



**Juma v Dincom Ltd & another (Civil Case 124 of 2012)
[2024] KEHC 9344 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9344 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL CASE 124 OF 2012
SC CHIRCHIR, J
JULY 18, 2024**

BETWEEN

REBECCA BRENDA JUMA PLAINTIFF

AND

DINCOM LTD 1ST DEFENDANT

HOLDEN INVESTMENTS LTD 2ND DEFENDANT

JUDGMENT

1. Through the plaint dated 29/5/2012 the plaintiff filed suit against the defendants seeking for a permanent injunction against the 2nd Defendant from interfering with her goods, pending the termination of the lease Agreement between the 1st Defendant and 2nd Defendant, and between the Plaintiff and 1st Defendant. She also sought for a declaration that the intended sale of her property was unlawful.
2. At the same time the plaintiff filed a Notice of Motion seeking for a restraining order against the sale of the goods that the 2nd defendant had attached goods pending suit. She further sought for access to the same goods , pending suit.
3. In a ruling delivered on 31.7.2012, the court allowed the plaintiff to have access to her goods , on the condition that she pays the sum of Ksh. 684, 973.93/= , being the amount she had admitted to be owing as arrears of Rent.

The Plaintiff’s Case

4. It is the Plaintiff’s case that on 1.1.2010 she signed a franchise Agreement with the 1st Defendant, to operate a restaurant known as “Kula Corner”. The Restaurant was to be operated at a premises known as Nakumat Holden Hall at Kakamega Town (The suit premises).She further stated that the lease for the restaurant was signed between the 1st and 2nd Defendants.



5. She further states that on 15.4.2012 the 2nd defendant closed the premises over an alleged non- payment of rent amounting to Ksh.1,371,164.56/=. She further stated the premises were closed without prior notice to her and that the 1st Defendant did not inform her of any notice it may have received from the 2nd Defendant.
6. It is further her case that non-payment of rent did not entitle the 2nd Defendant to close the premises, outside the confines of the Law.
7. She further pleaded that on 26.5.2012 she came across a notice by the 2nd Defendant, indicating that her goods would be sold off to defray the rent. She avers that she does not owe the 2nd Defendant any such rent and therefore the 2nd Defendant has no authority to levy distress for rent.
8. She avers that she has suffered loss of business as a result of the 2nd Defendant's action.

1st Defendant's case

9. On 31.1.2014 the 1st defendant filed a defence and counter- claim. The 1st Defendant's case is that it secured the Lease over the suit premises for purposes of the franchise. That the plaintiff paid rent and took over the premises ; that consequently, the Plaintiff became a tenant, independent of the franchise.
10. It is further stated that the Plaintiff was the one in occupation and thus for all intents and purposes, she was the tenant of the premises, and that she was aware of the terms of the Lease that had been entered between the 1st and the 2nd defendant.
11. The 1st Defendant further state that it entered into the franchise Agreement with the Plaintiff under which the monthly royalties for the use of the 1st defendant's trademark and know- how, in the Plaintiff's restaurant were to be paid to it. That it was further a term of franchise Agreement that any arrears due to the franchisor (the 1st defendant) was to bear interest at an annual rate of 4% over the current Barclays Bank daily base rate ,with a minimum of 12% per month.
12. The 1st defendant further states that the amount due under the franchise was Ksh.936,139.89/= Which amount it claims from the Plaintiff plus interest as aforesaid.
13. It was further stated that it is the 2nd defendant who terminated the lease Agreement by exercising his right under clause 3.18 of the Agreement , and without any prior Notice to the 1st Defendant.
14. Consequently the 1st Defendant seeks as against the Plaintiff the following:
 - a. Ksh.936,139.89/= being the total sum of the royalty, rent and service charge arrears.
 - b. The sum of Ksh.9,154,133.56/= in respect of rent, service charges and VAT on termination of Lease prior to expiry period.
 - c. A declaration that any claim that the 2nd Defendant may bring against the 1st defendant in respect of the Lease Agreement , be a claim against the plaintiff.
15. In its defence against the 2nd Defendant's counter-claim the 1st Defendant insist that at all material times the 2nd Defendant was aware that the Lease Agreement was for the benefit of the franchise and the rent was to be paid by the Plaintiff, through the 1st Defendant.
16. It is further stated that , it is the 2nd defendant who terminated the lease pursuant to clause 3.18 of the lease Agreement and that 2nd defendant denied them the chance to continue with the Agreement or let out the suit premises to another franchisee.



