**Tafuna Enterprises Limiited v City Apartments Limited (Civil Appeal E102 of 2024) [2025] KEHC 859 (KLR) (Civ) (17 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 859 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E102 OF 2024**

**RC RUTTO, J**

**JANUARY 17, 2025**

**BETWEEN**

**TAFUNA ENTERPRISES LIMIITED ..... APPELLANT**

**AND**

**CITY APARTMENTS LIMITED ..... RESPONDENT**

***(Being an appeal from the judgment delivered by Hon. Lesootia Saitabau on 14th December 2023 in Nairobi Milimani Chief Magistrates Court Civil Suit No. 664 of 2019)***

## JUDGMENT

1. This appeal arises from a judgment and decree entered in Nairobi Chief Magistrates Milimani Commercial Court Case No. 664 of 2019 in favour of the Respondent against the appellant in the sum of Kshs 4,093,531/=. The genesis of the claim is as contained in the amended plaint dated 5th March 2021. In that plaint, the Respondent sued the Appellant for breach of the terms of the lease agreement by defaulting to pay rent and service charge arrears. The Respondent sought payment of Kshs.4,093,531/= as the outstanding rent, along with interest and costs of the suit.

2. In its amended defence dated 7th December 2020, the Appellant alleged that the lease agreement was intentionally frustrated by the Respondent's acts and omissions. The Appellant also filed a counterclaim seeking a refund of the deposit paid, amounting to Kshs 395,430/=, a refund of Kshs 725,170/= incurred in renovating the premise, a refund of Kshs.149,000/= raised from the auction of its goods, and damages for lost business.

3. In a reply to defence and counterclaim dated 25th February 2021 the respondent denied allegations that it frustrated the lease agreement.

4. After hearing and analyzing the parties' evidence, the trial court dismissed the appellant's counterclaim with costs and allowed the respondent's claim as prayed in the Plaint.

5. Aggrieved by the decision of the trial court, the appellant lodged this appeal vide a memorandum of appeal dated 23rd January 2024, raising six (6) grounds of appeal set out herein verbatim as follows:

    a. The Learned Magistrate ignored and/or misapprehended the totality of the Appellant's evidence including matters of public notoriety to wit; the effect of the road construction and blocked access on a recreational business and thereby reached the wrong conclusions.

    b. The Learned Magistrate wrongly exercised his discretion in failing to take into account the fair market and/or reasonable value of the Appellant's distrained goods and improvements on the premises and thereby made an irrational, unreasonable and unconscionable valuation of amounts to be set off against the respondent's claim.

    c. The Learned Magistrate otherwise gave undue primacy to the Respondent's evidence and thereby condemned the Appellant unheard.

    d. The Learned Magistrate exceeded his jurisdiction by inferring into a written contract extraneous terms that were not provided or agreed therein and thereby unlawfully condemned the Appellant to payment of interest.

    e. The Learned Magistrate misapprehended the applicable laws and principles to the doctrine of frustration and thereby reached the wrong conclusions on the question as to whether the contract was repudiable on account of frustration.

    f. The Learned Magistrate erred in fact and law by taking into account extraneous matters and failed to take into account relevant matters in arriving at his decision.

6. Reasons whereof, the appellant prayed that the appeal be allowed and judgment of the trial court be set aside and substituted in terms of the prayers (a), (b), (c), (d), (e), (f) and (g) of the appellant's defence and counterclaim dated 7th December 2020.

7. The Court directed that this appeal be canvassed by way of written submissions. The appellant's filed their submissions dated 11th June 2024 while the respondent's submissions were dated 27th November 2024.

**Appellant's submissions**

8. The Appellant sets out four issues for determination as follows:

    (a) whether the appellant owed the respondent Kshs.4,093,531/= as rent arrears;

    (b) whether there was frustration in the performance of the lease agreement;

    (c) whether the Appellant is entitled to a refund of the deposit paid under the lease agreement and Kshs 149,000; and

    (d) whether the Respondent is entitled to the interest awarded.

9. On the question of whether the appellant owed the respondent Kshs.4,093,531/= as rent arrears, the appellant submitted that the respondent did not prove the amount claimed as special damages. The appellant argues that the letters relied upon by the respondent, specifically, the letters dated 17th June 2016 and 16th August 2016, do not suffice as statements of account, nor do their transmission adhere to acceptable accounting practices for an accrued debt. Furthermore, the Appellant contends that none

of the documents provided demonstrate a computation of the alleged special damages. The appellant argues that the respondent did not explain why invoices or the appellant's statement of accounts were not presented as evidence. Consequently, the trial court could not ascertain the amounts sought with particularity, and reliance on the respondent's evidence was manifestly wrong.

