



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. E053 OF 2020**

**LAKE OIL LIMITED.....PLAINTIFF**

**=VERSUS=**

**DAVID NDEGWA KAMAU.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The Judgment herein is in respect of the Complaint dated the 7<sup>th</sup> August 2020, whereby the Plaintiff have sought for the following Reliefs;

***I. An order of permanent injunction be issued against the Defendant to restrain him by himself, servant, agents, employees and/or officers from taking over, entering, trespassing form taking possession, damaging the Plaintiffs assets or in any other way, interfering with the Plaintiff quite possession over the premises known as L.R No. Nairobi/Block 118/875, including the entire improvements within the said property pending the hearing and determination of this suit.***

***II. Cost of this suit.***

***III. Any other remedy the court deems fit to grant to meet the end of justice***

2. Upon being served with the Complaint and summons to enter appearance, the Defendant herein duly entered appearance and thereafter filed a Statement of Defence and Counter claim dated 16<sup>th</sup> September 2020.

3. For clarity, the Counter-claim filed by the Defendant herein has sought for the following Reliefs;

***a. The Plaintiff to vacate the said premises as a result of breach of the agreement.***

***b. The court to order immediate closure of the Plaintiff petroleum and LPG Gas cylinder business due to lack of proper license.***

***c. Damages of breach of contract.***

***d. Cost of this suit.***

***e. Any other order that the court may deems fit and just to grant***

4. Upon being served with the Statement of Defense and Counter-claim the Plaintiff herein filed a Reply to Statement of Defense and Defense to Counter-claim dated 7<sup>th</sup> June 2021, whereby the Plaintiff essentially denied and/or disputed the allegation at the foot of the Statement of Defense and Counter-claim.

5. On or about the 12<sup>th</sup> May 2021, the Plaintiff and the Defendant entered into a consent, which was adopted and endorsed on the court record as hereunder;

***I. parties are to proceed to have the matter heard based on documents and have abandoned the pending application.***

***II. Parties are to file and exchange documents within 14 days of today.***

***III. Mention before the deputy registrar on the 10<sup>th</sup> June 2021 to confirm compliance with Order 11 of the Civil Procedure Rules.***

***IV. Status quo to be maintained.***

6. Based on the foregoing consent, the parties herein proceeded to and filed their respective Bundle of Documents, as well as their respective written statements, to be relied upon.

**STATEMENTS BY THE PARTIES**

**BY THE PLAINTIFF**

7. On behalf of the Plaintiff herein, one Nagib Hussein Ahmed, filed a comprehensive witness statement dated the 14<sup>th</sup> June 2021, whereby the witness has alluded to the following pertinent facts.

8. The Plaintiff and the Defendant entered into and executed a lawful lease over and in respect of the premises *L.R No. Nairobi/Block 118/875, which was to last for a period of 15 years w.e.f 9<sup>th</sup> May 2018.*

9. It has also been stated that the lease documents, which was entered into and duly executed, contained all the terms and conditions which were to bind the parties during the life time of the lease Document.

10. On the other hand, the Plaintiff's witness has further stated that upon the execution of the lease, the plaintiff company entered upon the suit property and operationalized a petroleum station, as well as a gas selling outlet.

11. Further, the Plaintiff's witness has further stated that the Plaintiff company proceeded to and procured the various license and/or approval from the relevant authority including Energy and Petroleum Regulatory Authority, which is the concerned body which is mandated to deal with licensing and regulation of gas/petroleum station.

12. Besides, the Plaintiff's witness has further stated that during the entire period of occupation and use of the premises, same have complied with and/or adhere to the terms of the lease instrument and that at no time, has the Plaintiff breached and/or violated the terms thereof.

13. On the other hand, the Plaintiff's witness has further stated that at no single time has Energy and Petroleum Regulatory Authority issued a notice and/or such other notice to the Plaintiff, arising from any breach or violation of the provision of the relevant Act and/or Regulations made thereunder.

14. Other than the foregoing, the Plaintiff's witness has stated that same received a demand notice from the Defendant herein dated the 5<sup>th</sup> July 2020, whereby the Defendant purported that the Plaintiff was in breach of various clauses of the lease instrument.

