Ali & another v Durow & another (Environment & Land Case E071 of 2021) [2021] KEELC 4753 (KLR) (18 November 2021) (Ruling)

Mohamed Sharif Ali & another v Ismail Ibrahim Durow & another [2021] eKLR

Neutral citation: [2021] KEELC 4753 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E071 OF 2021

JO MBOYA, J

NOVEMBER 18, 2021

BETWEEN

MOHAMED SHARIF ALI ..... 1ST PLAINTIFF

JAMAL SALEBAN KARIYE ..... 2ND PLAINTIFF

AND

ISMAIL IBRAHIM DUROW ..... 1ST DEFENDANT

ISMAIL HOLDINGS COMPANY LIMITED ..... 2ND DEFENDANT

RULING

1. Vide the Notice of Motion Application dated 23rd February 2021, the Plaintiffs/Applicants' herein have sought for the following Reliefs;

   i. .....(Spent)

   ii. An order of temporary injunction do issue restraining the 1st and 2nd Defendants jointly and/or severally, their servants, agents, employees and/or anyone claiming through them from issuing any kind of threats or accessing Plaintiff's business premises and/or records at LR 36/VII/467-Eastleigh Nairobi, pending hearing and determination of this application.

   iii. An order of temporary injunction do issue restraining the 1st and 2nd Defendants jointly and/or severally, their servants, agents, employees and/or anyone claiming through them from issuing any kind of threats or accessing Plaintiff's business premises and/or records at LR 36/VII/467-Eastleigh Nairobi, pending hearing and determination of this suit.

   iv. An order of Mandatory injunction do issue compelling the 1st and 2nd Defendants jointly and/or severally, to immediately return all records and assets of the Plaintiffs/Applicant illegally

taken by the Defendants including but not limited to files, computers and keys of the boarding and lodging rooms at LR 36/VII/467-Eastleigh Nairobi ,pending hearing and determination of this application.

v. An order of mandatory injunction do issue compelling the 1st and 2nd Defendants jointly and/or severally, to immediately return all records and assets of the Plaintiffs/Applicant illegally taken by the Defendants including but not limited to files, computers and keys of the boarding and lodging rooms at LR 36/VII/467-Eastleigh Nairobi pending hearing and determination of this suit.

vi. An interim order be issued directed to the Defendants jointly and/or severally directing them their servants and/or agents to only access the premises leased to the Plaintiffs LR 36/VII/467-Eastleigh upon written notice pursuant to Clause 8 of the lease between the parties dated 10th July 2018.

vii. Pending the hearing and determination of this application, the Plaintiffs do deposit the monthly rents payable in the sum of kes.3, 500, 000/= only, in court pending the 2nd Defendant/Respondent specifically performing its obligation under lease between the parties dated 10th July 2018 and reconciliation of accounts.

viii. Pending the hearing and determination of this suit the Plaintiffs do deposit the monthly rents payable in the sum of kes.3, 500, 000/= Only, in court pending the 2nd Defendant/Respondent specifically performing its obligation under lease between the parties dated 10th July 2018 and reconciliation of accounts.

ix. The OCS Shauri Moyo Police Station is hereby ordered to ensure law and order in compliance with the court orders.

x. Costs of this application be borne by the Defendants/Respondents in any event

2. The Subject Application is premised on the grounds contained and/or enumerated at the foot thereof, running from [a] to [p] inclusive and the Application is further supported by the affidavit sworn by the 1st Plaintiff/Applicant on the 23rd February 2021, to which the 1st Plaintiff/Applicant has annexed a total of 6 annextures thereto.

3. Upon being served with the Notice of Motion Application herein, the Defendants/Respondents reacted thereto by filing Grounds of Opposition dated the 16th March 2021, as well as a Replying Affidavit sworn on the 19th March 2021, to which the 1st Defendant/Respondent has attached a total of 6 annextures.

4. Stung by the Replying Affidavit filed by and/or on behalf of the Respondents herein, the Plaintiffs sought for and obtained leave to file a Further Affidavit and in this regard, the 1st Plaintiff/Applicant duly swore a further affidavit though titled as Affidavit in Response to the Defendant'/Respondent's Replying Affidavit. For clarity, the said affidavit comprises of Documents running up to 469 pages.

5. Before the Subject Application could be heard and disposed of, a Group of interested parties filed an Application dated 19th March 2021, in respect of which the said Group, namely the proposed interested parties, sought for leave to be joined into the proceedings as interested parties, owing to the fact that same had an interests in the suit property, by virtue of being lawful tenants in occupation and Possession of the suit premises.