2nd defendant's case

17. On 11.6.2012 the 2nd Defendant filed a Defence and counter-claim. It is the 2nd Defendant's case that under the lease agreement, there was no requirement for notice prior to the exercise of the Right of re-entry ; that in any event the sum owing as at the time of the re- entry was Ksh.1,328, 352.74/= and which amount continues to accrue interest.
18. The 2nd Defendant further states that the plaintiff has been aware about the terms of the Lease Agreement, as she has been paying the rent since inception of the lease through the 1st Defendant.
19. It is further stated that the plaintiff has admitted the claim evidenced by the issuing of cheques , but which cheques were dishonoured upon presentation
20. In the Counter claim, the 2nd Defendant claims against the plaintiff and 1st Defendant a sum of Ksh.1,387, 757.22/= being the aggregate of rent arrears, service charge and value added Tax (VAT) outstanding as at 31.5.2012.
21. The 2nd Defendant further claims that in the event of termination of Lease, he is entitled to seek against the Plaintiff and 1st defendant a total of Ksh.9,154,133.56/= being the rent that would have accrued between 1st June, 2012, when the lease came to an end , and 31.10.2015 in terms of clause 3.18, 15 A 5 (I) and 5 (m) of the Lease Agreement.
22. It further seeks for interest at commercial rates as stipulated in the agreement.
23. On 22/7/2022, the plaintiff's suit was dismissed for want of prosecution and the 2nd defendant was allowed to proceed with his counterclaim.

The Evidence

24. The first and only witness was Rafinder Lingham who identified himself as one of the directors of the 2nd Defendant company. He adopted his written statement dated 7/6/2012 as his evidence- in -chief.
25. In the said statement he stated that a director of the 1st Defendant one Dominic Kosen approached him in September 2010, seeking premises for a restaurant. He further told him that the restaurant will be operated under a franchise.
26. Consequently the Lease Agreement dated 21/9/2010 (PExb 1) was entered into. He stated that the rent payment was always erratic and as at January 2012, the amount outstanding was Ksh.1,272,455.11/=. The last payment of Ksh.614,199.21/= was made on 9.2.2012 , leaving a balance of Ksh.658,255.90/= . That as per clause 3.18, the occupant of the premises was to pay Rent.
27. It was further his evidence that his advocate sent a letter to the 1st Defendant notifying him about the intended re-entry on account of failure to pay rent, which was then outstanding at ksh. Ksh.1, 328,452.47. He further stated that on 15/5/2012, he received a letter from the Plaintiff, admitting to owing a sum of Ksh.660, 232/= for the month of January to April 2012, and some royalties due to the 1st defendant.
28. He stated that clause 5(a) of the Agreement gives the 2nd Defendant a right of re-entry without notice.
29. He stated that the sum due to the 2nd Defendant by both Plaintiff and 1st defendant was Ksh.1, 387, 757. 22/= being the rent due as at 31.5.2022 and Ksh.9, 152, 133.56/= being the sum total of rent of the remaining term of the lease.



30. In his oral evidence, he stated that he was relying on the list of documents as per the list of documents dated 7/6/2012 and filed on 11/6/2022. The documents were produced and marked as 2nd defendants Exhibits No. 1 to 11.
31. On cross-examination by the Advocate for the Plaintiff, he admitted that the lease Agreement (PExb. 1) was between the 1st and 2nd Defendants. He further stated the plaintiff was to pay rent to the 1st defendant and the 1st defendant would in turn remit it to the 2nd Defendant.
32. That cheque marked as 2nd defendants exhibit 4 was drawn by the 1st Defendant in favour of the 2nd Defendant.
33. He further told the court that according to the Lease Agreement, he was supposed to re-enter the premises, if the default in payment went on for 15 days. He further stated that the plaintiff was the one who paid the deposit of Ksh.474, 106.50/= He admitted that the security was refundable, and that he has not refunded the same.
34. He further stated he terminated the Lease between his company and 1st Defendant in May 2012 and that the Plaintiff had taken her items out of the premises.
35. On Cross-Examination by the Advocate the 2nd defendant, the witness told the court that he entered into the agreement with the 2nd Defendant. He admitted that according to the Ruling by Justice Thurania, the Plaintiff was the one to pay rent to the 2nd Defendant. He insisted that his claim was against the Plaintiff by virtue of occupation, and against the 2nd Defendant by virtue of the contractual Agreement.