15. It was the plaintiff's Witness further statement that upon receipt of the demand notice from the Defendant, same proceeded to and retained her advocates, to respond to the demand notice and in this regard, a response was duly issued vide letter dated 16<sup>th</sup> July 2020.

16. Further, the Plaintiff's witness stated that despite the response from the Plaintiff advocates, the Defendant issued a further notice the 5<sup>th</sup> August 2020, whereby same maintained the threat to terminate the lease and to retake possession on the 15<sup>th</sup> August 2020.

17. Owing to the foregoing, the witness contended that the Plaintiff was therefore obliged, obligated and/ or otherwise, constrained to and indeed filed the subject suit.

**DEFENDANTS STATEMENT**

18. The Defendant herein, similarly filed a lengthy statement dated the 16<sup>th</sup> September 2020, whereby same stated and confirmed that indeed same and the Plaintiff entered into and executed a lease Instrument on the 9<sup>th</sup> May 2018.

19. The Defendant further aver that upon the execution of the lease instrument, the Plaintiff herein entered upon the suit premises and operationalized the petroleum/gas station, in line with the lease Instrument.

20. However, the Defendant has further stated that on or about the 14<sup>th</sup> May 2020, same was informed by his caretaker, Arthur Kinyanjui that three (3) officers from Energy and Petroleum Regulatory Authority went to the petrol station and carried out inspection thereat, with a view to ascertaining compliance with the various provision of the Act and in particular, ascertaining whether the petrol station, had procured and obtained the requisite license(s).

21. It was the Defendant's further statement, that upon the inspection by the officers from Energy and Petroleum Authority, it transpired that the Petroleum station had been operating for a period of two (2) years without the necessary and/or requisite license.

22. On the other hand, the Defendant has also stated that on or about the 25<sup>th</sup> May 2020, same also received a demand notice from a neighbor to the petrol station, complaining that his tenants had been dumping old and used tyres in his plot, which is located next to the Defendant's plot, the plot housing the petrol station.

23. The Defendant went further to state that the demand notice also contended that the tenant had also placed a plastic pipe on the complainant's side of the boundary wall and that the said pipe was illegal and dangerous in case it burst.

24. The Defendant further stated that the Demand notice, which same had received and given unto to him 14 days, within which to remedy the default and/or lapses.

25. Owing to the foregoing, the Defendant stated that he proceeded to and issued the Plaintiff herein with a Demand Notice dated 5<sup>th</sup> July 2020, whereby same brought to the attention of the Plaintiff the various breaches and in particular, sought to terminate the lease between the Plaintiff and himself.

26. On the other hand, the Defendant has further stated that vide the Notice dated the 5<sup>th</sup> July 2020, the Plaintiff was to vacate the suit property within 90 days, from the date of the last notice issued by Energy and Petroleum Regulatory Authority. For clarity, the Defendant emphasized that the Plaintiff was to vacate on or before the 15<sup>th</sup> August 2020.

27. Besides, the Defendant further stated that upon receipt of a letter from the Plaintiff's advocates dated the 16<sup>th</sup> July 2020, same instructed his advocates to issue a further Notice dated the 5<sup>th</sup> August 2020, which further demanded that the Plaintiff must vacate the suit property on, or before the 15<sup>th</sup> August 2020.

28. Based on the foregoing, it is the Defendant's case that the Plaintiff has breached and/or violated the terms of the lease instrument and therefore the lease contract ought to be terminated.

29. Besides, the Defendant has further demanded that the court should proceed to issue an Order to close the Plaintiff's Petrol/Gas station, immediately and award him Damages for Breach of Contract.

### **SUBMISSIONS**

30. Vide the orders of the court issued on the 12<sup>th</sup> May 2021, the parties herein agreed to file and exchange written submissions for purposes disposing of the subject dispute.

31. Pursuant to and in line with the said consent, the Plaintiff proceeded to and filed two set of written submissions, the first of which was filed on the 8<sup>th</sup> October 2021, and the latter was filed on the 18<sup>th</sup> November 2021.

32. On his part, the Defendant filed written submissions on the 19<sup>th</sup> October 2021 and same are titled as the Defendant's Final submissions.

33. I must point out that the two sets of submissions herein are on record and same have been duly considered and shall be applied towards the determination of the issues in dispute, where appropriate.

### **ISSUES FOR DETERMINATION**

34. Having reviewed the pleadings filed by the parties herein, namely the Plaint and the attachment thereto and the Statement of Defense and Counter claim and the attachment thereto and having similarly, considered the written witness statements, which were adopted by the parties, I am of the considered view that the following issues are germane for determination;

***I. Whether the Plaintiff has breached the terms of the lease/contract either as alleged or at all.***

***II. Whether the Notice to terminate the contract dated the 5<sup>th</sup> July 2020, was lawful and/or legally sound.***

***III. Whether the court has jurisdiction to order and/or direct immediate closure of the Petrol/Gas station in the manner sought by the Defendant.***

***IV. Whether the Defendant is entitled to Damages for Breach of Contract and whether such Damages have been proven.***

### **ANALYSIS AND DETERMINATION**

#### **ISSUE NUMBER 1**

***Whether the Plaintiff has breached the terms of the lease/contract either as alleged or at all.***

35. The Defendant herein issued and served a demand notice dated the 5<sup>th</sup> July 2020, which was addressed to the Plaintiff and whereby the Defendant contended that the Plaintiff had breached and/or violated the various clauses the lease agreement.

36. According to the Defendant, the Plaintiff had committed the following Breaches;

***a. Contravene clause 6.4 of the lease by making alterations and addition to the building.***

- b. Alterations of the building plan.*
- c. Contravened clause 6.6 by not installing fire hydrants within the premises as required by the law.*
- d. Not taken appropriate measures in case of a fire outbreak clause by marking a fire assembly point.*
- e. The Plaintiffs activities and that of the Plaintiffs agents are causing annoyance to the neighbor property by dumping old and/or used tires in the neighbors property.*
- f. You have not been complying with energy and petroleum authority rules on safety and storage of gas, using unlicensed motor vehicle to deliver petroleum and diesel.*
- g. Contravene clause 6.1.3 by failing to comply with EPRA notice and thereby putting the premises and the other users.*

37. The Defendant has itemized various clauses of the lease agreement, which are said to have been breached and/or violated by the Plaintiff and against which the termination has been sought.

38. Having so identified the clauses of the lease agreement, which are said to have been in breach, it is therefore incumbent upon the Defendant to lay before the court evidence of such breaches and/or procure the attendance before the court of witness, whose statement, would be helpful in proof of the alleged breaches.

39. For the avoidance of doubt, it is the Defendant who had alleged and/or contended that the Plaintiff had breached and/or violated the terms of the lease contract and therefore the Burden of proving such breaches, laid on the shoulders of the Defendant and not otherwise.

40. In respect to the foregoing observation, it is imperative to take cognizance of the provisions of **Section of 107, 108 and 112 of the Evidence Act Chapter 80 Laws of Kenya**, which provide as hereunder;

**107. Burden of proof**  
*(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*  
*(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

**108. Incidence of burden**  
*The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.*

**112. Proof of special knowledge in civil proceedings** *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.*

41. Based on the foregoing, one would have expected the Defendant herein to place before the court evidence of alteration and additions to the building and alterations of the building plans.

42. For clarity, such evidence can only arise, if the Defendant procured any Building plans, which were utilized by the Plaintiff to make the alterations and additions to the existing building.

43. In my humble view, such Building plans, if any, would be obtainable from Nairobi City County, which is responsible for approval of building plans, for purposes of alterations, adjustments and/or addition to any existing building.

44. In the alternative, if the alteration and/or addition to the building, as well as the building plan, was undertaken without authorization, a suitable complaint, would have been made to the Nairobi City County Government, who would in turn issue the requisite and Enforcement notice.

45. In this respect, the Defendant would thus have placed before the court Evidence of such complaint and the resultant Enforcement notice, if any, issued by Nairobi City County Government.

46. As concerns the failure to install Fire hydrants and/or marking of a Fire assembly point, similarly a complaint would have been made to Nairobi City County Government or the Nairobi Metropolitan Service and the requisite Enforcement Notice, would have been issued and exhibited by the Defendant. However, no such notice has been exhibited and/or availed to the court.

47. Pertaining to the complaint, that the Plaintiffs activities are causing annoyance to the neighbors of the suit property by dumping old and un-sued tires in the neighbors property, similarly a requisite complaint ought to have been made to the requisite authority and the requisite Enforcement Notice, would no doubt have been issued.

48. Suffice it to note, that the Complaint herein speaks to causation of a nuisance whose abatement is well provided for under the Provisions of **the Public Health Act Chapter 242 Laws of Kenya**.

49. Curiously though, the Defendant herein has not stated whether, other than the sale of the Petroleum Lroducts and liquefied Petroleum Gas, the Plaintiff is also engaged in the sale of used and un-used tires, to warrant the accusation of dumping. For clarity, if the Plaintiff is not engaged in such business, then where from would the used and un-used tires come from.

50. In any event, the Complaint based on dumping of used and un-used tires, is founded on a demand letter dated the 25<sup>th</sup> May 2020, authored by one, Paul R. N Thige, which alludes to **your tenants** and same is not clearly complaining against the Plaintiff.

51. At any rate, it appears that the premises where the Petrol Station is located, also houses many other tenants, other than the Plaintiff and there is a likelihood, that the issues raised vide the Demand notice dated the 25<sup>th</sup> May 2020, if same is genuine, may have been caused by persons other than the Plaintiff.

52. Never the less, to the extent that it is the Defendant who brought the letter before the court, the Defendant was thus duty bound to establish and/or prove, that the terminology **Your Tenants** and/or Servants on the upper flows, refers to the Plaintiff, and not otherwise.

53. Concerning none compliance with Energy and Petroleum Regulatory Authority Regulations, pertaining to safety and storage of gas and use of unlicensed motor vehicles to deliver petroleum and diesel, it is important to note that such a complaint should made to and attended by the Energy and Petroleum Regulatory Authority, in the first instance and an Appeal if any, should be addressed to the Energy Tribunal.

54. In respect to the complaint herein, the court has not been shown any evidence that a complaint has ever been addressed to Energy and Petroleum Regulatory Authority and that the Authority has dealt with it or otherwise, refused to deal with it.

55. Secondly, assuming that the Energy and Petroleum Authority, has refused to deal with such a complaint (*which is not the case*), the court has not been shown any Evidence of an Appeal to the Energy Tribunal, which would be the requisite authority to handle such an Appeal.

56. In respect of the complaint, that the plaintiff has failed to comply with Energy and Petroleum Regulatory Authority Notice, and thereby putting the premises and other users to great danger, similarly the court has not been shown any such Notice, which was issued to and served on the Plaintiff.

57. Nevertheless, if there was ever such Notice issued by Energy and Petroleum Regulatory Authority, which has not been complied with, then the appropriate body to address such none compliance, would be the Energy and Petroleum Regulatory Authority and not the Defendant.

58. For the avoidance of doubt, the Defendant herein, has not been constituted as an agent of the said authority and has, the Authority has delegated Statutory mandate unto the Defendant.

59. Better still, if the Defendant is aware of any such Notice that was issued by the Energy and Petroleum Regulatory Authority, which has not been complied with by the Plaintiff, then the Defendant is at liberty to commence and/or originate judicial review proceedings against Energy and Petroleum regulatory Authority, to compel enforcement of the Notice, if any.

60. Suffice it to say, that it is not enough to through such an accusation on the face of the court and to expect the court to take same at face value and to act on same, without demanding for more.

61. To the contrary, the Burden of Proof requires that the person making the allegations, should venture to avail and provide credible and sufficient evidence, which however, has not been provided for and/or tendered in respect of the subject matter.

62. In support of the foregoing position, I can do no better than to restate the position as contained in the Decision in the case of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR**, where the honourable Court of Appeal observed as hereunder;

*‘when the 1<sup>st</sup> respondent came to court, he was bound by law and practice to lay the evidence to support existence of the facts he pleaded. That is what we understand Section 108 of the Evidence Act to be demanding of a party like the 1<sup>st</sup> respondent that:*

*“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”*

*That he did not do. The claim he put forth that three limited liability companies existed, they had shareholders including himself, each holding a certain percentage of shares, were not proved. The claim that those companies held certain properties which were sold and transferred was also not proved. Accordingly, the learned judge fell in error to assume that those facts indeed existed.*

*It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.’*

## **ISSUE NUMBER 2**

**Whether the Notice to terminate the contract dated the 5<sup>th</sup> July 2020, was lawful and/or legally sound.**

63. On the 5<sup>th</sup> July 2020, the Defendant herein issued to and against the Plaintiff a Demand Notice whereby same stated as hereunder;

***“Our instructions are to demand which we hereby do that you vacate the property within 90 days from the date of the last notice to comply issued by energy and petroleum regulatory authority***

***“if you do not vacate the premises within the stipulated time, our client shall enforce the said notice to vacate at you cost. The last date of you occupancy being 15<sup>th</sup> August 2020”.***

64. Before venturing to analyze the validity and/or propriety of the said Notice, it is important to also reproduce the provisions **of Clause 8.8 of the lease document**, which provides as hereunder;

**“then the lessor shall serve upon the lessee a notice in writing requiring the lessee to forthwith remedy the same and if the lessee shall not within 90 days thereafter comply with such notice the lessor may at any time thereafter enter upon and repossess the premises and there upon this lease shall determine without any further liability to the lessee save for outstanding rent”**

65. From the provisions of clause 8.8 of the lease instrument, it is imperative to note that where there is a breach and/or violation of the terms of the lease, the lessee is entitled to be issued and served with a 90 days' Notice to remedy the breach.

66. On the other hand, if the lessee fails to remedy the breach within the 90 days period, from the date of Notice, then thereafter the lessor can enter upon and retake possession of the premises.

67. In view of the foregoing, the starting point is whether or not the Demand Notice dated the 5<sup>th</sup> July 2020, has complied with the terms of clause 8.8 of the Lease Instrument.

68. Assuming that the lessor had established and/or proved breach of the clauses, as alleged, (*which is not the case*) then the demand notice issued on the 5<sup>th</sup> July 2020, would have given to the Plaintiff **90 days**, within which to rectify the breach.

69. Be that as it may, the Notice issued, dated the 5<sup>th</sup> July 2020, which does not even give the Plaintiff the window to remedy the breaches, stipulates that the Plaintiff's occupancy would terminate on the 15<sup>th</sup> August 2020, clearly that amounts to forty (40) days.

70. In my humble view, the Defendant did not require to Einstein, to help him in the computation of time and to alert him that the **90 day period**, would not have accrued by the **15<sup>th</sup> August 2020**.

71. Nevertheless, it is worthy to point out that the terms of the lease document were written therein and thereafter executed by the parties, for same to be binding thereof. For clarity, the terms were not meant to beautify the lease instrument.

72. Having duly executed and signed the lease document, the Defendant herein is duly bound and same cannot therefore seek to unilaterally, amend, rescind and/ or alter same by sidewind.

73. In support of the foregoing statement of the law, I rely on and adopt the decision in the case **of National Bank of Kenya Limited v Pipeplastic Samkolit Limited & 8 Others (2001) eKLR**, where the court observed as hereunder;

***A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.***

***As was stated by Shah JA in the case of Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported):***

***“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain”.***

### **ISSUE NUMBER 3**

**Whether the court has jurisdiction to order and/or direct immediate closure of the Petrol/Gas station in the manner sought by the Defendant.**

74. In the Body of the counter claim, the Defendant herein has made a specific request that the Court be pleased to close and/or direct the closure of the Plaintiff Petrol station immediately.

75. I am aware and alive to the provision **of Energy Act 2019**, which has created and or established *inter alia* the Energy and Petroleum Regulatorily Authority, which is a statutory authority charged with regulations and supervision of Energy and Petroleum industry, including the importation, transportation, storage and sale of petroleum products and LPG gas.

76. One of the mandates of the said Authority is receipt of complaints pertaining to violations of the provisions of the Act, and to carry out necessary inspection, to authenticate such complaints, and where appropriate to mete out, appropriate sanctions.

77. For the avoidance of doubt, one of the sanctions that inheres in the said authority is to demand and enforce compliance with the licensing terms and in default, to decree closure of the offending petrol station.