6. Following the filing of the Application by the Proposed Interested parties, the honourable court ordered and/or directed that the said Application be disposed of before hand and in this regard, the

respective parties were called upon to file and exchange written submissions, pertaining to and/or concerning the said Application.

7. Consequently, the Chamber Summons Application dated 19th March 2021, which was filed by the Proposed Interested parties was indeed heard and disposed of vide ruling rendered on the 19th July 2021, whereupon the Application was allowed. Consequently, the proposed Interested parties were indeed joined into the proceedings as such.

8. Following the Disposal of the Application for joinder, the matter was set down for the hearing and disposal of the Notice of Motion Application dated the 23RD of February 2021, filed by and/ or behalf of the Plaintiffs/ Applicants and which Application is the subject of the instant Ruling.

Depositions by the Parties:

Plaintiffs/ Applicants' Case:

8. The 1st Plaintiff/Applicant has sworn an affidavit dated 23rd February 2021 and in respect of which the 1st Plaintiff/Applicant has averred as follows;

9. The Plaintiffs/Applicants entered into and executed a lease agreement with the 2nd Defendant over and in respect of the premises otherwise known as sub division number 467 (original number 57/4) of section VII -Eastleigh, whereby the Plaintiffs/Applicants were granted a lease pertaining to and/ or concerning the 9 floors situate in the suit property, with the exception of the banking hall on the ground floor.

10. It is 1st Plaintiff/Applicant's further averment that the lease term over the premises was for a period for 10 years and that pursuant to the lease agreement, it was incumbent upon the Plaintiffs/Applicants to pay the sum of kes.19,000,000/= only, comprising of kes.10,500,000/= only, on account of Rent for the period of November 2018 to January 2019 and a Security Deposit of kes.9, 000, 000/= only.

11. The 1st Plaintiff/Applicant has further averred that Monthly rents over and in respect of the demised premises was also agreed upon in the sum of kes.3,500,000/= only, per month for the First five (5) years of the lease term and thereafter the Rents was to escalate to the sum of kes.3,650,000/= only, in respect of the last five years of the lease term.

12. It is the deponent's deposition, that upon the execution of the lease agreement, the Plaintiffs/ Applicants complied with and/or fulfilled the terms of the agreement, particularly as to the payment of the rents for the months of November 2018 to January 2019, as well as the Security Deposit.

13. On the other hand, the Deponent has further averred that even though the lease Agreement indicated that the Plaintiffs/Applicants were to enter upon and take possession of the suit property w.e.f 1st October 2018, same was however, not ready and thus the Plaintiffs/Applicants did not enter upon and take possession in accordance with the terms of the lease agreement.

14. It is the deponent's further averment that the suit property was only readied and the Plaintiffs/ Applicants were granted possession on the 1st April 2019, and even though the Plaintiff's/Applicants took possession of the suit property, same was still having teething problems, which required to be addressed by the Defendants/Respondents.

15. On the other hand, the deponent has further averred that upon taking possession of the suit property, the Plaintiffs/Applicants commenced to pay and indeed paid the monthly rents of kes.3,500,000/ = Only, up to and including April 2020, when the deponent states that the hotels and lodges, were eventually closed due to governmental directives meant to combat covid-19 pandemic.

16. Besides, the deponent has further averred that during the closure, there was consultation between the Plaintiffs/Applicants and the Defendants/Respondents, whereupon the 1st Defendant/Respondent herein undertook to carry out and/or undertake renovation and certain finishes in the demised property.

17. The deponent has further averred that during the period of closure, it was agreed between the plaintiffs/Applicants and the Defendant/Respondents that the Plaintiffs would be paying monthly rents of kes.1,000,000/= Only,per month and it is further averred that indeed the Plaintiffs/Applicants paid the said sum, namely, the sum of kshs, 1,000,000 Only, for the months of May, June and July 2020.

18. Be that as it may, the deponent has further averred that on or about the 25th July 2020, the 1st Defendant/Respondent herein, who is said to be the principal director of the 2nd Defendant/Respondent went to the suit property and demanded for the keys of the demised premises from the Plaintiff's manager namely, Mr. Mohamed Haret, who yielded over the keys to the premises and thereafter the 1st Defendant/Respondent took over and/or assumed the Administration office of the Plaintiffs/Applicants business.

19. It is further averred that following the take over of the Plaintiffs/Applicants Administration office by the 1st Defendant/Respondent, same proceeded to and changed the computer passwords and keys for all the lodging rooms as well as seizing possession of the Records belonging to the Plaintiffs/Applicants.

20. The Deponent has further averred that ever since the 1st Defendant menacingly and illegally procured and/or obtained the keys to the Administration office, the 1st Defendant/Respondent has failed and/or declined to allow the Plaintiffs/Applicants and/or their agents to re-enter upon and take possession of the suit property, in accordance with the lease agreement or at all.

