REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL CASE NO. 13 OF 2017

MOHAZO EPZ LTD.....PLAINTIFF

VERSUS

NEW WIDE GARMENTS EPZ LIMITED.....1ST DEFENDANT

EXPORT PROCESSING

ZONES AUTHORITY (EPZA).....2ND DEFENDANT

AND

CROSS-CLAIM

EXPORT PROCESSING

ZONES AUTHORITY (EPZA).....2ND DEFENDANT/CLAIMANT

VERSUS

NEW WIDE GARMENTS EPZ LIMITED.....1ST DEFENDANT

AND

COUNTER-CLAIM

EXPORT PROCESSING ZONES

AUTHORITY (EPZA).....2ND DEFENDANT/CLAIMANT

VERSUS

MOHAZO EPZ LTD.....DEFENDANT

JUDGEMENT

The Parties

1. The Plaintiff herein, **Mohazo EPZ Ltd,** a limited liability company filed this suit against the Defendants herein, **New Wide Garments EPZ Limited** and **Export Processing Zones Authority (EPZA)** as 1st and 2nd Defendants respectively. While the 1st Defendant is described in the plaint as a limited liability company, the 2nd defendant described itself as a statutory corporation established under section 3 of the ***Export Processing Zone Act***, Cap 517 Laws of Kenya.

2. According to the plaintiff, it was at the material time the occupier of premises known as Mavoko LR No. 18474 & 67, godown no. 59, as lawful tenant of the 2nd defendant wherein he was carrying the business of manufacturing, finishing, packaging and dispatching home and

decorative items to various international markets. It was pleaded that the plaintiff was in the aforesaid business as an exporter and supplier of the said handmade items and in particular, arts and crafts and artefacts to other jurisdictions including the United States of America. The 1st Defendant, on the other hand, was the occupant of premises known as Mavoko LR No. 18474 & 67, s 10 which was adjacent to the plaintiff's godown belonging to the 2nd Defendant.

3. According to the Plaintiff, on or about 11th June, 2015, at about 1.00pm the Godown partition wall that separated the plaintiff's said premises from the 1st Defendant's said unit 10 collapsed when the 1st Defendant's agents so negligently stacked rolls of garments on top of each other up to the roof level, thereby causing the wall to collapse as a result of the pressure/load from the rolls of garments which pushed the wall to a point of collapse. It was pleaded that the collapsed wall extensively damaged the plaintiff's goods and rendered its premises derelict and unusable, particulars whereof are well within the knowledge of both the 1st and 2nd defendant.

4. It was the Plaintiff's case that the collapse of the said wall was caused by the joint negligence of the 1st and 2nd defendants. The 1st Defendant was charged with moving and/or handling its goods in a reckless manner; failing to take care or due care; and failing to have and or have due regard for the plaintiff's property. The 2nd Defendant, on the other hand was charged with failing to ensure the safety of the plaintiff; failing to maintain its premises in a safe condition; and failing to install strong partitioning walls.

5. According to the Plaintiff as a result of the foregoing, it suffered loss and damage in the sum of Kshs 96,298,200.00 whose particulars were set out as follows:

a) Value of soapstone products	Kshs 2,348,805.25.
b) Wooden products	Kshs 7,093,675.62.
c) Equipment, tools and machinery	Kshs 1,298,968.00
d) Loss of profit	Kshs 45,600,000.00.
e) Consequential loss	Kshs 1,100,000.00
f) Summary loss	Kshs 34,320,000.00
g) Cost of relocation	Kshs 461,183.00
h) Assessor's fees	Kshs 3,238,770.00
Grand total loss	Kshs 96,298,200.00

6. . It was further contended that as a result of the foregoing, the managing director of the plaintiff, one **Ms Zohra Baraka** became so stressed when the plaintiff could not meet its business obligations that she developed high blood pressure for which she claims damages to be assessed by the court.