10. The appellant further submitted that the evidence presented in support of the special damages claim is contradictory, as the amounts alleged in the letters of 17th June 2016 and 16th August 2016 show a discrepancy.

11. On the issue of whether there was frustration in the performance of the lease agreement, the appellant submitted that it wrote to the respondent regarding construction on Ngong Road Lane, which blocked customer access to the premises, resulting in an unsustainable decline in customer flow and requested a waiver in rent from the respondent. Additionally, that they reminded the respondent of previous requests to reduce rent, decrease the rental space, and extend operational hours to boost sales, as the construction hindered customer traffic. The Appellant further submitted that it eventually surrendered part of the rental space to lessen its burden. To support these arguments, the Appellant relied on the holding in Lucy Njeri Njoroge v Kaiyahe Njoroge [2015] eKLR and Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & Another [2014] eKLR, and urged that these circumstances meet the criteria for invoking the defense of frustration.

12. On whether the Appellant is entitled to a refund of the deposit paid under the lease agreement and Kshs.149,000/=, the Appellant submits that it is undisputed that a deposit of Kshs.317,340/= was paid in accordance with the lease agreement. Furthermore, under the terms of the lease, the appellant, as the tenant, was entitled to a refund of this deposit upon termination of the agreement. Regarding the Kshs.149,000/=, the appellant submits that the Respondent admitted to instructing auctioneers who proclaimed the appellant's property at the leased premises. However, the respondent failed to provide any evidence of the auction, notice of sale, or statement of account as required by the Auctioneers Rules of 1997 and Section 18 of the *Auctioneers Act*, respectively. The appellant argues that the lack of evidence regarding the auction constitutes conversion of the appellant's goods, effectively depriving the appellant of title and possession of the seized property. The appellant relies on the assets register, which itemizes the number, market value, depreciation, and forced market value of the items seized. The appellant further submits that the trial court erred in disregarding these documents.

13. On whether the respondent is entitled to interest, the Appellant submits that the trial court inferred extraneous terms into the contract that were neither provided for nor agreed upon, thereby unlawfully condemning the appellant to pay interest. Citing National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd (2002) 2 E.A. 503, [2011] eKLR, the appellant argues that by awarding interest not stipulated in the contract, the trial court exceeded its jurisdiction by introducing terms that were not included or agreed upon in the written contract, thereby unlawfully imposing an obligation on the appellant to pay interest. They urged the court to allow the appeal as prayed.

**Respondent's Submissions**

14. The respondent submitted that the crux of the claim before the lower court was breach of rental obligations which culminated to ensuing demands for payments and subsequent auction. That the outstanding amount as at 16th August 2016 was Kshs.4,093,531/=. It urged this court to evaluate the totality of the evidence tendered before the trial court during the hearing.

15. The respondent set out three issues for determination namely; whether the appellant breached the terms of the lease; whether the appellant was discharged from its obligations under the lease. whether

the judgment of the trial court was based on a misapprehension of the law or facts as to allow the instant appeal.

16. The respondent submitted that parties are bound by the terms of their contracts. That the appellant freely executed the lease, and there is a clear admission of indebtedness by the appellant. They further submitted that no evidence was tendered by the appellant to corroborate the alleged hampering of its business during the construction of Ngong road.

17. It was its submission that the appellant was seeking a retrial of its case through the instant appeal since they failed to discharge the evidential burden to the required standard. That it should not be allowed to tender new evidence. It urged the court to find that the doctrine of frustration cannot activate in aid of the appellant since the fact of diminishing clientele cannot be reasonably construed as an inference or frustration of the terms of the lease or rendering the leased premises unfit for use as pronounced by the appellant. Reference was made to the case of Lucy Njeri Njoroge v Kaiyahe Njoroge (Civil Appeal 161 of 2002) (2015)KECA 960.

18. In urging the court to dismiss the appeal the respondent submitted that the appellant has not demonstrated that the trial court's findings were unsupported by evidence or based on misapprehension of facts or that the court acted on a wrong principle in reaching the finding.

**Analysis and Determination**

19. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. The foregoing duty was succinctly stated by the Court of Appeal in the case of Selle v Associated Motor Boat Company Ltd (1968) EA 123 and Peters v Sunday Post Limited [1985] EA 424).

