



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO.5 OF 2019

RAM INTERNATIONAL LIMITED.....PLAINTIFF

VERSUS

MAASAI MARA UNIVERSITY.....DEFENDANT

JUDGMENT

1. The plaintiff sued the defendant herein vide a plaint dated 7th August 2019, praying that judgment be entered against the defendant in the following terms;

- a. Payment of the sum of Kshs. 112, 276,591/- only, on account of accumulated and/or accrued Rent Arrears and Accruals/Loss of Profit for the outstanding period of the Lease/Lease term.
- b. Interests at Court rates (14%) on the outstanding figure/sum, details in terms of Paragraph (a) and (b) above, w.e.f 31st May 2017.
- c. Costs of this suit be borne by the Defendant
- d. Such further and/or other relief as the Honourable Court may deem fit and expedient so to grant

2. The plaintiff averred that on 2nd January 2015, the Defendant approached it with a request to obtain space within the plaintiff's LR. No. KISII MUNICIPALITY/BLOCK 111/147 (hereinafter referred to as the "suit property") which comprises of a multi-storey commercial building, located within Kisii Town. The defendant intended to carrying out educational activities, in the premises for its students residing within Kisii Town and her environs. Subsequently, the parties entered into a lease agreement, whereby the plaintiff leased in favour of the defendant a portion of the suit property, measuring 37, 200 Square Feet. The plaintiff claimed that the Defendant took possession of the suit property with effect from 1st February 2015. The plaintiff claimed that it was an was an express term and condition of the lease agreement that the defendant would pay rent quarterly in advance in the following manner;

- i. 1st two years rent payable was Kshs. 7,365,600/= only (1,227,600/= per month) plus 16% V.A.T.
- ii. 2nd two years rent payable was Kshs. 8,102,160= only (1,350,360/= per month) plus 16% V.A.T.
- iii. 3rd two years rent payable was Kshs. 8,912,376 only (1,485,396/= per month) plus 16% V.A.T.

3. The plaintiff claimed that from 1st February 2015, the defendant paid a total of Kshs. 15,050,728/= in rent up to 31st May 2017, and vacated the premises before the contractual timeline. By the time the defendant moved out of the premises, it had accrued rent totaling to Kshs. 40,442,054/=. The plaintiff averred that during the period of occupation between 1st February 2015 and 31st May 2017, the defendant paid a total of Kshs. 15,050,728/= leaving rent arrears of Kshs. 25,391,326/=.

4. According to the plaintiff, it was also a condition of the agreement that the Defendant would pay a Penalty Interest of 2% per month, for any late payment or default. Therefore, when the Defendant vacated the demised premises, it was in arrears for a total of 26 months and the total interest chargeable over the period of default was a sum of Kshs. 13,203,489/ =.

5. The letter of offer which formed the basis of the Contract between the parties was to run for a period of 6 years commencing from 1st February 2015 and terminating on the 31st January 2021. However, in breach of the letter of offer, the defendant unilaterally vacated the demised premises on 31st July 2019 without regard to the terms of the lease. The plaintiff claimed that as result of the breach, it was deprived of rental income, for a total of 88 months for the remainder period of the lease term, between the 31st May 2017 to the 31st January 2021. The plaintiff computed its loss for the 88 months as follows;

i. 20 months @ Kshs. 1,350,360/=	
(between 1/6/2017 - 31/1/2019)	Kshs. 27,007,200/=
ii. VAT @ 16 %	<u>Kshs. 4,321,152/=</u>
SUB TOTAL	Kshs. 31,328,352/=
iii. 24 months @ Kshs. 1,485,396/=	
(between 1/2/2019 - 31/1/2021)	Kshs. 35,649,504/=
iv. VAT @ 16%	<u>Kshs. 5,703,920/=</u>
SUB TOTAL	Kshs. 41,353,424/=

6. The plaintiff claimed that the defendant was unjustly indebted to in the sum of Kshs. 112,276,591/= comprising of;

i. Rent arrears inclusive of VAT and penalty interest

For the period between

1/2/2015 -31/5/2017 Kshs. 38,594,815/=

ii. Rent accruals for the period between

1/6/2017 – 31/1/2019 inclusive of VAT Kshs. 31,328,352/=

iii. Rent accruals for the period between

1/2/2019 -31/1/2021 inclusive of VAT Kshs. 41 353,424/=

iv . Total Kshs. 112,276,591/=

7. The plaintiff further claimed that it had issued the defendant with Notices dated 25th April 2017 and 22nd May 2017 which the defendant refused to heed. It therefore urged the court to grant the orders sought.