21. Owing to the foregoing, the deponent has further averred that the Defendants/Respondents herein have since taken possession of the suit property and thereby barred the Plaintiffs/Applicants and/or their agents from re-entering upon and carrying out their business in the suit property.

22. Consequently, the deponent herein has thus implored the court to find and hold that the actions by and/or on behalf on the Defendants/Respondents, constitutes and amounts to an illegality and in this regard, the honourable court should grant the Reliefs sought to avert the loss and/or Damage to which the Plaintiffs/Applicants have been exposed.

Defendants'/respondents' Case

23. The 1st Defendant's/Respondent's herein filed a Replying Affidavit sworn on the 19th March 2021, and in respect of which the 1st Defendant/Respondent has acknowledged that there was a lease agreement, which was entered into between the Plaintiffs/Applicants and the 2nd Defendant/Respondent herein, over and in respect of the suit property, with the exception of the banking hall on the ground floor thereof.

24. It is the 1st Respondent's averment that pursuant to the lease agreement, it was agreed that the Plaintiffs/Applicants herein were to pay 3 months rents, for the period of November 2018 to January 2019, amounting to kes.10,500,000/= only and security Deposits in the sum of kes.9,000,000/Only, which was payable upon the execution of the lease agreement.

25. Nevertheless, the 1ST Defendant/ Respondent has averred that despite the execution of the lease agreement, the Plaintiffs/Applicants herein failed and/or neglected to pay the security Deposit amounting to kes.9, 000, 000/=Only, which Security Deposit remained in arrears, owing and due up to and including 16th November 2019.

26. On the other hand, the 1st Defendant/respondent has also averred that despite the clear and explicit terms of the lease agreement, the plaintiffs, engaged and/or indulged into various breaches, including failure and/or refusal to pay the contractual rents, as and when due and also proceeded to sub-let portions of the suit property, contrary to the clauses thereof, that prohibited subletting.

27. As a result of the breaches, which have been enumerated in the body of the Replying affidavit, the 1st Defendant/Respondent has averred that same was constrained to and indeed issued to and served the Plaintiffs with a Demand and Notice of termination of the lease agreement vide letter dated the 16th November 2019.

28. It is further averred that upon issuance of the demand and notice to terminate the contract, the Plaintiffs/ Applicants moved out and vacated the suit property and only left behind the sub-tenant known as Ellabella, who was operating the Restaurant, on the 2ND Floor of the suit premises.

29. It is the 1st Defendant/Respondent's further averment that the Plaintiffs/Applicants herein moved out and/ or vacated from the suit property voluntary, after the breaches to the lease agreement were brought to their attention.

30. It is further averred, that the Plaintiffs/Applicants herein did not pay rents for various periods and in this regard, the 1st Defendant/Respondent has itemized the non-payments of Rents for the periods inter alia;

    a. February to March 2019

    b. April to July 2019

31. On the other hand, the 1st Defendant/Respondent has further averred that other than the lease agreement which was executed on the 10th July 2018, there has been no other agreement between the Plaintiffs/Applicants and the Defendants/Respondents, whereby it was agreed that the monthly rents would be varied downwards to kes.1,000,000/= Only ,either as alleged by the Plaintiffs/Applicant or at all. In this regard, the 1st Defendant/Respondent avers that the terms and/ or the clauses of the lease agreement could only be varied and/or altered by an addendum, duly executed by the parties and not otherwise.

32. On the other hand, the 1st Defendant/Respondent has further averred that at the execution of the lease agreement, the suit property was substantially complete and that the outstanding finishes, were carried out and undertaken during the 2 months duration, for which the Plaintiffs/Applicants were not called upon to pay any rents, namely August to October 2018.

33. Besides, the 1st Respondent has also averred that at the time when the Plaintiffs/Applicants took possession of the suit property, same were provided with a washing area and a functional gym. For clarity, the functioning gym was situated on the top floor of the suit premises, contrary to the averments by the Plaintiffs/Applicants.

34. As pertains to the sinking of borehole, the First Defendant/ Respondent herein has averred that same (Defendant/Respondent) ensured that there was a borehole in the premises, which they (Defendants/ Respondents) paid for.

35. On the other hand, the 1st Defendant/Respondent has contended that having provided and/or ensured the existence of a borehole in the suit premises, there was therefore no basis upon which the plaintiffs/ Applicants herein could proceed to sink another borehole within the suit property.

36. In any event, the 1st Defendant/Respondent has proceeded to aver that at no point in time did the Defendants/Respondents consent to the Plaintiffs/Applicants sinking any borehole within the suit property.

37. Finally, the 1st Defendant herein has averred that following the departure of the Plaintiffs/Applicants from the suit property in November 2019, the suit property has since been demised and/or leased out to various tenants, who are now in occupation and possession thereof.

Plaintiffs'/applicants' Further Case.

38. Upon being served with the Replying Affidavit sworn on the 19th March 2021, the Plaintiffs/Applicants herein, filed a further affidavit sworn on the 22nd March 2021.

39. In respect of the further affidavit, the 1st Plaintiff/Applicant has averred that contrary to the averments in the Replying affidavit, same remained in occupation and possession of the suit property, operating a hotel business between the period of 2019 to 2020.

40. On the other hand, the 1st Plaintiff/Applicant has further averred that during the said period, their hotel business received guests and/or visitors, who checked in and paid for their services. In this regard, the 1st Plaintiff/Applicant has attached Receptionist sheet to confirm that the hotel was operational.

41. Besides, the 1st Plaintiff/Applicant has also averred that during the operation of the hotel, same was forced to outsource laundry services because the Defendants/Respondents had not provided them with laundry. In this regard, the 1st Plaintiff/Applicant has attached delivery notes from Capitol Laundry Services Limited, to confirm delivery and collection of assorted linen from the hotel.

42. On the other hand, the 1st Plaintiff/ Applicant has also averred that neither himself nor the 2nd Plaintiff was served with the Demand and Notice to terminate the lease agreement vide letter dated 16th November 2019. In this regard, the 1st Plaintiff/Applicant has therefore denied receipt of the said letter or at all.

43. Besides, the 1st Plaintiff/Applicant has contended that same indeed paid the Rent for November 2018 to January 2019, amounting to kes.10,500,000/= Only, as well as the Security Deposit amounting to kes.9,000,000/= only. In this regard, the 1st Plaintiff/Applicant has denied the averments by the 1st Defendant/Respondent that the amount at the foot of security deposit was not paid.

44. Other than the foregoing, the 1st Plaintiff/Applicant has averred that it is the Plaintiff/Applicants who pursued and obtained the various consent for purposes of sinking the borehole. Consequently, it is stated that the averments by Defendants/Respondents that same had sunk a borehole in the suit premises, was misleading and false.

45. Finally, the 1st Plaintiff/Applicant has also averred that the lease agreements which have been annexed or attached to the Replying affidavit by the Defendants/Respondents, are fraudulent and have merely been signed between the 2nd Defendant/Respondent and companies and persons that are related with the Defendants/Respondents and same are merely intended to dupe and/or mislead the court.

46. In the premises, the 1st Plaintiff/Applicant has implored the honourable court to discard the contents of the Replying Affidavit and to grant the Reliefs sought at the foot of the Application dated 23rd February 2021, so as to protect the contractual rights of the Plaintiffs/Applicants.

Interested Parties's Case

47. Following the Ruling delivered by the court on the 19th July 2021, the interested parties were admitted and/or joined in the proceedings and same were allowed to participate in the subject matter as persons who have a stake to the suit property.

48. Having being so admitted, the interested parties were enjoined to file and serve their Responses in opposition to the Notice of Motion Application dated the 23rd February 2021.

49. Pursuant to the foregoing, the interested parties filed a Replying affidavit, through the First Interested Party, whereby same maintained and/or reiterated that they had entered into and/or executed lease agreements over and in respect of portions of the suit property and that they were in possession thereof.

50. It was further averred that at the time of the execution of the various lease agreements, the premises were vacant, except for the 2nd floor, comprising of a Restaurant, which was operational.

51. On their part, the Interested parties through the affidavit of the 1st interested party, have implored the honourable court to dismiss the Application by the Plaintiffs/Applicants.

Submissions by the Parties:

52. On the 23rd March 2021, the subject matter came up for mention before the honourable court and on which date the court issued directions pertaining to and/or concerning the manner in which the subject application was to be canvassed and/or disposed of. For clarity, it was directed that the application be disposed of by way of written submissions.

53. Owing to the foregoing, the parties were directed to file and exchange their written submissions and the relevant authorities.

54. Pursuant to and in line with the foregoing directions, the Plaintiffs/Applicants proceeded to and filed their written submissions on the 15th April 2021, whilst the Defendants/Respondent also filed their submissions on the same day.

55. On the other hand, it is worthy to note that other than the submissions, the Plaintiffs/Applicants and the Defendants/Respondent, haves also filed voluminous authorities in support of their respective cases. Same form part and parcel of court record and have also received due consideration.