Plaintiff's Submissions

36. It is the Plaintiff's submissions that this court lacks Jurisdiction to entertain this suit because, pursuant to clause 5(c) of the lease Agreement, any dispute on Rent was supposed to be referred to Arbitration.
37. On the sum of Ksh.9,154,133.56/= for the remainder of the Lease, the Plaintiff states that having been the one who terminated the lease, the 2nd defendant cannot turn around and claim rent for the remaining period of the Lease.
38. On the arrears of Ksh.1,362,639.11 the Plaintiff submits that there was no proof that VAT was being remitted to the relevant Authorities.
39. To buttress her submissions the plaintiff has relied on :
 - a). owners of the Motor vessel " Lilian" vs Caltex Oil ltd (1998) e KLR
 - b). Euromec international Ltd vs Shandong Taikai Co Ltd 9 2021) e KLR
 - c). Ram international Ltd vs Maasai Mara University (2021) e KLR

1st Defendant's Submissions.

40. It is the 1st defendant's submission that the Ruling of Justice Thurania delivered on 31.7.2012 determined the question of who was liable to pay rent for the premises. Consequently, it is argued, the same issue can not be addressed again by this court as it will offend the doctrine of res judicata. He has cited the Paul Mungai Kimani & 2 others vs. Kenya Airport authority & 3 others S.C petition no 71 of 2019 eKLR where it was held that the court is expected to take Notice of its decisions



41. In support of the Application of the principle of resjudicata the 1st Defendant has relied on the case of Dina Management Ltd Vs [County Government of Mombasa No. E010 of 2021](#) and John Florence Services Ltd & Another Vs Cabinet Secretary Transport and Infrastructure Petition No. 17 of 2025.
42. The 1st defendant further submits that the Franchise Agreement was entered into on 1.1.2010 while the Lease Agreement was entered into on 21.9.2010 and thus the 2nd Defendant knew that the Plaintiff was the constructive tenant. It is submitted that the Lease Agreement and Franchise Agreement were therefore collateral.
43. The 1st defendant further submits that the 2nd defendant has, through its submissions, acknowledged that the Plaintiff was supposed to indemnify the 1st Defendant; It is further argued that there was no Agency Agreement between the Franchise and Franchisee. That indeed clause 3.18 of the Lease acknowledge the independent liability of the person in occupation of the premises.
44. The 1st Defendant further submits that under clause 3.18, 5(a) and 5(i) of the Lease Agreement, it is evident that the Plaintiff, and not the 1st Defendant, was liable for payment of rent.
45. It is further submitted that to the extent that the 2nd Defendant has admitted that the Plaintiff was the exclusive and constructive tenant of the 2nd Defendant, then the Plaintiff and the Defendant cannot be held liable jointly and severally.
46. Concerning clause 5(a) and 5(i) of the Lease which clauses obligate the Lessee to pay rent for the entire period, notwithstanding termination, it is argued that section 71(4) as read with section 71(8) of the [Land Act](#) 2012, nullified the Common Law Rule requiring the lessee to be bond by the original life-span of the Lease.
47. It is further stated that the plaintiff has admitted the claim, evidenced by issuing of cheques which were dishonored.
48. It is further stated that it is the 2nd Defendant who terminated the lease pursuant to clause 3.18, and denied the 1st defendant an opportunity to continue the Lease Agreement or to let out the premises to another franchise.