7. Apart from the plea of negligence the plaintiff relied on the doctrine of *res ipsa loquitor*.

The 1st Defendant's Defence, Reply to 2nd Defendant's Defence and Defence to Cross-Claim

8. In its defence, reply to the 2nd Defendant's Defence and Defence to Counterclaim, the 1st Defendant admitted that it was the occupant of unit S10 as stated in the plaint but stated that the occupation was for a temporary period of seven (7) days from 10th June, 2015. It further admitted that the wall separating units S9 and S10 collapsed on 11th June, 2015 but denied that it was negligent as alleged by the plaintiff. In particularly denied that the rolls of garments stored in unit S10 caused the collapse of the wall separating units S9 and S10 and instead averred that the wall collapsed because it was hopelessly weak, an issue which was within the 2nd Defendant's knowledge. According to it therefore, the wall collapsed as a result of 2nd Defendant's negligence and/or dereliction of duty in that the 2nd Defendant failed to maintain the premises in a safe condition; failed to put up a strong partitioning wall; failed to repair the portioning wall; failed to warn the plaintiff and the 2nd defendant of the weak wall; failed to address the concerns raised by the 1st defendant on the weak wall and apparent cracks on the wall; failed to repair the cracks on the wall or replace it completely; reassured the 1st defendant that the wall had been inspected and found strong enough for use by the 1st defendant; failed to inform the plaintiff and the 1st defendant that the partitioning wall was designed as a non-load bearing wall; and built a partitioning wall that had serious structural shortcomings.

9. The 1st Defendant further denied the allegations of loss and damages set out in the plaint and stated that if the Plaintiff suffered loss and damage, the same were not caused by acts of the 1st Defendant. It was further contended that if at all the Plaintiff suffered any loss and damage, the Plaintiff took no steps to mitigate the alleged losses. Accordingly, the applicability of the doctrine of *res ipsa loquitor* was denied. The 1st defendant denied the allegations of negligence at paragraphs 8 and 9 of the 2nd defendant's defence and the 2nd defendant is put to strict proof thereof.

10. The same averments were reiterated in response to the 2nd Defendant's Defence and counterclaim and the 1st Defendant prayed that the Plaintiff's suit and the 2nd defendant's cross-claim against the 1st Defendant be dismissed with costs.

The 2nd Defendant's Defence and Counterclaim

11. In its defence, the 2nd defendant pleaded that it owns LR No. 18474/66 and 67 situate at Athi River, Machakos County on which property it has erected business premises including godowns known as Incubator Phase I Building. It was pleaded that at the material time, the Plaintiff was a tenant of the 2nd Defendant at godown No. S.9 on the Incubator Building Phase I while the 1st Defendant occupied the neighbouring godown S.10. Both tenants were participants in the Export Business Accelerator (EBA) Programme of the 2nd Defendant. It was however disclosed that the Plaintiff had not renewed its annual Licence as an EPZ company for the year 2015.

12. According to the 2nd Defendant, the wall collapsed owing to the negligence of the 1st Defendant. It however averred that the Plaintiff is under duty to prove the extent of resulting damage to its goods, if any. The 2nd Defendant therefore denied the allegations and particulars of negligence. In its view, the 1st defendant excessively and incorrectly loaded or stacked rolls of its goods and products horizontally along the entire wall to the roof; brought unreasonable load and pressure on the walls; broke the wall; and overloaded the wall.

13. The 2nd Defendant therefore denied the allegations of loss and damage set out in the plaint in the sum of Kshs. 96,298,200/= or any part thereof. It further denied that the fallen wall was the probable cause of the alleged ill-health of the Plaintiff's Director.

14. The 2nd Defendant however counterclaimed against the 1st Defendant. According to the 2nd Defendant, the Plaintiff occupied godown S.9 while the 1st Defendant occupied godown S.10 separated by a partition wall. It was the 2nd Defendant's case that the Plaintiff was under a Lease dated 25th June, 2013 paying annual rent of US $ 4,591.98 exclusive of service charge for godown S.9 while the 1st Defendant godown S.10 under permission granted vide a letter dated 9th June, 2015.