20. Guided by the above dictum and carefully analysing the record of appeal and the parties' submissions, the following issues arise for determination:

    a. Whether the Appellant breached the terms of the lease and whether the performance of the lease was rendered impossible due to frustration.

    b. Whether the Respondent proved its case on a balance of probability.

    c. Whether the Appellant is entitled to the remedies sought.

**a. Whether the Appellant breached the terms of the lease and whether the performance of the lease was rendered impossible due to frustration**

21. It is not in dispute that the parties herein mutually entered into a six-year fixed term lease agreement without a termination clause. That pursuant to the lease agreement the appellant's rent was payable in advance on the 1st day of the month, the appellant was also required to pay a security deposit of Kshs. 317,340/= being one quarter's rent and a service charge totaling to Kshs 317,340/= per year.

22. The appellant avers that the respondent did not prove its claim for special damages since the letters of 17th June 2016 and 16th August 2016 do not suffice as statements of account to be used to justify unpaid invoices and receipts. That it is not ascertainable how the alleged amounts were costed and computed. In response, the respondent stated that as at 16th August 2016 the outstanding rental amount was Kshs 4,093,531/= as shown on the letter dated 16th August 2016 addressed to the appellant and in a series of other correspondences between the parties.

23. From the evidence contained in the record of appeal it is evident that the appellant being in areas of the rent wrote to the respondent's property managers requesting for waiver and the possibility for rent and space reduction. A perusal of the letter dated 15th January 2015 show that appellant committed to remit monthly instalments of Kshs.200,000/= in settlement of accrued arrears. Further, the appellant's own witness statement acknowledges that on 9th June 2016 the respondent wrote an email demanding the total unpaid instalment and consequently distrained its business wares way below the market value.

24. From this it is deducible that indeed there was a breach of the lease agreement which led to the rent arrears, a demand being issued and subsequently distrain of the appellant's business wares.

25. The contentious issue therefore is establishing whether the appellant breached the lease agreement or if the lease was frustrated making it impossible for the appellant to perform its obligations. According to the appellant, the agreement was frustrated by the respondent's acts and omissions, which prevented it from fulfilling its obligations as originally intended. The appellant asserts that the restricted control, access to the leased premises as a result of the ongoing road construction was without notice to the appellant impaired thereby fundamentally altering the fitness and/or suitability of the said premises for purpose. That to mitigate the effects, it wrote to the respondent requesting for a waiver of rent and variation of the lease terms to facilitate reduction of rented space and thereby rent payable. In addition, it notified the respondent of its intention to exit the premises. The appellant contends that had it been permitted to fulfill the negotiated obligations, it would have sustained its business operations and fully met its commitments.

26. On the other hand, the respondent submitted that the appellant having alluded to the continued usage of the let premises cannot activate the doctrine of frustration. Further, that the fact that the clientele diminished cannot be reasonably construed as rendering the lease property unfit to use as pronounced by the appellant.

27. The Court of Appeal case of Lucy Njeri Njoroge v Kaiyahe Njoroge [2015] eKLR provided for the factors to be taken into consideration for frustration to be held to exist. In summary, the court identified the following principles of the doctrine of frustration:-

    i. whether the frustration was caused by the default of the parties.

    ii. whether an unforeseeable event occurred leading to the frustration of the agreement.

    iii. whether, the intervening event resulted in something so radically different from that originally contemplated by the parties

28. Considering the guiding principles of the doctrine of frustration, it is important for this court to evaluate the evidence to determine whether the Appellant contributed to the alleged frustration. In 2015, specifically through a letter dated 15th January 2015, the Appellant requested, among other things, a waiver of rent payments from the Respondent due to the construction on Ngong Road Lane, which hindered customer access to the rental premises and affected business. Notably, in the letter, the Appellant requested that the waiver be considered starting from December 2014.

29. The evidence suggests that the appellant fell short of its financial projections due to a decline in clients, which subsequently made it challenging to fulfil its rent obligations. This was attributed to the road construction along Ngong road. This court notes that the construction of the road and the decline in clientele were circumstances beyond the control or fault of either of the party.

30. On the question whether the occurrence was unforeseeable, the court notes that no evidence was presented by either party to substantiate this point. It is, however, surprising that neither party,

particularly the appellant who relies on this defence for its breach of the lease agreement, indicated when the construction on Ngong Road Lane began, which was essential to determine if the alleged frustration coincided with the start of construction. More importantly, no evidence of the said construction was provided before the court allegations were just made. In the absence of such confirmation, the correspondence between the parties suggests that the rent arrears began accruing before the construction started, making it convenient for the Appellant to cite ongoing construction as a reason for the breach of the lease agreement. I am not persuaded that I need to take judicial notice or as a matter of public notoriety infer the construction of Ngong Road Lane and the extent of such construction and the resultant effect on the leased property.