2nd Defendant's Submissions

49. On the question of Jurisdiction, the 2nd Defendant points out that it was the Plaintiff who took the initiative to file suit, and never sought for the matter to go for Arbitration. It is further submitted that none of parties challenged the jurisdiction of the court as required under Section 6 (1) of the [Arbitration Act](#). In this regard the 2nd Defendant had relied on the case of *Lofty Vs Bedowin Enterprises Ltd (2005) E.A* and *Diocese of Marsabit Registered Trustees Vs Technotrade Pavilion Ltd*. Where the two courts found that failure to invoke reference to Arbitration prior to or at the time of filing appearance or at the time of filing any pleadings or at the time of taking any steps in the proceedings appearance would disentitle a party to later deny the jurisdiction of the court. In this regard the 2nd Defendant has called the plaintiff's plea "Mischievous, spurious, "lackadaisical" and simply not serious"
50. On whether the plaintiff should be held jointly and severally liable with the 1st Defendant, the 2nd defendant submits that the Lease Agreement was entered into for the benefit of the Franchisee and as such the plaintiff was the equitable beneficiary of the Lease. To buttress its submissions, the 2nd Defendant has relied on the cases of *Mark Otanga Otiende Vs Dennis Oduor Admoi (2021) eKLR*; *Dartinton Bourough Council Vs Witshle Northern Ltd (1995) IWLJ 68*; *William Muthee Muthoni Vs Bank of Barodo (2014) EKLR* and *Aineah Likuyani Vs Aga Khan Health Services (2013) EKLR*.



51. It is further submitted that in any event, clause 3.18 of the Lease Agreement obligated the occupier of the premises to pay rent, while the 1st Defendant's liability was based on the lease Agreement. It is finally submitted that the Plaintiff was a constructive party to the Lease Agreement.
52. On whether there was a breach of the Agreement between the 2nd and 1st Defendant, the 2nd defendant submits that the 1st Defendant and Plaintiff breached the Agreement by their failing to pay Rent. The 2nd Defendant further argues that the plaintiff is the one who removed her goods before any action was taken by the 2nd defendant. It is further submitted that the Lease was only to be terminated at the expiry of 10 years as was evident on clause 5 (i) of the Agreement.
53. It is further contended that the 2nd Defendant and the Plaintiff voluntarily conceded to the provisions of aforesaid Lease as she has been paying the rent since inception through the 1st defendant.
54. The 2nd defendant argues that it is not the business of the courts to rewrite contracts. In this regard, reliance was placed on the decision in the case of JKUAT Vs Kwanza Estates Ltd (2022) eKLR.
55. On the Applicability of the Land Act 2012, the 2nd defendant argues that since the Lease Agreement was entered into prior to the commitment of the said Act , the provisions of section 71 of the Land Act is not applicable to the lease forming the subject matter of this dispute.
56. It is further submitted that instead, the common law position as reflected on clause 5 (1) of the Lease Agreement is applicable. In the alternative, the 2nd Defendant submits, the 1st Defendant should be made liable for one year period pursuant to section 11(5) of the Land Registration Act.
57. Finally , it is submitted that considering that the Lease was terminated in May 2012, the court should find that the 1st defendant and Plaintiff are liable, in addition to the rent, for the period between 1st June, 2012 to 31.10.2015.

Determination

58. A brief background of this matter is necessary.
59. On 1st January 2010, the Plaintiff and the 1st Defendant entered into a Franchise Agreement in which the Plaintiff (franchisee) was to operate a restaurant under the trade name and Terms and Conditions set by the 1st Defendant (Franchisor). The Agreement was to run for a period of 6 years at a premises known as Nakumatt Holden Hall – Kakamega.
60. On 21/9/2010 the 1st defendant (as lessee) and 2nd Defendants (as lessor) entered into a Lease Agreement for a period of 10 years from 1.11.2009.
61. It came out from the evidence that the leased premises was to be used by the franchisee to operate a restaurant going by the name “ Kula Corner”
62. On 15.4.2012 the Plaintiff's restaurant was closed on account of failure to pay rent. Thereafter Nyaluoyo Auctioneers issued a public Notice indicating that a number of items will be sold on 30/5/2012, within the leased premises.
63. The Plaintiff moved the Court and obtained a temporary injunction against the sale .After inter-parties hearing of the Application,Lady Justice Thurairaja (as she then was) delivered a ruling on 31. 7.2012 allowing the plaintiff to access the premises on condition that she paid Ksh.684,973.93/= being the amount she had admitted as the rent owing. Thereafter there is no indication as to whether the Plaintiff got access to her items or whether she paid the stated sum.



64. On 18.5.2022 the Plaintiff's suit was dismissed for want of prosecution and the 2nd Defendant was allowed to prosecute the counter-claim as aforesaid.
65. I have considered the pleadings, the evidence and parties' submissions, together with the Authorities relied on, and I have identified the following issues for determination:
- a). Whether this court has Jurisdiction to entertain this case.
 - b). Whether the issue of who was liable to pay rent for the premises is resjudicata.
 - c). Whether the 2nd Defendant is owed Ksh.1,387,757.22/= being arrears of rent as at 31.5.2012.
 - d). Whether the 2nd Defendant is entitled to a sum of Ksh.9,154,133.56/= being damages incurred as a result of termination.
 - e). Who is liable for the payment of the damages referred in(d) above , if any

Whether this court has Jurisdiction to determine this matter

66. The plaintiff has submitted that this court does not have jurisdiction as the Lease Agreement contained an Arbitration clause in respect of which the parties were to refer any dispute to Arbitration.
67. The 2nd defendant on the other hand contends that the plaintiff claim had no merit since she was the first one to institute the suit; that in any event it should have been raised before or at the entry of appearance by the defendants.
68. Section 6(1) of the Arbitration Act provides as follows;
- “A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—
- (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or
 - (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”
69. It is now settled that where contracts contain Arbitration clauses , then , subject to certain exceptions the court must give effect to them.
70. In the case of Blue Limited V Jaribu Credit Traders Limited, Nairobi (Milimani) HCCS No. 157 of 2008 Kimaru, J (as he then was) stated inter alia:
- “It is now settled law that where parties have agreed to resolve any issue arising out of a commercial agreement, the courts are obliged to give effect to the said agreement of the parties by staying proceedings and referring the dispute for resolution by arbitration.”
71. In Kenya Pipeline Company Limited vs. Datalogix Limited and Another Nairobi HCCC No. 490 of 2004 [2008] 2 EA 193, Warsame, J held that:
- “It is clear from the reading of section 6(1) that ... the court must give effect to the terms of the contract which provide for arbitration and as a matter of course the court has a duty to honour the plea of the parties so as to give effect to the wishes of the parties and their



contractual relationship... It is against public policy to deprive parties of their choice and hinder their attempt to resolve their disputes through arbitration...Our system of law and dispute resolution should not countenance the existence and continuation of two parallel processes in respect of the determination of an issue arising between the same parties or parties claiming under them over the same subject matter.”

72. The issue for determination by this court is whether the filing the suit before court and the filing memorandums of appearance as well as of defences by the defendants amounted to the acceptance of the court’s jurisdiction as submitted by the 2nd defendant.
73. In this case, section 6(1) of the *Arbitration Act* requires that a defendant who wishes to stay proceedings, “applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought. This implies that a defendant may apply for stay at the time of filing the Memorandum of Appearance or any time before acknowledging the claim.
74. In *Eunice Soko Mlagui v Suresh Parmar and 4 others* [2017] eKLR, the court of appeal contrasted the law prior to 2009 when the *Arbitration Act* was amended to the current position. After setting out the provisions of section 6 of the *Arbitration Act*, the court observed as follows:

“Prior to the 2009 amendment, the pertinent part of section 6(1) provided that: “A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration...”

The main difference between the position before and after 2009 is that before 2009, a party was required to apply for referral of the dispute to arbitration at the time of entering appearance or before filing any pleadings or taking any other step in the proceeding. After 2009, the provision still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance or before acknowledging the claim in question. In our minds, filing a defence constitutes acknowledgement of a claim within the meaning of the provision.