8. The defendant opposed the claim in a statement of defence dated 15th October 2019. It denied all the averments made by the plaintiff and put it to strict proof thereof. The defendant noted that the plaintiff had premised its claim on a letter of offer which in its view, was not a contract and the plaintiff could not use it as a basis to extort money from it. If at all there was any tenancy agreement the defendant asserted that it had the right to terminate it by giving notice. The amount of money claimed by the Plaintiff was also challenged by the defendant for being outrageous and mathematically unattainable as per the terms of the letter of offer.

EVIDENCE

9. Ashwin Ramji Gudka (PW1), who stated that he was the plaintiff's managing director adopted his written statement as his evidence in chief. His written statement was mostly a reiteration of the averments made in the plaint. He also produced the listed documents as exhibits in the matter. He added that the lease between the parties was for 6 years and had no clause for termination. However, the defendant had walked out in May 2017 having only paid a sum of Kshs. 15,050,728/=. The total monies due up to May 2017 was Kshs. 40,442,054/=. PW 1 claimed that the defendant was in arrears of Kshs. 25,391,326/= when they left which they had never paid. He claimed that when the defendant departed there was pending a lease period from May 2017 to 31st January 2021. PW stated that the premise was still empty as he had not leased it to anyone since the agreement was still on. He told the court that amount expected as rental income from 1st June 2017 to 31/12/2017 was Kshs. 72,681,776/=. PW1 denied the defendant's claim that they were extorting money from it as the letter of offer had been accepted by both parties and signed by the defendant's legal officer.

10. In cross examination, PW1 stated they had filed a resolution by the plaintiff which authorized him to sign documents on behalf of the company. He stated that before leaving, the defendant had written to them through a letter dated 20/3/2017 indicating that they would be leaving on 31/5/2017. In their letter, the defendant sought a tabulation of the outstanding amount and the plaintiff had written back on the 25th April 2017 telling them what was outstanding. The defendant responded vide a letter dated 1/5/2017. PW1 defended the plaintiff's tabulations of unpaid rent and stated that they had raised a few invoices although he did not have copies of the invoices in court. He admitted that he had read newspapers and may have learnt that the Kisii Branch of Maasai Mara University was to be closed. He however maintained that the defendant had not told him why they were vacating.

11. PW1 further testified that the suit property belonged to the plaintiff although it was in his name. He also insisted that he was the plaintiff's Managing Director. PW1 could not recall appointing A.I. Onyango on the said lease agreement. He denied knowing him and stated that he had only given formal instructions to the firm of Oguttu. He added that the firm of A.I. Onyango company Advocates was

referring to plot NO.9102/78 within Kilgoris Town which was not their property.

12. Alfred Ongeta Nyabochwa (DW1), the defendant's legal officer adopted his written statement dated 17th February 2020 as his evidence in court. In his statement, DW1 averred that sometimes in the year 2015, the defendant rented the plaintiff's within Kisii town to host her Kisii town Campus. The space rented was equivalent to thirty -seven thousand two hundred (37,200) square feet with effect from 1st February, 2015. The premise was rented out to the defendant as per the terms and conditions contained in a letter of offer issued to the defendant by the plaintiff and there was never any lease agreement between the plaintiff and the defendant. DW1 stated that the rent was payable on a quarterly basis. The defendant took possession of the premises on the effective date and paid the rent for the first quarter together with a deposit equivalent to a month's rent in advance. He stated that the parties had agreed that the deposit paid up to the plaintiff would be refunded upon termination of the tenancy relationship but the deposit had not yet been refunded.

13. DW1 stated that the defendant had dutifully paid the requisite rent to the plaintiff as and when they fell due and whenever there was any delay, the defendant duly paid the penalty charges demanded by the plaintiff as was agreed prior to taking up the premises. However, sometimes in the month of June 2016, the defendant received communication from the Commission for University Education demanding the closing down of the defendant's satellite campuses including the Kisii campus located on the plaintiff's premises in accordance with the regulations governing University Education. DW1 claimed that the notice made it impossible for the defendant to continue with her occupation of the plaintiff's premises. The defendant sent out a termination notice which was delivered to the plaintiff in time. The defendant sought to know whether there were any rent arrears that were due to the plaintiff and the plaintiff acknowledged receipt of the defendant's notice and promptly responded by informing the defendant of the arrears as per its records.

14. DW1 further claimed that on 7th June 2016, representatives from the University visited the plaintiff's offices and had a discussion with the plaintiff on a possible continuation with the tenancy agreement and the same culminated into rescission of the termination notice dated 25th April, 2016 earlier issued by the defendant. However, the attempted interventions by the University's administration to continue running her Kisii Campus were unsuccessful and the Commission for University Education ordered closure of the Kisii Campus. The defendant had no option but to close down the campus. It therefore prepared and issued a termination notice dated 20th March, 2017 informing the plaintiff that it would vacate the premises with effect from 31st May, 2017.

15. The witness claimed that when the defendant first issued a termination notice, the plaintiff demanded arrears of Kshs. 1,368, 150/= through her then advocates, A.I. Onyango & Co. Advocates on 24th May, 2016. Upon receipt of the termination notice, the defendant peacefully vacated the premises. It was therefore shocking to learn of the claim by the plaintiff through the documents served on the defendant owing to the fact that the defendant vacated the premises with the full knowledge of the plaintiff having given sufficient vacation notice which was accepted by the plaintiff.

16. DW1 averred that the plaintiff could not turn around to claim rent payment from the defendant over the duration when the defendant had surrendered occupation of the premises. He stated that the termination of the tenancy was on account of an unforeseeable factor without the control of the defendant and in any case the termination was mutually agreed upon by the parties and the defendant could not therefore be said to be in breach. He claimed that there were never any explicit terms and conditions of the letter of offer. He stated that the defendant had acted within the confines of the law and upon mutual understanding of the parties.

17. During the trial, DW1 adopted the defendant's documents as his evidence. The plaintiff's learned counsel objected to the production of the Newspaper cutting annexed to the list of documents. By consent, the letters written by Messrs A.I. Onyango Company Advocates were expunged from the record.

18. DW1 told the court that PW1 had claimed that the premises belonged to the plaintiff but they later realized that the premises belonged to him and not the plaintiff company. He testified that at the time of vacating, the defendant got in touch with PW1 who was present when the defendant removed its property from the premises. They were handed over to PW1 who took them and had them locked up. He stated that when they asked for a tabulation of arrears, the figure that was demanded as at 20th June 2016 was Kshs. 18,644,344/=. He added that there had been an understanding that PW 1 was to prepare a lease but he did not.

19. In cross examination, DW1 confirmed that the defendant had approached PW1 to take the premises and PW1 had generated a letter of offer which was signed by the defendant to signify acceptance. He admitted that the letter contained the rent amount to be paid over a specified duration and agreed that the rent was to be paid annually and biannually.

20. He stated that they had taken over the premises in February 2015 and the 1st and the 2nd quarters' rent were paid. He also admitted that the defendant had signed stating that they would occupy the premises for 6 years and that there was no clause speaking to termination before 6 years. He also admitted that they had communicated with the plaintiff on rent arrears. He claimed that they had paid Kshs. 4,000,000/= shown in their list of documents and stated that other payments had been made but admitted that he did not have documents to support his claim. DW1 further testified that the PW1 had not indicated if he signed it as a director of the plaintiff. He also claimed that the plaintiff did not issue receipts for the periodic payment and claimed that they had been undergoing criminal investigations since 2016 so most of the documents were with the DCI.

SUBMISSIONS

21. The parties took directions to dispose of their cases by way of written submissions. The plaintiff's learned counsel started off by urging this court to expunge from the record the newspaper cutting relied on by the defendant to prove that the Commission for University Education had ordered it to close down its Kisii Campus. He argued that the newspaper cutting was legally inadmissible as it was hearsay evidence and had not been accompanied by the requisite Electronic Certificate.

22. As to whether there was a lease agreement between the parties, counsel relied on the case of *Kenya Commercial Bank Limited v*

Popatlal Madhavji & Another [2019] eKLR, in support of his submissions that although no formal Lease document was ever prepared, executed or registered, the defendant had accepted and executed the letter of offer to lease the suit property and it was therefore an enforceable contract *inter partes*.

23. Counsel argued that the lease agreement between the parties had no clause that allowed for its termination. Therefore, the Notice to Terminate Lease, which was issued on behalf of the Defendant, was a nullity ab initio. Having accepted the terms of the letter of offer, whereby the duration of the tenancy was stipulated to be 6 years, the defendant was obliged to remain in occupation of the premises for the entire period and in the event of termination, it was bound to pay the rents receivable for the outstanding period. Counsel submitted that based on the terms of the lease agreement, the total sum owed to the plaintiff was Kshs. 112,276,591/ =.

24. The defendant's counsel in his written submissions began by challenging the plaintiff's capacity to sue. He argued that the letter of offer dated 2nd January 2015, was signed by one Mr. A. Gudka and Maasai Mara University. It was not shown that Mr. Gudka was signing the letter as a director of plaintiff company or in his capacity as a representative of the company. PW1 had also adduced evidence which showed that he was the registered owner of the leased property. Counsel argued that the plaintiff had not demonstrated to the court if the owner of the property was unable to sign. Invoking the doctrine of privity to a contract, counsel submitted that the plaintiff was not a party to the agreement and could not therefore enforce its terms. Counsel insisted that the leased property belonged to PW1 who was a separate legal entity from the plaintiff and he could not enter into a contract as its agent.

25. Given that the agreement was not translated into a formal lease or registered, counsel argued that it was a periodic lease as defined under **Section 57** of the **Land Act**. The rent was payable on a quarterly basis thus, the three-month notice given prior to vacation of the property was sufficient.

26. Counsel was adamant that the defendant was not accountable to pay rent for the period after termination of the tenancy as it had vacated the premises and given vacant possession. He presumed that the Landlord had rented the property to someone else and had been enjoying proceeds of the same to him and to award him his claim would amount to unjust enrichment as held in the case **Vehicle & Equipment Leasing Limited v Coco Cola Juices Kenya Limited Formerly t/a Beverage Services (K) Ltd [2018] eKLR**.

27. Regarding interest, counsel urged the court to award interest as per the agreement at a rate of 2% per month. He relied on the case of **Kenya Commercial Bank Limited v Pickwell Properties Limited [2020] eKLR** where the Court of Appeal upheld a decision of the high court to award interest as per the contractual terms.

28. In his further submissions, the plaintiff's counsel countered that the letter of offer clearly and explicitly identified the parties to the lease agreement as the plaintiff and the defendant. Regarding the defendant's misgivings with the manner in which PW1 had signed the letter of offer, counsel submitted that PW1 was and had remained the managing director of the plaintiff and he executed the letter in his capacity as director. He submitted that as at the time the letter of offer was executed, the suit property was registered in the name of the plaintiff.

29. Regarding the termination of the lease agreement, counsel submitted that the letter of offer did not provide for a clause for termination. Hence, it was not within the right of the Defendant to unilaterally terminate it without entering into any termination arrangement with the Plaintiff. He dismissed the attempts by the defendant to explain the reasons for the termination. Counsel submitted that although the Commission for University Education, may have directed closure of such campuses, no admissible evidence, had been tendered in support of the claim.

30. On interest, counsel argued that whereas the payment of interest was discretionary, the court had to exercise its discretion on the basis that where a party has been deprived of the usage of monies, at the instance of a tortfeasor, then the court had to ensure that the victim is duly remunerated. He thus urged the court to allow the suit with costs.

ISSUES

31. Having considered the pleadings, the evidence and the submissions before this, I find that the issues arising are;

- a . Whether the plaintiff had locus to sue;
- b. Whether there was an enforceable contract between the plaintiff and the defendant;
- c. Whether the defendant terminated the contract; and
- d. Whether the defendant breached the terms of the lease relationship with the plaintiff and if so and whether the plaintiff is entitled to the monies claimed

ANALYSIS AND DETERMINATION

Whether the plaintiff locus and whether there was an enforceable contract between the plaintiff and the defendant.

32. The defendant contests the plaintiff's locus to bring this suit. The court's attention is drawn to the fact that PW1 signed the offer letter and did not indicate anywhere in the letter that he was signing as a director of the plaintiff company or in his capacity as a representative of the company. Further, the certificate of lease and the certificate of search produced as evidence in court by the plaintiff showed PW1 as the owner of the suit property. During cross-examination, PW1 had stated that the plaintiff was not his estate agent mandated with management and collection of rent.

33. The defendant argued that no evidence was adduced to prove that PW1 was a director of the Plaintiff and that the contract was between it and PW1. Therefore, the plaintiff could not seek to enforce the terms of a contract it was not privy to. The defendant claimed it was surprised when it was served with court papers alleging that it had breached a contract of lease between it and the plaintiff because it had never entered into a contract with the plaintiff.

34. The defendant further argued that in filing this suit, the plaintiff acted as though PW1 and it were indistinct yet a company reserved the right to enter into contracts in its own name. It was submitted that the letter of offer produced in court was a private contract between PW1 - the landlord and the defendant. Had the contract been intended to be in favour of the plaintiff, it would have stated so. Additionally, the letter of offer did not bear the company's seal hence it was evident that the plaintiff was not a party to the contract and had no cause of action against the defendant.

35. The plaintiff on the other hand argued that the letter of offer had identified the Parties to the tenancy agreement, in clause 1 thereof as the plaintiff and the defendant. Being the contractual landlord, the plaintiff was entitled to institute the suit. It was argued that PW1 had executed the letter of offer in his capacity as managing director of the plaintiff as demonstrated in the verifying affidavit and the resolution passed by the plaintiff's Board of Management.

36. "*Locus standi*" is defined in the **Black's Law Dictionary 9th edition** at page 1026 as the right to bring an action or to be heard in a given forum. In ***Housing Finance Company of Kenya Ltd v Embakasi Youth Development Project Civil Case No. 1068 of 2001[2004] eKLR*** J.B. Ojwang J (as he then was) held that only a juristic person, endowed with legal personality, can have *locus standi* before the Court, and can be the subject of rights and liabilities. The plaintiff produced a copy of Certificate of Incorporation which proves that it is a body corporate with the capacity to sue and be sued.

37. The existence of the letter of offer dated 2nd January 2015 is not disputed. The parties also agree that the letter of offer was capable of establishing a binding and enforceable lease agreement as held in the case of ***Kenya Commercial Bank Limited v Popatlal Madhavji & Another [2019] eKLR*** as follows;

In seeking to explain the purport of section 106 of the Transfer of Property Act, this Court in the case of Mega Garment Limited vs Mistry Jadva Parbat & Co. (Epz) Limited [2016] eKLR succinctly put it thus;

"The time-honoured decision of this Court in Bachelor's Bakery Ltd v Westlands Securities Ltd (1982) KLR 366 which has been followed in a long line of subsequent decisions elucidates the status of an unregistered lease.

It reiterates and confirms the firmly settled law, first, that a lease for immovable property for a term exceeding one year can only be made by a registered instrument; that a document merely creating a right to obtain another document, like the one in this dispute, does not require to be registered to be enforceable; that such an agreement is valid inter-partes even in the absence of registration, but gives no protection against the rights of third parties. That exposition of the law hold true in this case.

Therefore, by virtue of the existence of the agreement of lease in the terms spelt out in the letter of 23rd December 1998, a valid, binding and enforceable agreement for a fixed term period of 5 years and 3 months came into existence as between the parties and we so find.

38. The sticking point between the parties is whether the plaintiff entered into a lease agreement with the defendant. On the one hand the plaintiff asserts that it entered into a contract with the defendant while the defendant insists that it entered into a contract with PW1, the registered owner of the land.

39. The parties executed the letter of offer on 26th January 2015. Contrary to the defendant's assertion, it is not a mandatory requirement for a company to affix its common seal to a document to signify execution. **Section 37** of the **Companies Act** provided the following options for execution of documents by a company at the material time.

37. (1) A document is executed by a company—

(a) by the affixing of its common seal (if any) and witnessed by a director; or

(b) in accordance with subsection (2).

(2) A document is validly executed by a company if it is signed on behalf of the company—

(a) by two authorised signatories; or

(b) by a director of the company in the presence of a witness who attests the signature.

40. The letter of offer in this case was signed by PW1 who claims that he was a director at the material time. However, the letter of offer does not state the capacity in which he signed the letter. There is also no proof that PW1 was a director of the plaintiff company at the time of execution. The plaintiff referred to a copy of a resolution by the Board of Directors of the plaintiff which shows that PW1 was authorized by the company to sign and execute documents on behalf of the company. However, that resolution is dated 5th August 2019, and would not apply to the letter of offer which had been signed a few years earlier.

41. **Section 3(3)** of the **Law of Contract Act** provides that;

“No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party...”

42. In **Kukul Properties Development Limited vs Tafazzal H. Maloo & 3 Others [1993] eKLR** Muli JA held as follows on the applicability of the above provision of the Law of Contracts Act:

“With the greatest respect, the learned trial judge misdirected himself. In the first place it matters not what the parties or one of them believed or was made to believe. The real issue was whether the agreement was duly executed by the parties, and if not, was the agreement binding and enforceable against any of the parties?”

It is trite law on this point and is made beyond doubt under Section 3(3) of the Law (Cap 23 Laws of Kenya)

I hold that the intended agreement between the appellant and the Porbundarwallas was inoperative and therefore unenforceable for lack of execution by the appellant; the sum total was that there was no valid agreement enforceable in law”

43. The Court of Appeal in **Samuel Mureithi Murioki & another; v Kamahuha Limited [2018] eKLR** cited with approval the case of **Ashok Morjaria v Kenya Batteries [1981] Ltd. & 2 others, [2002] eKLR**, where the Court held:

44. “So where, as here, a director of a company executes a loan agreement on behalf of the company and stamps it with a company stamp, as the second defendant did, the company cannot wriggle away from its obligations to pay by contending that the borrowing was not authorised, or one director’s signature was not enough or the company seal was not affixed to the agreement if what he did was within his ostensible authority as director of the company as in deed it was.”

45. In the above case, the court upheld an agreement signed by a director notwithstanding the claim that the company had not complied with its internal procedures as to execution of contracts. In the present case however, there was no proof that PW1 was acting as a director. It is my finding therefore that the letter of offer was not properly executed and was thus unenforceable in law. This finding is fortified by the decision of the Court of Appeal in **Chon Jeuk Suk Kim & another v E. J. Austin & 2 others Civil Appeal No. 265 of 2010 [2013] eKLR** where it was held;

On the issue of the execution of the lease agreement, there is no dispute that it was executed by the appellants on one part and Austin & Partners. There is a rubber stamp of Austin & Partners Ltd and one signature. The plaint was amended to indicate that Austin & Partners Ltd acted as an agent of the respondents. The law of course allows an agent to execute a binding contract for the principal. However the 1st respondent other than saying that he is a Managing Director of Austin & Partners Ltd and that the 2nd respondent was his wife did not give evidence relating to the agency. He did not even refer to the document or identify the person who signed it. Further he did not disclose directors of the company or the person or persons authorized to sign documents on behalf of the company. No certificate of incorporation was produced in the absence of any concrete evidence agency and due execution by agent was not proved on balance of probabilities.

*The learned Judge did not consider this issue which arose from the pleadings **in the absence of evidence for valid execution of the document and prove of agency the document is not enforceable as a contract either by the respondents or by the company. [Emphasis added]***

46. Be that as it may, it is clear from the facts that there was a tenancy relationship between the plaintiff and the defendant. DW1 confirmed as much in his evidence. He admitted that they had approached PW1 about the premises and went on to take possession of the premises from February 2015. He confirmed that the defendant had paid a deposit and some of their rental deposits but vacated the premises on 31st May 2017.

47. Where there is no written agreement between the parties such as in this case, **Section 57 of the Land Act** provides for a periodic tenancy. The provision stipulates;

57(1) If in any lease—

(a) the term of the lease is not specified and no provision is made for the giving of notice to terminate the tenancy, the lease shall be deemed to be a periodic lease;

(b) the term is from week to week, month to month, year to year or any other periodic basis to which the rent is payable in relation to agricultural land the periodic lease shall be for six months;

(c) the lessee remains in possession of land with the consent of the lessor after the term of the lease has expired, then—

(i) unless the lessor and lessee have agreed, expressly or by implication, that the continuing possession shall be for some other period, the lease shall be deemed to be a periodic one; and

(ii) all the terms and conditions of the lease that are consistent with the provisions of sub-paragraph (i) shall continue in force until the lease is terminated in accordance with this section.

(2) If the owner of land permits the exclusive occupation of the land or any part of it by any person at a rent but without any agreement in writing, that occupation shall be deemed to constitute a periodic tenancy.

(3) The periodic tenancy contemplated in subsection (1) (a) shall be the period by reference to which the rent is payable.

(4) A periodic tenancy may be terminated by either party giving notice to the other, the length of which shall be not less than the period of the tenancy and shall expire on one of the days on which rent is payable.

48. I concur with the persuasive case of **Ukwala Supermarket (Eldoret) Limited v Amritral Sojpar Shah Wholesalers Limited [2017] eKLR** where the court held as follows;

I do find that there was no written agreement between the plaintiffs and the defendant. What existed was a contract between the defendant and previous owners and therefore, written agreement was not binding to the plaintiff. I do agree with the plaintiff that the relationship between the plaintiff and defendant was a periodic tenancy. A periodic tenancy is a tenancy that continues for successive period until the tenant gives the landlord notification that he wants to end the tenancy. The period depends on how the rent is paid. For calendar month, it becomes monthly tenancy. If rent is paid quarterly, it becomes a quarterly tenancy and if paid yearly, a yearly tenancy..

49. Notwithstanding the unenforceability of the letter of offer, the defendant was bound to fulfil his obligations under the periodic tenancy. Having been put into possession of the land, the defendant could not escape its duty under the tenancy by questioning the plaintiff's title to the land. In the **Halsbury's Laws of England 4th Edition Vol. 27 at page 11** the authors opine that;

Whilst the tenancy continues, a tenant is absolutely estopped from denying the title of the landlord by whom he was let into possession, whether or not he has notice of any defect in title."

50. A similar position was taken by the court in **E.H. Lewis & Son. -v- Morelli, (1948) 2 All ER 1021** and restated in the case of **Kasturi Limited v Nyeri Wholesalers Limited [2014] eKLR**.

Whether the defendant terminated the contract

51. Had the letter of offer constituted a valid agreement between the parties, the defendant would have been bound to the lease term for a period of 6 years. Termination of the lease before the lapse of the time specified would not be available to the defendant.

52. In the present case however, since the relationship between the plaintiff was a periodic tenancy, the relationship could be terminated by either party giving notice of not less than the period of the tenancy according to **Section 57 (4) of the Land Act**.

53. Based on the evidence of PW1 and DW1, the defendant took possession of the demised premises on 1st February 2015 and vacated the premises on 31st May 2017. DW1 claimed that they had received communication from the Commission for University Education demanding the closing down of her satellite campuses including the Kisii campus located on the demised premises. The defendant relied on a newspaper cutting to prove that the Commission for University Education had ordered them to closed down their campus in Kisii. He stated that they sent a notice to the plaintiff that it would not be possible to continue with occupation of the land but in June 2016, they had a discussion on continuation of the tenancy agreement which culminated in the rescission of the termination notice dated 25th April 2016.

54. While I agree with the plaintiff's position that the newspaper cutting relied on by the defendant was inadmissible hearsay evidence, there is sufficient evidence that the defendant issued a notice to terminate the lease which was received by the plaintiff. PW1 acknowledged that the plaintiff had received a letter to terminate lease dated 20th March 2017 which indicated that the defendant would move out of the premises on 31st May 2017. I therefore find that the defendant terminated the tenancy relationship through the letter dated 20th March 2017.

Whether the defendant breached the terms of the lease relationship with the plaintiff and if so and whether the plaintiff is entitled the monies claimed

55. The defendant did not contest the plaintiff's assertion that the rent payable was Kshs. 1,227,600/= per month for the 1st year and Kshs. 1,350,360/= per month for the 2nd year inclusive of 16% V.A.T. In response to the defendant's letter requesting for a tabulation of its arrears, the plaintiff's advocate wrote a letter dated 25th April 2017 and 22nd May 2017 stating that the defendant's arrears up to and including that quarter was a sum of Kshs. 29,751,760/=. In his evidence, PW1 testified that when the defendants vacated the premises they had outstanding rent of Kshs. 25,391,326/= which is the amount pleaded in the plaint. On the issue of the 2% interest having found that the tenancy was a periodic tenancy in my view the said interest cannot apply.

56. For his part, DW1 stated that they did not have any documents to prove the amount they owed the plaintiff. **Section 112 of the Evidence Act** provides that *"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."* The defendant did not avail evidence to counter the plaintiff's tabulation of rent due it. The

only document produced by the defendant to prove payment was an application for remittance to the plaintiff dated 25th January 2016 for a sum of Kshs. 4,000,000/=. The defendant has not shown that it paid any money to settle the debt owing to the plaintiff at the time it left the demised premises. However, the plaintiff did not challenge the defendant's testimony that it paid a refundable deposit of one month's rent.

57. Consequently, I find that the defendant was indebted to the plaintiff in the sum of Kshs. 24,163,726/= computed as follows;

i. Rent arrears for the period of occupation between 1st February 2015 and 31st May 2017- Kshs. 25,391,326/=

ii. Less refundable deposit of Kshs. 1,227,600/=

58. The plaintiff sought interest in the rate of 14% on the outstanding sum with effect from 31st May 2017. Section 26 (1) of the Civil Procedure Act gives the court discretion to order interest at such rate as the court deems reasonable. In the case of **National Bank Of Kenya Ltd Vs. Peter Nyakundi & Another [2006] eKLR** the Court of Appeal held;

"...This provision [section 26] is understood to be applicable only where the parties to the dispute have not by their agreement, fixed the rate of interest payable. If by their agreement parties have fixed the rate of interest payable, then the court has no discretion in the matter and must enforce the agreed rate unless it is shown in the usual way either that the agreed rate is illegal or unconscionable or fraudulent..."

59. Having found that the rate of 2% is not applicable and noting that the plaintiff has not explained why it did not file suit in 2017 when the breach occurred, the interest applicable shall be at court rates.

60. In the end, I enter judgment in favour of the plaintiff against the defendant in the following terms;

a. Payment of the sum of Kshs. 24,163,726/ = on account of accrued rental arrears;

b. The plaintiff is awarded interest at court rates from date of filing suit plus costs of the suit.

DATED, SIGNED AND DELIVERED AT KISII THIS 16TH DAY OF JULY 2021.

R.E. OUGO

JUDGE

In the presence of:

Mr. Mulisa For the Plaintiff

Mr. Ouma For the Defendant

Mr. Nanda For the Defendant

Mr. Orwasa Court Assistant