31. Furthermore, the Respondent's correspondence to the Appellant dated 8th January 2016 clearly stipulated that, even with the Appellant's proposals for rent waiver and space reduction, 50% of the rent arrears was to be paid first. In this regard, the court notes that the Appellant defaulted and remained in possession of the premises thus partially contributed to the frustration of the contract. It can therefore not be said that the intervening event resulted in something so radically different from that originally contemplated by the parties. To my mind, the appellant was keen on taking mitigating measures for the future in realization of its financial constraints and was keen to keep the property.

32. Based on the above, it is evident that the defence of frustration of the lease agreement cannot stand. Therefore, this court concurs with the trial court's determination that the Appellant breached the terms and conditions of the lease.

**b. Whether the Respondent proved its case on a balance of probability**

33. The Appellant submits that the amount being claimed as special damages by the Respondent is unsubstantiated as the Respondent did not produce any verifiable evidence in support of his claim for special damages.

34. It is trite law that 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 Richard Okuku Oloo v South Nyanza Sugar Co Ltd [2013] eKLR observed: -

> " ...a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of..."

35. The Appellant, in its submissions, argues that the letters dated 17th June 2016 and 16th August 2016, submitted by the Respondent in support of the claim for special damages, do not suffice as statements of account, nor does their transmission constitute an acceptable accounting practice for establishing an accrued debt.

36. In addressing this issue, the court notes that it is indeed true that the Respondent failed to specifically demonstrate how the rent arrears accrued. However, based on the facts presented, the correspondences between the parties and the pleadings raised at the trial court, it is evident that the Appellant admitted to the debt and even made payment proposals without disputing the figures sought. The amount claimed by the Respondent was neither contested nor opposed. It is therefore not tenable to raise the objection at this stage. Besides, there is no requirement that the evidence of indebtedness must be adduced in any specific format. At any rate the appellant has failed to demonstrate that the respondent prayed for a figure beyond or other than that which was contained in the correspondence.

37. With regard to the interest awarded, I have reviewed the Lease Agreement, specifically Clause 7(a), which states: "If rent or any other sums due under the lease are not paid on the due date, whether

formally demanded or not, the tenant shall pay to the landlord interest at the rate of 4% per month on any such sums from the date they were due to the date they are paid." Contrary to the Appellant's submissions, the award of interest is not inferred but is explicitly provided for in the lease agreement. The appellant has not made any further argument beyond award of interest or the inapplicability of the above clause on interest. Therefore, the trial court did not err in awarding interest at the rate of 4% as per the agreement. The appellant's argument that the trial court rewrote the contract between the parties remains unsubstantiated.

38. Consequently, I find that the respondent's claim, in terms of the reliefs sought were properly awarded. Thus, this ground of appeal must fail.

**c. Whether the Appellant is entitled to the remedies sought.**

39. The Appellant has repeatedly asserted in its submissions that it is entitled to a refund of the deposit paid, Kshs.725,170/= renovation costs aggregating KShs,725,170/=as well as the amount of Kshs 149,000/= allegedly yielded from the auction arising from distrain.

40. It is undisputed that the Appellant paid a deposit of Kshs.317,340/= and would generally be entitled to a refund of this amount. From the lease, the same was to be security for due performance by the Appellant of its obligations under the lease. This amount would only be refunded to the Appellant by the Respondent at the expiry or sooner determination of the lease term and after payment by the Appellant of all sums then owing to the Respondent and after the discharge of all its obligations as per the provisions of clause 4 (b) of the lease. Thus, the appellant is entitled to pursue this claim with the appellant once all sums owing have been paid.

41. With regard to the Kshs.725,170/= claimed as renovation costs, this court observes that the claim was unsubstantiated as no proof of the alleged renovations was submitted.

42. The upshot of the issues above, is that I am satisfied that the learned trial magistrate correctly determined the matter, and I find no reason to interfere with the trial court's findings. Therefore, the appeal fails.

43. Consequently, I find no merit in the appeal and hereby dismiss it with costs awarded to the Respondent.

Orders accordingly

**RHODA RUTTO**

**JUDGE**

**DELIVERED, DATED AND SIGNED THIS 17TH DAY OF JANUARY 2025**

For Appellant:

For Respondent:

Court Assistant: