



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CIVIL SUIT NO. 2 OF 2014**

**SIMONA RIZZOTI.....PLAINTIFF**

**VERSUS**

**KENYA WAY LIMITED.....DEFENDANT**

**CORAM: Hon. Justice Reuben Nyakundi**

**Nchogu, Omwanza & Nyasimi Advocates for the Plaintiff**

**Gicharu Kimani & Associates Advocates for the Defendant**

**JUDGEMENT**

**Introduction**

The genesis of this suit is a Complaint initially filed by the Plaintiff herein and dated 29<sup>th</sup> January 2014. During the pendency of this suit, its nature evolved necessitating an amendment to the original Complaint on 9<sup>th</sup> November 2017 and, on 5<sup>th</sup> March 2019, the Plaintiff eventually filed a re-amended Complaint dated 24<sup>th</sup> January 2019. Generally, the reliefs sought by the Plaintiff are in the nature of damages arising from breach of a lease agreement dated 7<sup>th</sup> June 2013; entered into between herself and other parties on the one part and the Defendant company on the other. The validity of this agreement is challenged by the Defendant and so is the capacity of the Plaintiff to institute this suit.

Specifically, the Plaintiff prays for:

**1. Judgment to be entered against the defendants;**

**2. An Order that the Defendant do and is hereby ordered to:**

- a) pay the Plaintiff the total projected profit for 5 years, amounting to 691, 880 Euros at the current exchange rate with interest thereon at court rates from 6<sup>th</sup> January 2014 equivalent to KShs. 78,182,440/=;**
- b) Pay the Plaintiff Monies which were in the Plaintiff's safe at the time of eviction amounting to Kshs. 325, 000/=;**
- c) Pay the Plaintiff the amount received from the bookings and or reservations between the 20<sup>th</sup> day of December 2013 to July 2014;**
- d) Pay the Plaintiff the amount for the Stock and materials at Kenya way, trading as White Elephant totaling Kshs. 1,239,632/=;**
- e) Pay the Plaintiff the amount outstanding on account for Armando Tanzini for his guests which is due and is to be paid by the Defendant;**
- f) To refund the Plaintiff the amount paid on account for electricity before the lease took effect to clear outstanding debt and another portion on the account utilized by the Defendant in running the Gallery, workshop, shop and auditorium all totaling Kshs. 279,910/= for the 7 months the plaintiff was in operation;**
- g) Pay the Plaintiff the Costs of purchasing mattresses, bed, table covers linen all totaling Kshs. 5, 500, 000/= which mattresses were retained and are being utilized by the defendant;**

*h) Pay the Plaintiff the Costs of purchasing kitchen accessories totaling Kshs. 300, 000/= which accessories were retained and are being utilized by the defendant;*

*i) Refund the Plaintiff the Costs for fixing and repairing air conditions totaling Kshs. 30, 000/= which air condition is being utilized by the defendant;*

*j) Refund the plaintiff for Costs for liquor license which could not be utilized by the Plaintiff;*

*k) Refund the Plaintiff the amount paid for water due to the outstanding bill of Kshs. 50, 000/=.*

*l) Pay for the Expenses incurred and paid for Armando Tanzini, director of the Defendant by the Plaintiff;*

*m) Refund the Plaintiff the Monies spent on renovation of the defendant's premises before occupation all totaling to Euro 30,000 equivalent to Kshs. 3,450,000/=; which amount was utilized for: Electrical repairs, plumbing works, construction, laundry, swimming pool repair; painting of the whole hotel, roofing repairs and kitchen repairs;*

*n) Return to the Plaintiff all the Plaintiff's property listed in paragraph 12 (ii), (iii), (iv), (v) (vi) and (vii) of the Re-amended plaint;*

**3. Pay Costs of and incidental to this suit;**

**4. Pay the Plaintiff Interest on 2 (a) and to (b) (h) at court rates from the date of this suit until payment in full; and**

**5. Any other or further relief as may be given by this Honourable court.**

In response to the suit, the Defendant filed its statement of Defence dated 18<sup>th</sup> February 2014. In it, the Defendant admitted to the existence of the Agreement dated 7<sup>th</sup> June 2013 but denied the existence of any other agreements. Per the Defendant, the Plaintiff did not have the *locus standi* to bring forth the instant suit in her own name as opposed to that of the company, which, according to the Defendant, had been the Lessee in the agreement dated 7<sup>th</sup> June 2013.

At trial, the Plaintiff relied on her own witness statement dated 9<sup>th</sup> November 2017. In aid of her case she also called to the stand Monica Kipkorir, an accountant who worked at the suit premises, who also relied on her statement dated 9<sup>th</sup> November 2017. The Defendant's case was made by its director, Armando Tanzini, who gave sworn testimony in Court on the 16<sup>th</sup> September 2019.

At the close of the Defence case, parties retired to file their submissions. The Plaintiff filed submissions dated 24<sup>th</sup> October 2019 while the Defendant filed submissions dated 17<sup>th</sup> August 2020.

What follows is a summary of the salient facts and evidence of the issues that emerged at trial.

### **Summary of the Case**

The Plaintiff averred that she is an adult of sound mind and disposition who had brought the instant suit in her own capacity as shareholder and as the director of Kuumba Limited. According to her, by a Lease Agreement dated 7<sup>th</sup> June 2013, the Plaintiff, Franco Tattoni and Francesca Gobesco agreed on behalf of Kuumba Limited to lease 19 rooms of White Elephant Hotel from the Defendant for a period of five (5) years one (1) month commencing from 1<sup>st</sup> May 2013 at the agreed annual rent of 70, 000/= Euros; with a 10% increase as from the third year.

It was contended that by reason of the inability to commence operations in view of the hotel's state of disrepair, the plaintiff along with her co-directors entered into a memorandum dated 23<sup>rd</sup> April 2013 in which it was agreed that Kuumba Limited carry out the required repairs and reimburse itself through the monthly rents payable. Reference was made to an agreement dated 26<sup>th</sup> September 2013, originally drafted in Italian but whose translation was availed to the court. This later agreement it was averred, contained the terms upon which repairs and payment for the same would be made as well as a list of the repair works undertaken.

It was averred that Kuumba Limited took possession of the 19 rooms as agreed and made rent payments as follows: 17,500 Euros for June-August 2013, 12,000 Euros for September - December 2013 and 387.10 Euros for 4 days in January 2014.

The case was also made that further to the repairs, Kuumba also incurred an extra cost of Kshs. 279,910/= and Ksh. 50,000/= on account of electricity and water bills respectively in accordance with paragraph 10 of the lease agreement, which should have been shared at the ratio of 40:60.

According to the Plaintiff's testimony, to facilitate the operation of the lease, she applied for and obtained a work permit from the Kenya Department of Immigration after paying the official fee of Ksh. 45, 000/=, obtained a liquor license at Ksh. 20,000/=, purchased an air conditioner at Ksh. 30,000/= and commenced operations in June 2013.

As the Plaintiff's case goes, on 5<sup>th</sup> January 2014, during the existence of the agreement, the Defendant through its Director Mr. Armando Tanzini, violently and without any reason and without due regard to the rule of law, evicted Kuumba Limited from the hotel and further

directed the guards employed by them to immediately vacate the hotel and replaced them with his own guards.

The Plaintiff further averred that at the time of her eviction the following items were left in the hotel:

*i. Kshs. 325,000/= stashed in envelopes in the safe deposit box*

*ii. Three cheque books, two DTB and one Imperial Bank*

*iii. All books of accounts.*

*iv. All registration documents of Kuumba Limited.*

*v. Receipt books and company records.*

*vi. One oven and electric mixer.*

*vii. Personal Computer VAIO by make*

It was contended that the unlawful eviction of the Plaintiff occasioned her great loss which she particularized as below:

i. Monies in the Plaintiff's safe at the time of eviction amounting to **Kshs. 325, 000.00/=**;

ii. Total projected profit for 5 years, at the rate of 138,376 Euros per year less rent, salaries, maintenance and tax amounting to 691,880 Euros which was equivalent to **Kshs. 78, 182, 440/=**;

iii. Amount received from the bookings and or reservations between the 20<sup>th</sup> December 2013 to July 2014 totaling **Kshs. 3,033, 155/=**;

iv. Stock and materials at Kenya Way, trading as White Elephant totaling **Kshs. 1, 239, 632/=**;

v. Amount outstanding on account for Armando Tanzini for his guests which is due and is to be paid by the Defendant;

vi. Costs of purchasing mattresses, bed, table covers linen all totaling to **Kshs. 5, 500, 000/=**, which mattresses were retained and are being utilized by the defendant;

vii. Costs of purchasing kitchen accessories totaling **Kshs. 300,000/=**, which accessories were retained and are being utilized by the defendant;

viii. Costs for fixing and repairing air conditioners totaling **Kshs. 30,000/=** which air condition is being utilized by the defendant;

ix. Costs for liquor license which could not be utilized by the Plaintiff;

x. Refund for the amount paid for water due to the outstanding bill of **Kshs. 50, 000/=**;

xi. Refund for the amount paid on account for electricity before the lease took effect to clear outstanding debt and another portion on account utilized by the Defendant all totaling **Kshs. 280,000/=**;

xii. Expenses incurred and paid for Armando Tanzini, director of the Defendant by the Plaintiff;

xiii. Monies spent renovation of the defendant's premises before on occupation all totaling to 30,000 Euros equivalent to **Kshs. 3,450,000/=**

The Plaintiff averred that the Defendant's unlawful acts amounted to a breach of contract and that she would seek recompense in the form of damages for the particularized loss. It was averred that despite making a report of the defendant's unlawful acts at the Malindi Police station and her complaint was duly entered in the occurrence book as entry number OB 79/6/01/2014, no action was taken.

On behalf of the Plaintiff, **PW2** Monica Kipkorir testified that as an accountant working at the White Elephant, she had had occasion to work under **DW1** Armando Tanzini, director of the Defendant for four months before she was transferred to Kuumba Limited when the business exchanged hands. Her testimony revolved around the financial operations of the White Elephant hotel. She testified about all the various purchases made as well as the repairs done to the hotel and produced invoices to this effect. She further testified about the employment roster, stating that it consisted of both permanent and casual employees at any given time. Crucially, she gave the approximate performance of the hotel, stating that during the low season it would earn about Ksh. 1,400,00/= and during the high season between Kshs. 3.8 to 4 Million. She put the monthly salaries of the permanent staff at Ksh. 630,000/= , while that of casuals at Ksh. 220,000/=.

For the Defendant, Mr. Armando Tanzini while acquiescing to the existence of the 7<sup>th</sup> June 2013 Lease Agreement, denied the existence of the agreement dated 23<sup>rd</sup> April 2013 by which the parties had purportedly agreed to the Lessee's effecting repairs on the property and

reimbursing themselves through the rent that was due. He contended that Kuumba Limited breached the terms of the Agreement by failing to pay rent as agreed. He was of the strong view that the Plaintiff could not bring this suit in her own capacity as she was but a director of Kuumba Limited which, in his view, was the proper lessee in the 7<sup>th</sup> June 2013 agreement.

### **The Submissions, Analysis and Determination**

Submissions on behalf of the Plaintiff were urged by Mr. Nyasimi Advocate, with Mr. Odhiambo Advocate holding his brief during highlighting. The Defendant was represented by Mr. Gicharu Advocate in advancing its submissions. I have duly considered the contributions made by Counsel and will refer to them in the resolution of the issues raised. The issues framed for determination by counsel are tripartite and I delineate them thus:

- i. Whether the Plaintiff has locus standi to file the instant suit;***
- ii. Whether there existed a valid lease agreement between the parties herein;***
- iii. Whether the Plaintiff is entitled to the reliefs sought.***

I propose to analyze and adjudicate upon the first two issues conjunctively. On the first issue of the capacity of the Plaintiff to institute this suit, it was submitted by Mr. Nyasimi that Ms. Rizzato had locus standi on two accounts. As the first limb of this argument, it was contended that at 7<sup>th</sup> June 2013 when the lease agreement was entered into by Simona Rizzato, Franco Tattoni and Francesca Gobesso on behalf of Kuumba Limited, Kuumba Limited did not exist. The company was incorporated on 26<sup>th</sup> June 2013. Accordingly, the agreement of 7<sup>th</sup> June 2013 was thus between the three businesspersons on the one part and Kenya Way Limited on the other.

In furtherance of this argument, it was submitted that it was trite that a limited liability company could only assume the liabilities and obligations of a pre-incorporation contract upon adoption or ratification. Since no evidence had been tendered to prove that Kuumba Limited adopted the lease agreement, it followed that its promoters were the ones that held personal liability. Reliance was placed on **Section 44 of the Companies Act, 2015** and on the cases of *Kelner vs Baxter* and *Phonogram Limited vs Lane*.

The second limb was that as per the re-amended Plaintiff, the Plaintiff had particularized details of personal losses of money among other items therefore she was a proper Plaintiff as per **Order 1 Rule 1 of the Civil Procedure Rules 2010**.

As to whether there exists a valid lease agreement, Counsel for the Plaintiff submitted that there exists an agreement dated 7<sup>th</sup> June 2013, whose existence the Director of the Defendant admitted to during cross-examination. It was submitted that by the terms of that agreement, the Plaintiff and two other persons, Franco Tattoni and Francesca Gobesso on behalf of Kuumba Limited, the lessees on one part, entered into a lease agreement with Kenya Way Limited, the lessor on the other part. The agreement was for the lease of the resort/hotel called White Elephant containing nineteen (19) rooms and including the restaurant, the conference room, pool, beach, reception area and office. This agreement, it was submitted, was drawn by Nyakoe Macharia & Co. Advocates and duly signed by the parties, signatures which have not been contested; this proved the existence of a valid lease agreement.

It was subsequently submitted that a lease agreement that is more than one year should be registered and, in the event that it is not, it operates as a contract; hence the said lease agreement herein was, at best, a contract inter partes which is binding, and only valid and enforceable between the parties thereto. In aid of this argument, reliance was placed on the cases of *W J Blakeman Ltd vs. Associated Hotel Management Services Ltd [1986] KLR 156* and *Souza Figueiredo v Moorings Hotel Co. Ltd [1960] EA 926*, cited with approval in *Chon Jeuk Suk Kim And Kim Jong Kyu Vs E.J. Austin And Others In Civil Appeal No. 265 of 2010 At The Court Of Appeal At Mombasa* where the Court held that unregistered document operates as a contract.

The Defendant, through Mr. Gicharu, did not think the Plaintiff had locus standi. Placing reliance on *Phares Omondi Okech & 3 Others (Suing for and on behalf of Kasgam Community – Wadhari Clan) vs Victory Construction Co. Ltd & Kisumu Water & Another [2015] eKLR and Juletabi African Adventure Limited & another vs Christopher Michael Lockley [2017] eKLR* it was argued that while in the re-amended Plaintiff the Plaintiff claimed to have brought the suit in her capacity as shareholder and director of Kuumba Limited, no evidence had been tendered to show she had the authority to institute the suit on behalf of the company.

Resisting the Plaintiff's argument, Mr. Gicharu posited that while the parties had purportedly entered into an agreement dated 7<sup>th</sup> June 2013 for the lease of the White Elephant hotel for a period of five years and one month, the law under **Section 4 (1) (iv) of the Registration of Documents Act** mandated that leases that were for a period exceeding one year ought to be registered; this one was not. Hence, the argument was made that there existed no valid lease agreement.

On to the issue of whether the Plaintiff had the capacity to sue, the argument by the Defendant, as I understand it, is that the Lessee in the agreement was Kuumba Limited. Therefore, the Plaintiff herein, being a director of that company ought to have obtained and presented to the Court evidence of her authority to file suit on behalf of Kuumba Limited. The view taken by the Plaintiff was that since at the time of the agreement Kuumba Limited was yet to be incorporated, the agreement was basically a pre-incorporation agreement and could only be construed as having been between the directors in the individual capacities.

The recital of the agreement dated 7<sup>th</sup> June 2013 is reproduced below:

***“This LEASE AGREEMENT made on the..... Day..... 2013 BETWEEN KENYA WAY LIMITED care of representative ARMANDO TANZINI of Identification Card Number 0749595 and P.O Box 553, Malindi in the Republic of Kenya ("hereinafter called the Lessor") which expression shall where the context so admits include its successors and assigns of the one part AND FRANCESCA DORESSO, SIMONA RIZZATO and FRANCO TATTORI holding passport numbers AA5932011,***

G264776, and A0276388 respectively and both of KUUMBA LIMITED a liability company duly incorporated in Kenya and or Post office Box Number 553, Malindi in the Republic of Kenya foresaid ("hereinafter called the Lessees") which expression shall where the context so admits include its successors and assigns of the other part.

The Lessor has agreed to let to the lessons the resort/hotel called WHITE ELEPHANT containing nineteen (19) rooms of the Restaurant, the conference room, pool, beach, reception area and office.

AND WHEREAS the LESSEES are desirous of taking over as a running concern the said hotel business of the aforementioned upon the terms, conditions and stipulations herein set out..."

The Certificate of Incorporation produced in court shows that Kuumba Limited was incorporated on 26<sup>th</sup> June 2013. It is obvious that this is after the execution of the agreement dated 7<sup>th</sup> June 2013. I am therefore inclined to agree with the Plaintiff's assertion that it must be construed as a pre-incorporation agreement. As per the law, until a company has been incorporated, it cannot contract or do any act. In *Civil Appeal 189 of 2016 Clement Muturi Kigano v Kibera Development Company Limited [2019] eKLR* it was held:

***"Until a company has been incorporated, it cannot contract or do any act. Nor once incorporated, can a company become liable for or entitled under contracts purporting to be made on its behalf prior to incorporation - for ratification is not possible when the ostensible principal did not exist. Any preliminary pre-incorporation arrangements will either have to be left to mere gentleman's agreements or the promoters will have to undertake personal liability. [emphasis supplied]"***

(See also *Kelner -v- Baxter (1886) KR 2 C.P. 174*; see also *Newborne -v- Sensolid (Great Britain Limited [1954] 1 QB 45 C.A.)*)

The position taken by the Court of Appeal above is not novel. It finds favour in the case of *Consolidated Chemicals Ltd vs. KEL Chemicals Ltd Civil Appeal No 6 of 1981* where the Court of Appeal in that instance stated thus: -

***"For a contract entered into by a company before incorporation to be legally binding upon it, there must be a company resolution clearly adopting such contract and such adoption must be provided for in the memorandum of the articles of association. Since the company did not ratify the pre-incorporation contract, there would have to be a new contract"***

The position above has been coded into statute. Illusory in this vein is **Section 44 of the Companies Act, 2015** which as regards pre-incorporation agreements provides that:

***44. (1) A contract that purports to be made by or on behalf of a company at a time when the company has not been formed has effect, subject to any agreement to the contrary, as a contract made with the person purporting to act for the company or as agent for it, and the person is personally liable on the contract accordingly.***

Per the recitals of the agreement of 7<sup>th</sup> June 2013, the Plaintiff and her two co-directors together with the Company Kuumba Limited are collectively referred to as the Lessees. However, we have since established that at the time of the agreement, Kuumba Limited did not exist as a legal entity. In short, the persons purporting to act on its behalf ought to be held personally liable. On this limb therefore, the argument advanced by the Defendant that the Plaintiff ought to have sought for and obtained authority to act on behalf of Kuumba Limited must fail. This is so since at the time of the agreement of 7<sup>th</sup> June 2013 and subject of this suit, Kuumba Limited had yet to be incorporated and could not have entered into any agreement with the Defendant. It just so happens that in the in the case at hand, Kuumba Limited directors were described in the agreement in their individual capacities as the Lessees. Furthermore, per the re-amended Plaint, the Plaintiff particularized details of personal items she lost as a result of her eviction. I therefore find that it was in order for the Plaintiff, Simona Rizzato to bring this suit in her own name.

Turning to the validity of the agreement dated 7<sup>th</sup> June 2013, in my view, its existence is not in doubt. The contestation raised by the Defendant is as regards the fact that being a lease agreement for a period exceeding one year, it ought to have been registered; there is no opposition to this position as it is indeed the position of the law. However, be that as it may, the lack of registration is not fatal, as ably pointed out by counsel for the Plaintiff. In *Civil appeal 45 of 1984 WJ Blakeman Ltd vs. Associated Hotel Management Services Ltd [1985] KLR 156, Nyarangi JA* stated:

***"In Souza Figueiredo & Co Ltd v Moorings Hotel Co Ltd [1960] 926, by an agreement the respondent let premises to the appellant for a term exceeding three years under the sub-lease, registration of the agreement was refused, the appellant took possession of the premises and it was later contended that the unregistered agreement was ineffectual to create any estate or interest and the contract to pay rent was unenforceable. It was held that whereas the agreement could not operate as a lease it could operate as an agreement inter parties which if followed by possession and payment of rent creates a tenancy from month to month: See also Rogan – Kamper v Lord Grosvenor (No 2) 1977 KLR 123 and EA Power & Lighting Co Ltd v The Attorney General [1978] KLR 217."***

The Court of Appeal in *Civil Appeal No. 265 of 2010 Chon Jeuk Suk Kim And Kim Jong Kyu Vs E.J. Austin And Others [2013] eKLR* held that an agreement of a lease or unregistered lease where the statute requires registration, though not conferring any legal or equitable estate was nevertheless enforceable as contract between the parties for the period stated in the document and the non-registration does not preclude the use of the document to show the terms of contract between the parties. In the Courts own words:

***"The decision in Souza Figueiredo & Co. Ltd was followed in Clarke v Sodhoni [1963] EA 107 where the Court further held that the proviso of section 40 for the Kenya Registration of Titles Ordinance that no lease for a period exceeding one year shall be valid unless registered does not exclude the use of unregistered lease to show the terms of the contract between the parties.***

*The case of GosVenor v Rogan – Kamper [1974] – 446 concerned the enforcement of an agreement for a lease contrary to section 40 of Kenya Registration of Titles Act and it was held that such a lease is valid between the parties although it gives no protection to the rights of third parties and the respondent held under the same terms as if a lease had been granted. In Bachelor's Bakery Ltd v Westlands Securities Ltd [1982] KLR 366 which concerned the enforcement of unregistered lease agreement it was held that such an agreement valid between the parties even in the absence of registration.*

*Those decisions show that an agreement of a lease or unregistered lease where the statute requires registration, though not conferring any legal or equitable estate is nevertheless enforceable as contract between the parties for the period stated in the document and the non-registration does not preclude the use of the document to show the terms of contract between the parties. Although those decisions relate to the construction of the provisions of the Registration of Titles Ordinance Act they apply with equal force to the legal effect of an agreement for a lease of unregistered lease of a period of over two years under the Registered Land Act as section 47 thereof is similar to the provision under consideration in those decisions.”*

So emphatic was the Court of Appeal in *Civil Appeal No. 265 of 2010 [supra]* in finding that the terms contained in such an unregistered document were enforceable that it went on to add, ‘*However it is worth repeating that covenants and stipulations in such document are enforceable inter parties.*’

In the instant suit, it is not in doubt that it was intended by the parties that the agreement of 7<sup>th</sup> June 2013 serve as a lease agreement. However, it was a term of the agreement that the lease term be five years and one month. As such, it was a requirement of the law that such lease be registered in order to be recognized as such. It was not. Nonetheless, as espoused in the authorities I have adverted to, I find that while the agreement of 7<sup>th</sup> June 2013 does not pass muster as a valid lease agreement owing to its non-registration, it is still enforceable as contract between the parties and is thus a proper benchmark to determine the terms contractual relations between the parties.

Having concluded that the Plaintiff had the capacity to sue and having established the validity of the agreement insofar as it describes the terms upon which the parties agreed to contract, I now turn to the question of whether the Plaintiff is entitled to the reliefs sought. My point of departure is whether the Defendant was in breach of the covenants contained in the agreement of 7<sup>th</sup> June 2013 in the manner the Plaintiff alleges.

The case made by the Plaintiff was that, despite her keeping up to date with the rent as per the terms of the agreement, the Defendant, through its Director Armando Tanzini had without notice evicted her from the suit premises contrary to the terms of their agreement thus violating her quiet possession. It was asserted that even if the Defendant had been desirous of terminating the agreement between the parties, the proper channel to do so was by giving notice of the termination as prescribed by **Section 4 (2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act**. Since no such notice was ever issued nor one produced in court, it was argued that the eviction by the Defendant was illegal. However, as I have held in the foregoing, the agreement of 7<sup>th</sup> June 2013 cannot be treated as a lease as it did not fulfill the crucial requirement of registration. That being said, it could still be enforceable as a contract between the parties.

To discover the intention of the parties in the contract, the substance of the agreement and the conduct of the parties must be considered. Regarding the substance of the agreement, an excerpt of the clauses of the agreement is reproduced below:

***NOW THIS LEASE WITNESSETH as follows:***

- 1) The period of the demise granted by the Lessor to the Lessees herein is five (5) years and One (1) month commencing the day of May 2013.***
- 2) The rent payable shall be Seventy Thousand Euros (70,000Euros) per year for the first two years and from the third year the rent will increase by 10%.***
- 3) The rent shall be paid every three months on the 5<sup>th</sup> day.***
- 4) The lessor guarantees that all the licenses required by law to run the hotel activities are available.***
- 5) The lessees shall only use the name WHITE ELEPHANT for activities connected to the hotel, any other use must be authorized by the owner of the trademark.***
- 6) The Lessees assure that there will not be any stakeholders of the company for the entire lease period.***
- 7) All the parts of the hotel/resort used by the lessor for his art activities such as Museum, Art Gallery and Art Shop are excluded from this agreement.***
- 8) The Lessees shall pay a sum of Seventeen Thousand Five Hundred Euros (17,500 Euros) as an anticipated lease fee upon signing this agreement.***
- 9) The Lessees hereby covenants to keep the demised premises to the requisite standard of cleanliness as not to infringe the Municipal by laws.***
- 10) The Lessees are not responsible for any undisclosed debts incurred by the Lessor before this Lease and take over of the premises.***

11) Upon termination of the Lease by expiry thereof or otherwise the Lessee shall deliver the premises to the Lessor in good and tenable repair together with all locks and keys to the premises and all buildings, furniture, fixtures, linen and all equipments contained and/or situated within the building.

12) If at the end of the term of the Lease, the premises are not left in the state required by this lease, the lessee shall pay to the Lessors on demand such sum as shall be certified by the Lessor's surveyor to represent on his reasonable opinion.

13) The Lessees shall effect comprehensive insurance cover with a reputable insurance company at full value of the premises for occupiers' liability, common law liability and workmen's compensation and for fire and burglary. It is further agreed that the beneficiary of the said insurance cover shall be the lessors subject however to the condition that it shall be the responsibility of the Lessors upon being paid by such insurance company, and only to the value of such payment, to reconstruct the entire premises and replace the damaged or lost fixtures, fittings, furniture movable, equipment and facilities or otherwise the entire subject of the insurance cover in the event of loss or damage arising from any risk so insured against and it is further agreed that such insurance cover shall include loss of profits and legal liability in respect of guest and their property.

14) In case of sale of the said property by the lessor, there shall be a fee for the lessees amounting to One Hundred Thousand Euros (100,000.00 Euros) and the lessor shall issue three months (90 days) notice of change of property in advance.

It is not in doubt that the Plaintiff and her associates were put into possession of the suit premises. As per the Defendant however, their failure to pay rent occasioned their eviction from the premises. It is this eviction that the Plaintiff alleges to have been in breach of their agreement. Gleaning from clauses 1, 2, 3 and 5 of the agreement, a few facts are apparent. The lease period was to be for 5 years and 1 month at a rent of 70,000 Euros per year for the first two years to be paid quarterly. Moreover, upon execution of the agreement, the Lessees were expected to make a payment of 17,500 Euros which would ostensibly cover the first quarter of their occupation.

The Plaintiff in her testimony asserted that she paid the rent monies to the tune of 17,500 Euros for the period of June to August 2013, 12,000 Euros for the quarter of September through December 2013 and 387.10 Euros for 4 days in January 2014 directly to Armando Tanzini, the director of the Defendant. Mr. Tanzini denies receiving such monies on behalf of his company. However, aside from the Plaintiff's averments, no documentary evidence was adduced as proof of payment of rent. While the Plaintiff averred that she lost most of the original documentation relating to her dealings with the defendant upon her eviction, surely it cannot be that there was not a scintilla of evidence showing proof of the transaction.

Going further, the agreement of 7<sup>th</sup> June 2013 is silent on notice for termination. All it provides regarding termination is that the Lessees return the suit premises in good condition. In a bid to surmount this hurdle, it was contended by the Plaintiff that the terms of **Section 4 (2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act** regarding notice ought to have come into play. By this suggestion, Counsel for the Plaintiff seemed to imply that the Plaintiff's occupation of the suit premises was a controlled tenancy. I must reject this proposition because per **Section 2 of the Landlord and Tenant Act**, a controlled tenancy is defined as:

*a tenancy of a shop, hotel or catering establishment—*

*(a) which has not been reduced into writing; or*

*(b) which has been reduced into writing and which—*

*(i) is for a period not exceeding five years; or*

*(ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or*

*(iii) relates to premises of a class specified under subsection (2) of this section:*

*Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy;*

The agreement in this instance was in writing and for a period exceeding 5 years. Additionally, it does not contain a provision for termination otherwise than for breach of covenants within 5 years from its commencement.

The Plaintiff asserted that part of what was due as rent was used to conduct repairs in the suit premises before it could begin operations. In aid of this assertion, per the Plaintiff's testimony, two other agreements informed her interactions with the Defendant. The first is a document titled 'memorandum of understanding' that appears to have been executed by the parties to the lease agreement of 7<sup>th</sup> June 2013 on the 23<sup>rd</sup> of April 2013. Additionally, the Plaintiff alluded to another agreement dated 26<sup>th</sup> September 2013. The contention was that this later agreement varied the one made on 23<sup>rd</sup> April 2013 to the extent that it provided for the terms upon which repairs would be carried out, the cost of said repairs and how these costs would be recovered. The Defendant was adamant that these agreements did not exist.

Despite the contention by the Plaintiff that the memorandum was the basis upon which the intended lessees had agreed that they would carry out repairs and reimburse themselves through the rents payable, my reading of the agreement of 23<sup>rd</sup> April 2013 reveals that it is fundamentally identical to the agreement of 7<sup>th</sup> June 2013. It does not allude to repairs as contended. As for the latter agreement, though the original document was in the Italian language, the translated copy does little by way of shedding light as to the terms upon which repairs would be made. In any case, contrary to the Plaintiff's position, there is no list of repairs and costs attendant thereto.

In light of the foregoing discussions, the following conclusions come to bear. First, as Kuumba Limited did not exist as at 7<sup>th</sup> June 2013, the lease agreement of that date could only have been entered into by individual persons, the Plaintiff and her associates. Second, the agreement did not meet the requirements of a valid lease as it was unregistered yet was for a period of 5 years and 1 month. Third, the document stated that rent would be paid quarterly but the Plaintiff did not offer any evidence of proof of payment of rent. Finally, no evidence was adduced to support the assertion that the parties had agreed for repairs to be undertaken on the hotel and costs be subsumed by the rent payments.

In the face of these conclusions, is the Plaintiff entitled to the prayers sought? I think not. The totality of the evidence does not support the allegation of breach as averred by the Plaintiff and I do find and hold as much.

Had the Plaintiff succeeded in proving breach, what would have followed was a consideration on the special damages she was entitled to. Arguing in favour of the Plaintiff, it was submitted that the Plaintiff specifically pleaded injuries suffered and reliefs sought. Reliance was placed on *McGregor on Damages, 19<sup>th</sup> Edition*. Further reliance was placed on *Jaura vs Ahmed, Gusii Mwalimu Investment Company Ltd vs Mwalimu Hotel kisii Limited CA Civil Appeal No. 160 of 1995, A S t/a Business 2000 vs Lakhamshi Virpal Shah & 5 Others [2016] eKLR* and *Rajabali Kassam t/a Giraffe Snack Bar v Total Kenya Ltd [2009] eKLR* for the submissions that special damages were due for loss of anticipated income as well as for the stock, fixtures and fittings that the Plaintiff undertook to repair.

Citing *Agricultural Finance Corporation v Lengetia Ltd*, the Defendant submitted that since the Plaintiff was not Kuumba Limited, she was not party to the impugned agreement and as such could not bring forth any claim based on it.

It is trite that special damages must not only be specifically pleaded with a great degree of particularity but also be proven by way of tangible evidence. The Court of Appeal in *Civil Appeal No. 115 of 2006 Douglas Odhiambo Apel & Emmanuel Omolo Khasin -vs-Telkom Kenya Limited* stated that:

***“A plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court.***

***The need for proof is not lessened by the fact that the claim is for special damage. Unless a consent is entered into for a specific sum, then it behooves the claiming party to produce evidence to prove the special damages claimed. ... It is not enough to merely point to the plaint or to repeat the claim in submissions. The law on special damages is that they must be specifically pleaded and strictly proved.”***

Augmenting the position that special damages must be specifically pleaded and proven, the Court of Appeal in *Gilgil Telecoms Industries Limited v Duncan Nderitu & 57 others [2016] eKLR* cited with approval its decisions in *William Kiplangat Maritim & Another -vs-Benson Omwenga - Civil Appeal No. 180 of 1993 (unreported)* and *Coast Bus Service Ltd -vs-Murunga Danyi & 2 Others - Civil Appeal No. 192 of 1992 (unreported)* stating as follows: -

***“We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit and, in this connection, it is not enough to simply aver in the plaint as was done in this case, that the particulars of special damages were to be supplied at the time of trial. If at the time of filing suit, the particulars of special damages were not known, then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of the special damages are pleaded in the plaint that a claimant will be allowed to proceed to strict proof of those particulars...”***

That the Plaintiff pleaded an extensive list of losses is not in doubt. However, while a host of documentation was produced at trial in a bid to prove the loss, it is my finding that they were insufficient in that regard.

In the upshot, the totality of the evidence is that the Plaintiff's did not prove the special damages flowing from the alleged breaches. The Plaintiff's suit must therefore fail.

Regarding costs, it is my finding that each party bears their own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 9<sup>TH</sup> DAY OF JUNE 2021**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of**

Mr Gicharu for the Defendant

Simona Rizzoti Plaintiff present

([lawyermomanyi@gmail.com](mailto:lawyermomanyi@gmail.com), [info@gklaw.org](mailto:info@gklaw.org))