accept the keys and letting the suit premises sit vacant for a year, the Plaintiff cannot be said to have taken all reasonable steps to mitigate its losses. The Plaintiff is thus not entitled to the claim for loss of income as pleaded, on account that the said loss arose due to its own actions and neglect.

c. Whether the Plaintiff is liable for the rent arrears as claimed

43. By seeking to have the deposit applied towards the rent arrears, the Defendants want to invoke Clause 2(c) of the Lease Agreement which provided that the Landlord could apply the deposit towards the tenant's obligations. The said clause also provides that the deposit was refundable without interest to the tenant at the expiry of the Lease. However, these provisions could only be invoked at the expiry of the term of the Lease.

44. In the letter of 5th May, 2020, the Defendant clearly stated that they had taken the option to vacate the premises which option as given by the Plaintiff's letter of 4th March, 2020 came with the condition that the Defendant would lose the deposit paid on the Lease. By taking that option, the Defendant had acquiesced to the condition for forfeiture of the deposit. The attempt by the Defendant to pay the arrears less the deposit being held by the Plaintiff was thus erroneous. Further, the correspondence of 22nd and 23rd July 2020 demonstrates that by the time the Defendant move out on 30th June 2020, it had not undertaken any renovation. This entitles the Plaintiff to be paid rent for the month of July 2020 as the premises as handed over were not ready for occupation by a new tenant.

45. I am also persuaded that the Plaintiff was entitled to a reasonable time to get an alternative tenant and Four (4) months (inclusive of the notice period and the time the premises was under renovation) was sufficient time for getting a replacement tenant. Thus, besides the deposit and rent for July 2020, I also find that the Plaintiff shall be paid rent for the month of August 2020 (comprising the reasonable notice period running for the months of May -August 2020).

46. Further, the Defendant in its letter of 5th May 2020 admitted owing arrears of rent which it wanted the Plaintiff to recover from the deposit. As stated herein above, the deposit having been forfeited, the rent arrears of four months and the service charge outsatnding was due and payable to the Plaintiff. It was admitted that only invoice numbers 51212, 53959, 54301, 54521, 54969 and 55009 remain unpaid with the invoice no. 55009 being the rent for the month of July, 2020.

47. The Defendant's only objection to the rent arrears claimed is that it settled the amounts vide the cheques forwarded through their letter dated 30th June, 2022. These amounts shall be payable less the amounts in the cheques forwarded if they were cashed and or replaced with new cheques (subject to the cheques being returned). For those reasons, the Plaintiff claim partially succeeds on the heading of loss of rent and to the extent allowed by this court.

48. Consequently, the court hereby enters judgement for the Plaintiff on the following terms:-

    a. A declaration be and is hereby issued that the Defendant is liable to pay any and all arrears of rent due and payable before 30th June, 2020 (less the amount in the cheques issued by the Defendant in settlement of the arrears if cashed)

    b. The Defendant shall pay to the Plaintiff rent for the month of July 2020 and additional one month rent (as compensation) to cover the reasonable notice of getting a replacement tenant.

c. Interest on (a) and (b) above at court rates from the date of filing this suit until payment is made in full;

d. The costs of this suit to the Plaintiff.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF FEBRUARY, 2024

A. OMOLLO

JUDGE