56. Notwithstanding the foregoing, when the instant matter came up for Mention on the 28th October 2021, the Advocates for the parties, namely M/s Julie Soweto holding brief for Senior Counsel, James Orengo,for the Plaintiffs/Applicants, Mr. Ahmmed Nasir, Senior Counsel for the Defendants/Respondents and Mr. Macharia Nderitu for the Interested Parties, requested the court to allow same to highlight their respective submissions.

57. Owing to the request, the honourable court allowed the Advocates for the parties to highlight the submissions and the highlights by and/or on behalf of the respective Advocates are also part of the Record.

Issues for Determination

58. Having appraised and/or evaluated the Notice of Motion Application dated the 23rd February 2021, the supporting affidavit thereto, as well as the Further affidavit sworn on the 22nd March 2021 and upon considering the submissions by the Plaintiffs/Applicants, on one hand, and having also appraised the Grounds of opposition dated the 16th March 2021, and the Replying Affidavit by the 1st Defendant/

Respondent, as well as the detailed submissions and authorities by the Defendants/Respondents, and having similarly taken into account the Response by the Interested parties and their submissions, [U1] the following issues are germane for Determination;

I. Whether the Plaintiffs/Applicants have established a prima facie case with over whelming chances of success.

II. Whether the Plaintiffs/Applicants are disposed to suffer Irreparable loss.

III. In whose favor does the balance of convenient tilts.

IV. Whether the Plaintiffs/Applicants have established exceptional circumstances to warrant the grant for an order for Mandatory injunction.

Analysis and Determination

Issue Number 1

59. It is common ground that the Plaintiffs/Applicants and the 2nd Defendant/Respondent, entered into and executed a lease Agreement dated the 10th July 2018, over and in respect of the suit property, whereby the 2nd Defendant/Respondent demised to and/or in favor of the Plaintiffs/Applicants the suit property comprising of 9 floors, with the exception of the banking hall on the ground floor thereof.

60. Similarly, it is not in doubt that the said lease Agreement contained and/or comprised of all the terms and conditions, upon which the parties agreed to be bound. In any event, upon the execution of the lease instrument, it was taken that both the parties involved understood and/or appreciated the import and tenor of the said clauses.

61. Owing to the foregoing, I must now proceed from the basis that the parties agreed to be bound by the terms of the said lease agreement and if any alteration and/or derogation, was to arise or ensue, same would only be perfected by the execution of an addendum thereto and/or a subsequent Agreement duly executed by the parties.

62. I must also point out that whilst interpreting the lease agreement herein, I am called upon to move within the four corners of the said Document and to pay tribute to the Doctrine of the 4-square Rule, which excludes the importation of the Extraneous and/or Extrinsic Evidence, with a view to construing an Agreement, contract and/or Deed.

63. In support of the foregoing observation, I am minded to refer to and/or rely on the provisions of Sections 97 and 98 of the Evidence Act, Chapter 80 laws of Kenya, which provides as hereunder;

97. (1) When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.

(2) Notwithstanding subsection (1)–

(a) wills admitted to probate in Kenya may be proved by the probate; Telegraphic messages. Presumption as to due execution, etc. Documents twenty years old. Written contracts and grants.

(b) when a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

(3) Subsection (1) applies equally to cases in which contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

(4) Where there are more originals than one, one original only need be proved.

(5) The statement, in any document whatever, of a fact other than the facts referred to in subsection (1), shall not preclude the admission of oral evidence as to the same fact.

98. When the terms of any contract or grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 97, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms:

Provided that–

(i) any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law;

(ii) the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved, and in considering whether or not this paragraph of this proviso applies, the court shall have regard to the degree of formality of the document;

(iii) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property may be proved;

(iv) the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition Evidence of oral agreement of property may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of such documents;

(v) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved, if the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract;

(vi) any fact may be proved which shows in what manner the language of a document is related to existing facts

64. On the other hand, it is also important to take cognizance of the Decision in the case of The Speaker of Kisii County Assembly & 2 others v James Omariba Nyaoga (2015) eKLR, where the honourable court observed as hereunder;

> "The 1st appellant's attempt to vary the terms of the letters of appointment, in our view, offends the provisions of Sections 97 and 98 of the Evidence Act, Chapter 80 Laws of Kenya, which attempt we must reject. . This is not the first time we are doing so. In the case of John Onyancha Zurwe v Oreti Atindaalias Olethi Atinda [Kisumu Civil Appeal No. 217 of 2003](UR), we cited, with approval, Halisbury's Laws of England 4th Edition vol. 12, on interpretation of deeds and non Testamentary Instruments paragragh,1478 as follows:-
>
> > '' Extrinsic evidence generally excluded:
> >
> > Where the intention of parties has been reduced to writing it is in general not permissible to adduce extrinsic evidence whether oral or contained in writing such as instructions ,drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary or add to the trms of the document.
> >
> > Extrinsic evidence cannot be received in order to prove the object with which a document was executed or that the intention of the parties was other than that appearing on the face of the document."