15. It was averred that on 11th June, 2015, the partition wall separating the godowns S.9 and S.10 caved in or collapsed as a result of excessive loading or horizontal pressure from goods stacked against the wall by the 1st Defendant and that the wall damaged goods stored in godown S.9 occupied by the Plaintiff. Following the collapse of the said wall, the godown S.9 was rendered unfit for use from 11th June, 2015 until 31st March, 2016 when it was reconstructed and restored to use. As a result, the 2nd Defendant lost US$ 4,069.02 in rental income from which sum it recovered insurance compensation of US$ 420.65 leaving a resultant loss of US$ 3,648.37 which sum it claimed against the 1st Defendant herein.

16. It was further pleaded that the 2nd Defendant incurred cost of rebuilding the wall in the sum of Kshs. 529,575/= of which sum Kshs. 409,450/= was paid by the insurer leaving a resulting loss of Kshs. 120,125/= which he claimed from the 1st Defendant.

17. As against the Plaintiff the 2nd Defendant averred that by the Lease dated 25th June, 2013 entered into with the Plaintiff, the Plaintiff rented the said godown for a period of 6 years with effect from 1st November, 2013 for the annual rent of US $ 4,591.98 with a service charge fee of US $ 459.20 p.a. However, the Plaintiff defaulted on repayment of rent and is now in rent arrears to the tune of US $ 16,038.41.

18. The 2nd Defendant therefore sought judgment against the Plaintiff in the sum of US $ 16,038.41 together with interest as well as the costs of the suit.

Plaintiff's Reply to the 2nd Defendant's Defence

19. In its reply to the 2nd Defendant's Defence, the Plaintiff reiterated its claim for Kshs 96,298,200 and averred that the 2nd Defendant admitted the plaintiff's loss and authorised its insurers to expedite and settle the same. Further the 2nd defendant authorised its own loss adjusters, Ms Integrity Limited, who assessed the plaintiff's loss at about Kshs 75 Million Kenya Shillings which the said defendant expected its insurers, British American Investments Company, to settle. The Plaintiff was therefore of the view that the denial of the claim by the 2nd Defendant is insincere and an afterthought meant to delay the due process.

Plaintiff's Case

20. In support of its case, the Plaintiff called **Zora Baraka**, PW1, the Plaintiff's managing Director who in his statement stated that the Plaintiff carries on business as an exporter and supplier of handmade items and in particular, arts and crafts and artefacts to other jurisdictions including the United States of America. It also carries on the business of manufacturing, finishing, packaging and dispatching home and decorative items to various international markets.

21. In order to carry out its business, the Plaintiff was the occupier of premises known as Mavoko LR No. 18474 & 67, godown no. S 9, located at the EPZ Mavoko area which it had lawfully leased from the 2nd defendant. The 1st Defendant, on the other hand, was the occupant of premises known as Mavoko LR No. 18474 & 67, S 10 which was adjacent to the plaintiff's godown belonging to the 2nd Defendant.

22. According to PW1's statement, on or about 11th June, 2015, at about 1.00pm the Godown partition wall that separated the plaintiff's said premises S 9 from the 1st Defendant's said unit S 10 collapsed when the 1st Defendant's agents and/or servants so negligently stacked rolls of garments on top of each other up to the roof level, thereby causing the wall to collapse as a result of the pressure/load therefrom which pushed the wall to a point of collapse. It was stated that the collapsed wall extensively damaged the plaintiff's goods and rendered its premises derelict and unusable, up to date.

23. It was stated that the collapse of the said wall was due to the negligence of both defendants. According to the statement, the 2nd defendant ought to have maintained and/or installed strong partitioning walls while the 2nd defendant was negligent in that its said agents

and/or servants moved and/or handled its goods in a reckless manner, did not take any or due care, and recklessly stacked materials even when it appeared dangerous to do so.

24. According to the statement as a result of the negligence, the plaintiff suffered loss and damage including value of soapstone products Kshs 2,348,802.25; wooden products Kshs 7,093,675.62; Equipment, tools and Machinery Kshs 1,298,968.00; loss of profits Kshs 45,600,000.00; Consequential loss Kshs 1,100,000.00; summary loss Kshs 34,320,000.00; Cost of relocation Kshs 461,183.00; Assessor's fees Kshs 3,238,770. According to the statement the grant total of the loss was Kshs 96,298,200.00. It was further disclosed that as a result of the foregoing, the managing director of the plaintiff, PW1, herein suffered stress, resulting into blood pressure, a disease she hitherto never suffered from.

25. In her oral evidence before this court, PW1 reiterated the foregoing and explained that the materials the plaintiff traded in were made out of wood, soap stones, sisal and other local materials. According to her the main buyers are chain stores such as TJ Max which has over 200 stores in United Kingdom and United States. Apart from these the Plaintiff also had direct importers and shops. Though they had been carrying on that business for a long time, in 2011, the plaintiff saw the need to move to EPZ in order to consolidate after becoming a member of the EPZ as required by the law in November, 2013.

26. According to the witness, when the wall collapsed, the plaintiff's products were damaged and the sewing machines are still there. At the time of the incident they were preparing an order for African Business Services worth Kshs 6 million with a profit margin of Kshs 2.4 million per month. She further testified that they were preparing for an exhibition hence they lost the opportunity to show case their products. She also lost goodwill of the organisation since she lost customers. Similarly, her brand equity which she had built after a long time was lost. Since the business was seasonal and it takes a long time to prepare, she had nowhere else to operate from. It was her evidence that whenever they have work she has to rent a place at Jamhuri Park because for 10 months the place is empty. It was her evidence that the loss also injured her employees and women who depend on her work.

27. It was her evidence that she had since developed high blood pressure, diabetes and peptic ulcers.

28. However, before the wall collapsed, they were never issued with any notice that there were cracks on the wall. According to her, initially there was an indication that the insurance was going to pay but later the plaintiff was told to go to court. It was her testimony that she got the services of an assessor who did the assessment after the 2nd Defendant's assessor had carried out their own assessment.

29. In support of the plaintiff's case, PW1 relied on the Plaintiff's bundle of documents which were produced as exhibit and prayed for the orders sought in the plaint.

30. In cross-examination by **Mr Kiprono**, learned counsel for the 1st defendant, PW1 stated that the plaintiff was in existence for 5 years though at the time of the incident it was one year old. When they went to EPZ they continued operating as Mohazo Eximpo. She clarified that the incident was on 11th May, 2015 and not June. She however stated that she was not at the scene at the time of the incident and went there the following day in the presence of police officers and officers from the 2nd defendant. According to her several meetings were held and in one of them she heard it being mentioned that cracks were observed. The said cracks were also noted by the assessor on both sides, inside and outside. According to the assessor, the structure was neglected. It was her case that the 1st Defendant was the one to blame since it was the one that caused the damage by stacking a lot of materials on the wall. She also blamed the 2nd defendant as her landlord. She however did not see the stacks before the incidents but only saw them after the incident. According to her, she did not know how the 1st defendant was told to stack the rolls. It was her case that the incident occurred when her worker was out for lunch.

31. PW1 disclosed that at the meeting she was offered some premises but the cracks were still there even by the time of her testimony. Though she was offered unit 8 there were cracks in unit 9. She stated that her basis of the claim was the cost of the products, profits and loss of business. According to her the cost of the soap stones is the cost of buying them though they had the buying and the selling price. Referred to the bundle she stated that though it had repair costs, no repairs were done and what she had was an invoice. It was her evidence that the profits were projected based on orders and clients and that she had LPOs to that effect. Prior to going to EPZ in 2010, they had an order from Italy. She agreed that the first figure she claimed was Kshs 37 million then it went to Kshs 75 million and then to 96 million. According to her she paid the loss assessor's fees and was given receipts.

32. In cross-examination by **Mr Ojiambo** for the 2nd Defendant, PW1 stated that the Plaintiff was still the 2nd Defendant's tenant occupying S9. However, from the date of the incident none of her employees had gone back there though all the equipment are still there. She sought the cost of relocation because she did not take the offer but she admitted that she had not incurred that cost. She however stated that she pays for the place at Jamhuri Park from where her orders are made. Those orders however come at different times from different buyers. However, at Jamhuri Park, she uses her own name and not that of the plaintiff company. She however denied that she had abandoned the plaintiff but stated that she was waiting for this matter to be determined. She however clarified that she had once exported the goods using the plaintiff at that time and was paid.

33. According to her some goods were damaged while others were not. The damaged goods were still in the premises. She stated that her list of the claim was based on the selling price. She however admitted that when exporting the goods, she would pay the cost of transport though the customers pay for the cost of shipping, clearing and forwarding. However, the initial payment is made by her after which reimbursement is made. Regarding the goods she was to export to Italy, it was her evidence that her claim was based on the fact that she had paid for it and the customer was now gone. According to her everything had been done though the samples had not been taken. By then she had not incurred the cost of clearing and forwarding.

34. PW1 testified that the exhibition was to be in New York and though she was given a receipt she did not have it. The ticket, according to her was a special ticket and she was informed that there would be no reimbursement. It was her evidence that the claim for 40,000/- being taxes was not paid. Though they pay for advertisements, she had no receipts for the same. According to her since she did not go to the exhibition she lost an order totalling Kshs 1 million. According to her she based her claim on the buying price and had not added the 30%.

To her she only added 30% of what she was going to lose. According to her evidence, the loss of profits was based on the loss of orders some of which were in writing while others were verbal.

35. PW1 explained that they do show the samples after which confirmed orders are made. These, however were not part of her records.

36. In her evidence, she had not yet collected the undamaged goods because the 2nd Defendant was yet to authorise her to do so and secondly the court was yet to decide on her claim.

37. Referred to the rent payments, she stated that the plaintiff had not paid the same since the occurrence of the incident as she was still waiting for the case to be determined. She however admitted that before the incident, she was in arrears of rent as she awaited the shipment to go. According to her, she was informed that to renew the rent was Kshs 1000/-. She was also to declare her purchase and export. Referred to the bundle she confirmed that she declared imports of Kshs 1.67 million which were the items that went to Italy. It was her evidence that she had 7 people. During the same quarter she declared export of Kshs 2.5 million and her local purchase for the period was Kshs 1.5 million while she exported the same at Kshs 2.5 million. Her authorised share capital was given as Kshs 1 million while her total investment was Kshs 5 million though it was indicated as Kshs 4.5 million. It was her evidence that the total fixed assets were valued at Kshs 3,536,000/- while the sales made for the year were Kshs 2.5 million. In PW1's evidence, her total target for 2016 was 30 million.

38. According to her, on the day of the incident, she was in the house but saw the rolls of material bales of clothes though it was a whole heap. According to her the bales belonged to the 1st Defendant whom she had been informed had moved in less than a week earlier. She stated that bales were heavy. It was her case that both her neighbour and the landlord were to blame for the collapse of the wall.

39. According to her evidence, she was claiming Kshs 245 million. Though the amount did not factor in the expenses, the rents were taken into account. It was her evidence that at the end of 2018, she made a profit of Kshs 25 million. To her, the profit was the difference between the purchases and the sales though she did not take into account the rents and salaries. While she admitted that she had seen the figure of USD 23000 claimed as rents, she stated that there was a waiver.

40. In re-examination by **Mr Leparamai** for the Plaintiff, PW1 stated that Eximpo was the original company which was started 30 years ago and though they registered a new company, Eximpo had been carrying on the same business so was like a continuation. According to her she had both buying prices from the suppliers and the selling prices. The Kshs 37 million demand, she clarified, was prior to factoring in everything. The EPZ's loss assessor however arrived at the figure of Kshs 75 million. It was her testimony that as a result of the incident the orders reduced. She explained that it was only the taxes that they did not pay. While they paid for the VISA, the branding, the stand, accommodation, they did not pay for the clearing and forwarding. In her evidence the assessors for the 2nd Defendant were from British Insurance, who were the 2nd Defendant's insurers.

41. She explained that the Kshs 4.5 million was the money they put into the business and that they used to make profit of Kshs 2.4 million which was based on the orders they were working on. As regards the 30% claim, it was based on the expected orders.

42. PW2, **Moses Njoroge Kariuki**, in his statement stated that he was the director of Epic Marine and General Assessors Limited and the Principal Officer of the said company. He was a registered Insurance Surveyor, duly licensed by the Insurance Regulatory Authority and was a member of the Institute of Loss Adjusters and Risk Surveyors. According to him, on 5th May, 2016, he was appointed by PW1 to prepare a report detailing the losses sustained by the Plaintiff. After carrying out the assignment, he compiled a report dated 12th December, 2016 which he presented to PW1 and produced.

43. In his evidence before the court, PW2 testified that he had been an assessor for 20 years. According to him, he visited the premises and went through the documents supplied and tabulated the items available. He also did physical checking and took photographs from which he based his report. His understanding was that some of the items are bought hence the buying price represents the purchase price and that the same would then be sold at a profit which is then based on selling price. Referred to the 30% item, he explained that it means that when you get an order it is a confirmation of a sale hence the profit is marked at an average of 30% based on the said confirmed orders. According to him, when a client was making deliveries, there was an average monthly profit of Kshs 2.4 million. So he calculated the loss for 19 months from the time of the incident till the date of his report.

44. In cross-examination by **Mr Kiprono**, PW2 stated that the nature of his work involves analysing documents and statements and to come up with a comprehensive report of the loss. In this case his total loss of profit was in respect of the loss suffered by the plaintiff based on the available figures flowing from the business. He confirmed that he saw the orders though the same were not attached to the report. The report was also based on the conversation he had with PW1. According to him, when he was instructed on 5th May, 2015 he visited the premises but they were not in use though there were debris. According to him the garments were not there at that time and hence he did not photograph them. He therefore projected a profit of Kshs 45,600,000/= based on the documents available and discussions. According to him the documents were email correspondences and narration of cash flow and that the 30 % profit make up was calculated upon confirmation of the orders and not on the invoices.

45. According to PW2 when he visited the premises he noticed that the premises were dilapidated and poorly maintained and poorly lit.

46. In cross-examination by **Mr Ojiambo**, PW2 stated that there was no time frame for the report. While the incident was on 11th June, 2015, he received the instructions on 5th June, 2016 almost a year later. He then wrote his report in December, 2016. According to him, he could not remember if there were tenants in godowns 9 and 10. However the walls that had collapsed had been repaired and he was able to see a new wall though there were still some stones and debris in the neighbourhood. He however stated that while the plaintiff sent a representative, there was no one from the 2nd Defendant to take him round though his understanding was that the debris came from the building. He was not advised to inform the 2nd Defendant of his visit. According to him the godown was not functioning at the time and no business was going on. He noted that there was a problem with the gutter but could not tell when the building was erected. He referred to one

of the photographs which revealed a huge hole on one of the pillars. To him the crack appeared to be structural starting from the top to almost half way to the bottom of the pillar though its end was not visible. He however admitted that he was a surveyor trained in insurance.

47. He explained that as regards the sewing machines they relied on the people who were doing repairs and their quotation and in this case he relied on the person who was repairing the machines. As regards the soap stones, he relied on the buying costs from the client but could not tell whether it was the buying or selling price in the market. He conceded that business do fluctuate and that he did not look at the bank statements but only went through the available statements. He however looked at the plaintiff's expenditure account and at what PW1 gave them as the buying and selling price on the basis of which they arrived at the profits. He also did inquire as to the capital that she had in order to make that profit. According to the witness, he believed the plaintiff had the capital. In his evidence the exchange rate at that time was Kshs 104/- to the dollar. He however admitted that the loss of an order is not the same thing as loss of profit. According to him, there were specific orders which were to be captured but were not satisfied. In his evidence loss of profits is the projected profits and not specific orders. According to him, the order must have been prior to the incident but he had no actual dates though he saw the emails confirming the said orders. While conceding that the 19 months he applied did not capture the actual loss his evidence was that he projected profit loss.

48. The witness reiterated that some goods were damaged while others were not though he only captured the damaged items. In his evidence the soap stones and some of the timber were cracked while others were contaminated by dust hence could not be sold. It was his position that it was not within his mandate to interview the landlord.

49. In re-examination, PW2 stated that the 30% mark-up was based on the confirmation of the orders. He reiterated that the building was fairly neglected and was not up to standard. He asserted that he did not capture the undamaged goods. In his evidence the issue of capital is not related to profit calculation.

1st Defendant's Case

50. On its part the 1st Defendant called **Rudolf Isinga**, DW1, the 1st Defendant's General Manager. According to his statement, which he wholly adopted as his evidence in chief, the 1st defendant runs a garment making factory at the Export Processing Zone, Athi River. On 8th June, 2015, the 1st defendant requested the 2nd defendant for a temporary storage facility which request the 2nd Defendant granted on 9th June, 2015 and allowed the 1st defendant to store rolls of fabric in Unit S 10 of the Incubator One for a period of one week free of any charge. Both the 1st Defendant's letter dated 8th June, 2015 requesting for the facility and he 2nd defendant's letter dated 9th June, 2015 granting the request were exhibited. It was disclosed that it was not the first time that the 2nd defendant had granted the 1st defendant such a request. According to DW1, unit S 10 and S 9, which was occupied by the plaintiff, were separated by a partitioning wall.

51. However, on being granted access to the unit, the 1st Defendant noticed cracks on the partitioning wall and raised its concerns with the 2nd defendant's maintenance team, that is, **Mr. Maroro** and **Mr. Steve Wahome** and a copy of the minutes of the meeting held on 16th June, 2015 were exhibited in the 1st defendant's bundle as evidence that the 1st defendant had raised concerns as to state of the partitioning wall. The said **Mr. Maroro** and **Mr. Wahome** inspected the partitioning wall and assured the 1st Defendant that the partitioning wall was sound and firm enough for the intended purpose.

52. On the basis of the said assurance, the 1st Defendant on the same day, 9th June, 2015, moved in a container load of fabric rolls which occupied close to half of the available space. However, at around 1.00 pm on 11th June, 2015, the 1st defendant was informed that the partitioning wall separating units 9 and 10 had collapsed.

53. Following the incident, the 2nd defendant sought to blame the 1st defendant for the incident on allegations that the wall caved in as a result of excessive loading or horizontal pressure emanating from the rolls of fabric that it had stored in unit S 10. As a result, the 1st defendant's insurers instructed M/s Saload Adjusters (K) Ltd to investigate the loss and the assessors found, among others, that;

> a) What eventually brought the wall down were pre-existing conditions that contributed to the eventual collapse of the wall, which included inherent defects.
>
> b) The stacking of the rolls of fabric was the final straw in a chain of events in a weak wall but not the only factor that led to the collapse of the structure.
>
> c) The 2nd defendant had not only failed to alert the 1st defendant that the partition wall was a non-load bearing but the 2nd defendant had also assured the 1st defendant, after inspection, that it was strong enough for the purpose that the 1st defendant had requested for.

54. A copy of Saload's report was exhibited in the 1st defendant's bundle.

55. According to DW1, there were other walls that had similar cracks. For instance, after the incident, the plaintiff declined to take an alternative space offered by the 2nd defendant on the ground it had a crack. The 1st Defendant however denied that it stacked the rolls of fabric to the roof levels since the rolls of fabric occupied only half of the space. In any event the 2nd defendant knew the items that it was storing in the unit and had assured the 1st Defendant that the partitioning wall was strong enough for the intended purpose.