78. On the other hand, the **Energy Act, 2019**, has also created and/or established an Appellate tribunal, namely the Energy tribunal, which deals with and/or handles appeals arising from decisions of the authority and in this case, the said Tribunal would be the second port of call for the Defendant herein, if the complaints alluded to are truly genuine.

79. In short, what I am saying is that this court is not seized of jurisdiction to delve into and/or digress to matters that belong to other Statutory bodies, that have been created and/or established under the law.

80. In my humble view, I am called upon to exercise deference and to ensure that the duly established Bodies, inter alia, the Energy Tribunal, are afforded the requisite latitude, to carry on and/or undertake their statutory mandate.

81. In support of the foregoing observation, I adopt and subscribe to the decision in the case of **Bethwel Allan Omondi Okal v Telkom (k) Limited (founder) & 9 Others (2017) eKLR**, where the court of appeal observed as hereunder;

**“Having done so, he made a finding to the effect that the grievances in question did not raise constitutional issues but rather, there were other dispute resolution mechanisms that ought to have been pursued. Since the complaints were basically against RBA, the learned Judge found that there were provisions in the Retirement Benefits Act, which the appellant should have invoked to pursue his claim. Any dispute should have been referred to arbitration in the first instance pursuant to Clause 36 of the Consolidated Deed of Trust and Rules, made under the RBA. If the appellant was dissatisfied with the decision of the arbitrator, then he could appeal to the Appeals Tribunal established under the RBA.”**

***The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions. See International Centre for Policy and Conflict & 4 others vs The Hon. Uhuru Kenyatta and others, Petition No. 552 of 2012, and Speaker of National Assembly vs Njenga Karume [2008] 1KLR 425”.***

82. The long and short of the foregoing is that the invite to close and/or direct closure of the Plaintiff’s petrol station does not lie within the Jurisdiction and/ or mandate of this Honourable Court.

#### **ISSUE NUMBER 4**

##### **Whether the Defendant is entitled to Damages for Breach of Contract and whether such Damages have been proven**

83. The Defendant herein has pleaded a claim for an award of damages for breach of contract. However, it is not clear which kind of Damages, whether Special or General Damages are the ones being sought by the Defendant.

84. Nevertheless, I must point out that the Defendant has not pleaded in the body of the counter claim any particulars of any Special loss and/or claim, to warrant a plea for Special Damages.

85. It is common ground that he who seeks a claim for Special Damages, is obliged to particularly plead, and thereafter specifically prove such a claim. Only then, can a court of law delve into and/or make an award for such a claim.

86. Consequently, and in the absence of particulars of special loss, no award for Special Damages can arise and/or be granted.

87. In support of the foregoing position, I restate the now established position of the law as was captured in the Decision in the case of **John Richard Okuku Oloo v South Nyanza Sugar Company Limited (2013) eKLR**, where the Court of Appeal stated as hereunder;

**“We agree with the learned judge that 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”.**

88. However, if what was being claimed is General damages for Breach of contract, then I must disabuse the Defendant of the perception that any such Damages are payable, either as claimed or at all.

89. Perhaps, without over repeating what is now trite law, No General Damages can be claimed and/or awarded for Breach of Contract.

90. In support of the foregoing, I beg to adopt and restate the position as captured in the case of **Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR**, where the court had this to say;

**“With the greatest respect to the learned Judge, we think that the reasoning is quite flawed. We are not persuaded that the authorities cited by the learned Judge support the proposition that in cases of breach of contract there does exist a large and wide-open discretion to the court to award any amount of damages. The opposite is in fact the case: as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In DHARAMSHI vs. KARSAN [1974] EA 41, the former Court of Appeal held that general**

*damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication”.*

**FINAL DISPOSITION**

91. Having reviewed the issues for determination and having addressed same, I am compelled to make the following orders;

***I. The Plaintiffs suit has been proven and same is hereby allowed in terms of prayer I of the Plaint subject to deletion of the words pending hearing and determination of the suit.***

***II. The Defendant’s counterclaim has not been proved and same is hereby Dismissed.***

***III. The Plaintiff shall have Cost of the Suit, as well as the Counter claim.***

92. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF DECEMBER 2021.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

**ENVIROMENT AND LAND COURT.**

**MILIMANI.**

In the Presence of;

**June**

**Nafula**

**Court**

**Assistant**