65. With the foregoing foundation, it is now appropriate to venture and deal with the complaints which have been raised by the Plaintiffs and to consider whether the complaints establish a prima facie case with overwhelming chances of success.

66. Firstly, it is not in dispute that the Plaintiffs/Applicants were called upon and or were obliged to pay the Rents for November, 2018, December 2018 and January 2019, amounting to kes.10,500,000/= only and Security Deposit in the sum of kes.9,000,000/= only, making a total of kes.19,500,000/= only, at the execution of the lease agreement.

67. According to the Plaintiffs/Applicants, same complied and/or paid the aforesaid sums as per the contract. In this regard, the Plaintiffs/Applicants have referred the court to a Bundle of Receipts ,which have been marked as annexture M-3.

68. I have perused the said Bundle of Receipts, which are 13 in number, with a view to authenticating and/or validating the Plaintiffs/Applicants averment at paragraph 3 of the supporting affidavit.

69. However, I must point out that the entire bundle of annexture M-3, do not relate to the Reciepts for payments of the three-month Rents for the period of November 2018 and January 2019 or at all. To the contrary, the Receipts on the face thereof, relate to payments of Rents between the period of August 2019 to April 2020, respectively.

70. On the other hand, the other critical aspect of the lease Agreement was the payment of the Security deposit, which was also supposed to be paid at the execution of the lease Agreement. Indeed, it is the security deposit that is under serious dispute.

71. The Defendants/Respondents have raised the issue that despite the explicit terms of the lease A greement and particularly concerning the payment of kes.9,000,000/= only, same was never paid by the plaintiffs/Applicants or at all.

72. On the basis of the averment and/or deposition by the 1ST Defendant/Respondent that the security deposit was never paid, which averment is contained in the Replying Affidavit, one would have expected the Plaintiffs/Applicants to place before the court evidence of Payment of the said security deposit. Unfortunately, I have looked at the further affidavit which was filed on the 22nd March 2021, but no such evidence has been availed and/or supplied.

73. In any event, the Burden of establishing that the terms of the lease Agreement were complied with fell on the shoulders of the Plaintiffs/Applicants, to prove to the court that indeed they complied with their part of the bargain and that the breach, if any, were occasioned by the adverse party. See Section 107 and 108 of the Evidence Act.

74. Notwithstanding the foregoing, I must point out that the Plaintiffs/Applicants have not discharged the burden of establishing compliance with and/or adhering with the terms of the lease Agreement.

75. Secondly, the Defendants/Respondents herein have also complained that upon the execution of the lease Agreement, the Plaintiffs/Applicants proceeded to and sublet a portion of suit property to a subtenant, namely Ellabella Restaurant, who has been operating on the 2nd floor of the suit property.

76. It was further averred by the Defendants/Respondents that the subletting of a portion of the suit property by the Plaintiffs/Applicants, was in breach and in violation of the terms of the lease Agreement.

77. Pursuant to the forgoing averments, it was also incumbent upon the Plaintiffs/Applicants, to respond and clarify the circumstances under which the sub tenants namely Ellabella, entered upon and commenced running a Restaurant situate on the 2nd floor of the suit property. However, yet again the Plaintiffs/Applicants have chosen to remain mute.

78. Thirdly, there is the issue pertaining to the circumstances under which the plaintiffs/Applicants moved out and/or vacated the suit property and when the vacation accrued.

79. Whereas the Plaintiffs/Applicants have averred that the 1st Defendant/Respondent went to the suit premises and whilst thereat intimidated and threatened the Plaintiffs/Applicants manager namely, Mohamed Haret, who thereafter handed over the keys to the administration office, the Defendants/Respondents on the other hand, have averred that the Plaintiffs/Applicants moved out of the premises after being served with the notice to terminate the lease.

80. I am aware that this is an interlocutory application and in this regard, I am not disposed to determine the issues of facts with finality, but nevertheless, towards proving the circumstances under which the Plaintiffs/Applicants moved out and evacuated from the premises (whichever is applicable), one would have expected the Plaintiffs/Applicants to procure and bring forth an affidavit by the manager, namely Mohamed Haret, who was said to have been threatened and thereby yielding possession of the Administration office to the 1st Defendant/Respondent.

81. Suffice it to note, that the Plaintiffs/Applicants have not found it appropriate to procure and bring forth the affidavit of the said manager, namely Mohamed Haret, which affidavit, would have been helpful, towards establishing, whether indeed same was threatened and thereby yielded the keys to the Administration office and by extension, the suit Property back to the Defendants/Respondents.

82. Without belaboring the point, it is my observation that the failure to procure and avail the affidavit of the said Mohamed Haret, ought to constitute a basis for an adverse inference against the Plaintiffs/Applicants.

83. In support of the foregoing position, I refer to and/or rely on the provision of Section 112 of the Evidence Act, which provides as follows;

> "112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

84. Other than the foregoing, there is also the issue that the lease Agreement between the Plaintiffs/Applicants and the 2nd Defendant/Respondent was terminated upon the issuance and service of the Demand and Notice to terminate vide letter dated 16th November 2019. In this regard, the position of the Defendants/Respondents is that the lease Ceased to exist upon the termination thereof on account of the Notice to Terminate.

85. However, when confronted with the said Demand and notice to terminate, the Plaintiffs/Applicants herein were comfortable with the averment that same had not received the said notice to terminate.Period.

86. In my humble view, the issuance and service of the said notice to terminate the tenancy was a pertinent issue and if the plaintiffs were contesting service, then it behooved the Plaintiffs/Applicants to issue a Notice to cross examine, seek and obtained leave to cross examine and thereafter Cross examine the author of the said letter, as well as the deponent of the Replying affidavit.

87. Notwithstanding the available recourse to impugn the said Notice and/or controvert the contents of the Replying Affidavit, the Plaintiffs/Applicants left the opportunity to pass and essentially, left the contents of the said Notice to terminate tenancy to suffice.

88. Based on the foregoing pointed issues, which negate the claims by and/or on behalf of the Plaintiffs/Applicants, I am afraid that the Plaintiffs/Applicants have not established and/or otherwise, have not proven a Prima facie case with overwhelming chances of success.

89. Perhaps it is now opportune and/or appropriate to consider the meaning, definition and import of what comprises of a prima facie case. In this regard, I am compelled to take cognizance in the decision in the case of Mrao Ltd. V. First American Bank of Kenya Limited & 2 Others [2003], KLR 125 he said:

> 'A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter'.

90. In a nutshell, I find and hold that the totality of the evidence placed before the court does not meet the threshold of what amounts to and/ or constitutes a Prima facie case.

Issue number 2

91. As pertains to the second issue herein, it is worthy to note that the Plaintiffs/Applicants have contended that the Defendants/Respondents have since breached and violated the terms of the lease agreement. For clarity, it is stated that the 1st Defendant/Respondent has since illegally retaken possession of the suit property and thereby evicted the Plaintiffs/Applicants.

92. My understanding of the averments of the Plaintiffs/Applicants is that the Defendants/Respondents have breached and/or otherwise violated the terms of the lease Agreement. Consequently, the Defendants/Respondents are guilty of breach of contract.

93. It is sufficient to note that a Breach of contract, culminates into and/or gives rise to a claim for liquidated and/or special damages, which are ascertainable and/or otherwise quantifiable and are thus compensable.

94. In any event, the Plaintiffs/Applicants herein have themselves proceeded to and indeed quantified the Monetary loss attendant to and/or arising from the said breach of the contract by and/or at the instant of the Defendants/Respondents. See paragraph 20 of the Plaint and particularly the particulars of loss and damage which provide as hereunder;

> Particulars of loss and damage
>
> I. Kes.52,000,000/ only being the amounts invested and directly incurred by the Plaintiffs/Applicants, with the consent of the Defendants/Respondents which includes the borehole sinking, generator, building finishing, air conditioners, solar and heating panels and connection among others.
>
> II. Loss of income equivalent to a Month's rents at kes.3,500,000/= Only, from August 2020 till the date of granting back possession of the lease premises.

95. Other than the contents of paragraph 20 of the Plaint, the Plaintiffs/Applicant have pleaded as part of the Reliefs sought, termination of the lease dated 10th July 2018, and the Defendants/Respondents jointly and/or severally be condemned to pay the Plaintiffs/Applicants general damages for breach of contract at kes.3,500,000/= per month for the unexpired term of the lease.

96. From the foregoing, it is apparent and/or evident that even the Plaintiffs/Applicants appreciate that the loss, if any, that same is exposed to suffer as result of the termination of the lease are calculable in monetary terms and thus capable of recompense.

97. In my humble view, once the loss that the Plaintiffs/Applicants are disposed to suffer is capable of being reckoned and/or computed in monetary terms, such a loss ceases to be Irreparable Loss and becomes compensable.

98. In support of the foregoing position, I invoke and reiterate the observation of the court in the decision in the case of Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. , where the honourable court held as hereunder;

> In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage.

99. Be that as it may, what amounts to an irreparable loss, which the Plaintiffs/Applicants were constrained to prove, has also attracted judicial definition in various decisions.