75. In line with the above decision and indeed as per the provisions of section 6(1) of the *Arbitration Act*, the Defendants ought to have filed an Application to stay proceedings before or at the time of making appearances. Having failed to do so they are presumed to have willingly subjected themselves to the jurisdiction of the court.
76. On the part of the plaintiff, she willingly subjected the claim to the jurisdiction of the court, notwithstanding the fact that she knew about the Arbitration clause in the Lease Agreement. To raise the question at the tail end of the proceedings smacks of mischief

Whether the Issue of who was Liable to pay rent is Resjudicata.

77. Section 7 of the *Civil Procedure Act* provides as follows:

“7. Resjudicata

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such



subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

78. Black’s Law Dictionary, 9th Edition defines res judicata as:

- “(i) an issue that has been definitively settled by judicial decision;
- (ii) An affirmative defence barring the same claim or any other claim arising from the same transaction, or series of transactions and that could have been- but was not-raised in the first suit”.

79. In Henderson –vs.- Henderson (1843-60) ALL E.R. 378, the following observation was made:

“...where a given matter becomes the subject of litigation in, and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time”.

80. In other words, an issue that has been fully determined conclusively by a court of competent jurisdiction, should not make its way back to the courts. That is what the doctrine is all about.

81. The doctrine of res judicata is founded on public policy and its aim is two-fold, namely; that there must be finality to litigation, and that an individual should not be harassed twice with the same account of litigation. This was stated in the Court of Appeal case of Nicholas Njeru Vs. the Attorney General and 8 Others Civil Appeal No. 110 of 2011 [2013] eKLR.

82. It is the 1st Defendant’s case, that Lady Justice Thuranira’s ruling of 31.7.2012 conclusively determined who between the 1st Defendant and the Plaintiff was liable to pay rent for the premises. The 1st Defendant thus pleads the doctrine of Resjudiceta is as far as this issue is concerned.

83. What did the Judge say in respect of this issue? The following portions of the Ruling highlights the Judge’s findings;” the bone of contention is whether the rent has been paid by the Plaintiff. Although there is a dispute on the exact amount accruing, the Plaintiff in Paragraph 12 of her affidavit has admitted that Ksh.684, 973.93/= was due and accruing....as the Restaurant closed on 15.4.2012 in May...with the rent accruing the Plaintiff was in breach of the Lease Agreement. The 2nd Defendant was entitled to re-entry under the Lease Agreement”.... The non-payment of the rent by the Plaintiff is the cause of the problems that led to the filing of the Application herein. The 2nd Defendant was therefore entitled to a repossession of the premises.....The prayer for access to the Plaintiff’s goods is allowed on condition that the Plaintiff’s pays the admitted, rent of Ksh.684, 973.93/=”

84. My observation is that, though the issue of who was to be liable to pay rent for the premises was not directly submitted to Court for determination at that stage, the ruling the Judge placed that responsibility at the door of the Plaintiff. She was in occupation and therefore she had the responsibility to pay rent. Thus as far as who was responsible for payment of rent, I agree with the 1st Defendant that



this issue was determined. There was no appeal against the Ruling. The Plea of Resjudicata therefore has merit and it is hereby upheld.

Whether the 2nd Defendant is owed Ksh. 1, 387, 757.22/= as arrears of rent.

85. The Plaintiff admitted that she owed Ksh. 684, 973. 93 against the demand of Ksh.1, 387,757.22/= by the 2nd Defendant. The 2nd Defendant produced a statement (DExb 10) showing the rent due as at 31.5.2012 was ksh. 1,385,757.22 The statement shows that the amount includes charges described as Finance charges.
86. The Plaintiff did not testify and therefore the allegation that an amount of Ksh.684,973.93/= only was due , was not proved. That is to say , the plaintiff failed to demonstrate how she arrived at that figure.
87. It is trite law that pleadings are not evidence and therefore, her plea that she only owed the said amount was not proved by way of evidence. It is further noted that even after the court ordered the Plaintiff to pay the above stated sum, there is no evidence that it was paid. Instructively, no question was put to the 2nd Defendant's witness at cross- examination on whether this payment was ever made.
88. The 2nd Defendant's testimony on the money ought, and which testimony was backed up with documentary evidence therefore remain uncontested. This court is entitled to accept the testimony of the 2nd defendant's witness as a true account on what was owed to the 2nd defendant.
89. However the 2nd Defendant witness did admit that the Plaintiff had paid a deposit of Ksh.474,106.50 which was refundable. He further admitted that he had not refunded this deposit. The amount due to the 2nd Defendant will therefore be deducted by ksh. 474,106.50. Thus the amount owed to the 2nd Defendant by the plaintiff is (Ksh.1,387,751.22 – 474,106.50) = Ksh.913,644.72/=

Whether the 2nd Defendant is owed Ksh 9,514,133.56/= and who is Liable to pay it.

90. The 2nd Defendant told the Court that this claim is against both the Plaintiff and 1st Defendant on the basis of occupation, and contractual Agreement, respectively. He therefore sought Judgment against the two jointly and severally .
91. The claim is based on clause 5(a) of the lease Agreement (DExb. 1). It provides as follows; "if the rent hereby reserved or any part thereof shall remain unpaid for fourteen(14) days after becoming payable (whether formally demanded or not).....then it shall be lawful for the Lessor at any time thereafter to re-enter upon the demised premises....and to hold and re-posses and enjoy them in their former state and terminate the term on this lease without prejudice to any claim by the lessor in respect of any antecedent breach of any covenant or provision herein contained AND the lessee waives any right to notice of re-entry or forthwith under any law for the time being in force PROVIDE ALWAYS that is the event of such determination of the term hereby created the Lessee shall remain liable to the Lesser for payment of all rentals, service charge, and/or any other sum payable under the terms and conditions of this agreement and for the entire period of the Agreement". (Emphasis Added)
92. The proviso to clause 5(a) is what is in contention. It is the 2nd Defendant's case that the 1st Defendant, and by extension, the Plaintiff ,agreed to this term and therefore they have no basis of trying to run away from it; that the courts are not in the business of re-writing contracts. It is further submitted that the Plaintiff's and 1st Defendant paid rent on the same terms and therefore, the 2nd Defendant is entitled to payment for the remaining period. The 2nd defendant also contends that the lease term was prematurely terminated by the actions of the Plaintiff and the 1st Defendant.



93. It is further pointed out that the claim emanates from the Common Law Rule which states that the Lessee remains liable to payment of the rent for the remainder of the lease term , in the event of premature termination.
94. The 2nd defendant further argues that Section 71(4) and Section 71(5) of the Land Act No. 6 of 2012 ,is not applicable to the subject Lease as it was entered into prior to the commencement of the Land Act No. 6 of 2012.
95. On the other hand the Plaintiff and 1st Defendant’s argument is that the Land Act of No. 6 of 2012 is applicable. The two, however have not laid a basis for this argument.
96. There is no ambiguity in the proviso to clause 5(a) of the lease Agreement. The payment of rent for the remaining period is not conditional. Further the 2nd Defendant has submitted that the Plaintiff and 1st Defendant actions, led to the termination. It has been established that indeed there was rent that was due but unpaid. The 2nd Defendant’s move to terminate the Lease was instigated by the Plaintiff’s and 1st Defendant failure to honor the terms of the Lease.
97. The Lease Agreement was entered into on 21st September, 2010, the commencement date for the Land Act , No. 6 of 2012, was 2nd May, 2012. Section 71(4) of the Land Act provides as follows ‘‘ as from the date of commencement of this Act-(a) the rule of Common Law that a lessee has, with the Agreement of the Lesser, vacated the Leased land before the date of termination of the lease shall cease to apply’’.
98. The pertinent question is whether the aforesaid section of the Act should have retrospective effect.
99. In the Supreme Court decision of Samuel Kamau Macharia & Another Vs Kenya Commercial Bank and 2 Others, the Court held interalia ‘‘As far non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless by express orders or necessary implication. It appears this was the intention of the legislative (Halbung’s Laws of England, 4th Edition at Page 57). A retroactive Law is not unconstitutional unless it:
 - I. Impairs the Obligation under a contract.
 - II. Divest vested rights.’’
100. I have no hesitation in finding that the coming into effect of the Land Act in 2012 did not affect the proviso to clause 5 of the Agreement. To rule otherwise would have the effect of divesting the obligations of the parties arising from the contractual Agreement.

The next Question is who is liable for payment of the rent for this remaining term

101. The 2nd Defendant is basing this claim as against the plaintiff on the fact of occupation , and contractual engagement , as against the 2nd Defendant. The 2nd Defendant argues that the plaintiff was a constructive tenant.
102. It has already been determined that the liability of the plaintiff was by virtue of occupation, as per Justice Thurania’s Ruling as aforesaid. The Plaintiff’s obligation to the 2nd defendant was therefore anchored on the occupation of the premises and not through Contractual Agreement. The fact of occupation therefore was the only basis of her liability.
103. Thus if her occupation was the basis of her liability, It raises the question as to whether she should be held liable for any monies outside the period she occupied the premises, and which claim is founded on a contract to which she was not privy to. Going by the 2nd defendant’s argument on grounds upon



which for the plaintiff liable and which ground was indeed affirmed by the ruling of justice Thurania, then my answer is in the negative

104. Secondly, the basis of occupation was a Franchise Agreement between the plaintiff and the 1st defendant. This Agreement was to run for a period of 6 years from 01/01/2010. On the other hand the lease agreement between the 1st and 2nd Defendant was for a period of 10 years from 1.11.2009. This means that the Plaintiff's occupation will have lapsed about 3 years before the contractual Agreement was to end.
105. It cannot be said therefore that, the Plaintiff, if she was to run her franchise for 6 years and decided to leave, she would still be bound to the 2nd Defendant by virtue of the Tenancy Agreement which she was not privy to.
106. In the circumstances, am not convinced that the two Agreements were intertwined and ran parallel to each other as suggested by the 2nd defendant.
107. To revisit the issue of the Plaintiff's Liability, to the extent that the basis of her liability to pay rent was based on occupation only, she cannot therefore be bound by other terms that were outside of actual occupation.
108. In view of the afore going, it is my finding that the Plaintiff is not liable for any claim arising from the proviso to clause 5 (a) of the Lease Agreement.

Liability of the 2nd Defendant.

109. In respect of the loss incurred by the 2nd Defendant occasioned by termination of the lease as pointed out by the 2nd Defendant, the 1st Defendant voluntarily signed the Lease and this court has no business tampering with contractual obligations of parties. Also as per the finding in the case of Samuel Machari (supra), whereas a law may have a retrospective effect, it cannot do so if it has the effect of divesting obligations under a contract or taking away vested rights. Any retrospective Application of section 71 of the *land Act* will divest parties to the Agreement of the obligations under the contract.
110. The 2nd Defendant produced a statement (Dexb. 10) showing the accruals between 1.6.2012, since the Lease was terminated, up to October 2015 (Sic). The 1st Defendant's representative did not testify and therefore there was no rebuttal to this claim or particulars thereof. The particulars of the claim consist of: Rent at Ksh.6,503,978.85/=, Service Charge at Ksh.1,387,515.60/= and Ksh.1,262,639.11/=, bringing the total to ksh.9,154,133.56
111. In the absence of any rebuttal, this is the only evidence that this court can rely on. it is my finding that the 1st Defendant is liable to the 2nd Defendant for a sum of Ksh.9,154,133.56/=.
112. In conclusion, judgment is hereby entered for the 2nd Defendant as follows:
 - a. For Ksh,913,644.65 as against the Plaintiff, plus interest thereon at the contractual rate of 18% from 01/06/2012 until payment in full.
 - b. For Ksh,9,154,133.56/= as against the 2nd defendant with interest at court rates from the time of filing suit until payment in full
 - c. Costs of the suit to the 2nd defendant in the ratio of 10% as against the Plaintiff, and 90% as against the 2nd Defendant.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 18TH DAY OF JULY, 2024.

S. CHIRCHIR



JUDGE.

In the presence of :

Godwin – Court Assistant

Mr. Mathekwa for the plaintiff.

Mr. Ochieng holding brief for Mr. Mwenesi for the 1st defendant.

Mr. Otieno for the 2nd defendant.



[Date]

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KAKAMEGA HIGH COURT CIVIL CASE NO. 124 OF 2012