100. In this regard, I am constrained to invoke and rely on the Decision in the case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR, where the court held as hereunder;

> On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be

> compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.

101. The Plaintiffs/Applicants herein have in the body of the plaint enumerated the nature and kind of loss that same are disposed to suffer and besides, same have ventured to compute the loss and it is therefore evident that the loss, if any, that the Plaintiff/Applicant shall suffer can easily be measured, with reasonable accuracy and/or precision and thereafter be paid.

102. In the circumstances, the loss to be suffered by the Plaintiffs/Applicants herein is not Irreparable loss and on this account the Plaintiffs/Applicants, are not entitled to the Equitable remedy of Temporary Injunction.

Issue number 3

103. The Plaintiffs/Applicants have conceded and/or acknowledged that same were removed from the suit property and that consequently, same are no longer in occupation and possession of the suit property.

104. Conversely, the Plaintiffs/Applicants have confirmed that the Defendants/Respondents re entered upon and took over the suit property and have remained in possession thereof to date, to the exclusion of the plaintiffs/Applicants.

105. Indeed, based and/or founded on the fact that the Plaintiffs/Applicants were removed from the suit property, same have sought for an order of Mandatory injunction, ostensibly, to reinstate and/or restore them back to the premises.

106. In my humble view, given that the plaintiffs/Applicants are no longer in occupation of the suit property and coupled with the finding that the Plaintiffs/Applicants, appeared not to have paid the Security Deposit, which was a term of the lease Agreement, the balance of convenience tilts in favor of the Defendants/Respondents.

107. In any event, given that the suit premises have since been leased and/or demised in favor of the Interested parties, who have exhibited the various lease agreements, entered into with the Defendants/Respondents, an order to the contrary would thus affect and/or unsettle the interested parties herein, who took the premises without knowledge and/ or Notice of the Plaintiffs'/Applicants' claim.

108. Suffice it to say, that the Balance of convenience tilts in favor of protecting the status quo currently obtaining in respect of the suit property and not otherwise.

109. In short, it is my humble view that even the Balance of convenience is in favor of the Defendants/Respondents, as opposed to the Plaintiffs/Applicants herein.

Issue number 4

110. As pertains to the circumstance under a which a Mandatory Injunction can issue, it is sufficient to refer to the Decision in the case of Kenya Bruaries Limited & Another v Washington Okeyo (2002) eKLR, where the court of appeal held as hereunder;

> The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England 4th Edn. para 948 which reads:
>
> > "A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought

> to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff ..... a mandatory injunction will be granted on an interlocutory application".

111. From the forgoing excerpt, what is clear and discernable is that a Mandatory Injunction can only issue special and exceptional circumstance and such circumstances must be pleaded with clarity and specificity and where no such circumstances exists, a Mandatory Injunction ought not to be granted.

112. On the other hand , it is sufficient to note that the grant of a Mandatory injunction would require proof to a standard higher than that of prohibitory injunction. Consequently, where an Applicant cannot meet and/or measure up to the grant of temporary/prohibitory injunction, then a mandatory injunction becomes an elusive dream. Same cannot be granted.

113. In support of the foregoing observation, I can do no better than to invoke and rely on the Decision in the case of Nation Media Group & 2 Others v John Harun Mwau (2014) eKLR, where the court of appeal held as hereunder;

> "A different and higher standard than that in prohibitory injunctions is required before an interlocutory mandatory injunction is granted. Besides, existence of exceptional and special circumstances must be demonstrated as we have stated, a temporary mandatory injunction can only be granted in exceptional and in the clearest of cases"

114. In my humble view, I have been unable to discern and/or decipher any exceptional circumstance to grant the Mandatory injunction, taking into account the evidence of the none payment of the Security Deposit and the various infractions committed by the Plaintiffs/Applicants on the terms of the lease dated the 10th July 2018.

Final disposition

115. From the foregoing discourse, I reach the inescapable conclusion that the Plaintiffs/Applicants herein, have neither established nor met the statutory threshold for the grant of the orders sought.

116. Consequently, the Notice of Motion Application dated the 23rd February 2021, is without Merits and same is hereby Dismissed with costs to the Defendants/Respondents and to the Interested Parties.

117. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF NOVEMBER 2021.

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI.

IN THE PRESENCE OF;

JUNE NAFULA COURT ASSISTANT

MS JULIE SOWETO H/B FOR JAMES ORENGO SC FOR THE PLAINTIFFS/APPLICANTS.

MR. AHMMED NASSIR SC FOR THE DEFENDANTS/ RESPONDENTS.

MR.MACHARIA NDERITU FOR THE INTERESTED PARTIES.