56. Therefore, DW1 denied the 2nd defendant's assertion that the 1st defendant was to blame for the incident that occurred on 11th June, 2015 since it was the 2nd defendant's employees that assured the 1st defendant that the unit was not only sound but was good for their intended purpose.

57. It was however stated that the plaintiff did not suffer the damage and/or loss that it alleges to have suffered and contended that vide a letter dated 27th November, 2015 from M/s Solonka & Co. Advocates the Plaintiff was demanding payment of Kshs. 75,299,247.87. According to DW1, neither the plaintiff nor the 2nd defendant proved that the 1st defendant was negligent in its use of unit S 10 nor that they had suffered damage and/or incurred loss as a result.

58. The 1st Defendant relied on its bundle of documents and urged the court to dismiss the plaintiff's suit and the 2nd defendant's cross-claim with costs to the 1st defendant.

59. In cross-examination by **Mr Leparmai**, for the Plaintiff, DW1 stated that he had been working for the 1st Defendant for 15 years and they were in the manufacture of garments for export. According to him, the 2nd Defendant gave them the storage facility and granted their request for inspection. It was then that they noticed cracks on the wall and sought to know whether it was fit for the storage and were given the assurance and the go ahead. They however did not consult the plaintiff because the plaintiff was on the other side and there was a partition. He confirmed that this was not the first time they were requesting for storage.

60. Referred to the report of Saload he confirmed that it talked of overloading of the wall and also mentioned the shortcomings on the wall. According to DW1, they ought not to be blamed for the damage since they requested for the storage facility for 7 days and they did not expect the wall to collapse so they did not know what happened. It was their evidence that their insured, who was under the obligation to appoint an assessor, denied liability after appointing the assessor.

61. In cross-examination by **Mr Ojiambo**, DW1 confirmed that Saload's report mentioned that the site visit was on 13th August, 2015 yet the event occurred on 11th June, 2015, two months prior. Referred to the said report, he confirmed that the report indicated that the wall was a non-load bearing wall and was not designed to support imposed load. The report further stated that the high stacking resulted into the failure of the wall perpendicular to the bending joint. He conceded that they had put the fabric on rows and that they stacked them on the same level and ran them against the wall. He however conceded that they were not allowed to go to the top and that the rule is that they are not supposed to be stacked higher than the height a person can remove the garments. Referred to the photographs in 2nd defendant's bundle he agreed that it was the scene of the incident and that though the rolls were up, they did not touch the ceiling.

62. In re-examination by **Mr Kiprono**, he stated that they did not consult the plaintiff because it was a tenant but they consulted the 2nd Defendant who confirmed the status of the wall and the building. He denied that they were advised that the wall was a non-loading wall but were just availed the space without conditions. According to him the 2nd Defendant knew they were going to store fabrics but never gave them any specifications on how to store the fabrics.

2nd Defendant's Case

63. The 2nd Defendant called **Andrew Njuru**, who testified as DW2. He also relied on his statement filed herein in which he stated that he was the Assistant Manager - Property at the 2nd Defendant based at Athi River, Machakos County. According to him, the 2nd Defendant is a statutory corporation established in 1990 under section 3 of the ***Export Processing Zone Act***, Cap 517 whose statutory functions include: -

(a) To implement the policies and programmes of the Government with regard to the development of the export processing zones.

(b) To identify and map the areas to be designated as export processing zones.

(c) To plan the development and maintenance, and to finance the basic infrastructure up to the perimeter of the export processing zones.

(d) To examine and process applications for designation of export processing zones and issue relevant approvals.

(e) To examine and process applications for licenses by the export processing zone developers, export processing zone operators, and export processing zone enterprises and issue relevant licenses.

(f) To maintain current data on the performance of the programme in each individual export processing zone and export processing zone enterprise.

(g) To do all such other acts as may be incidental to the attainment of the objective of the Authority or the exercise of its powers under the Act.

64. It was averred that the 2nd Defendant owns L.R. No. 18474/66 and 67 situate at Athi River in Machakos County on which land it has erected godowns known as Incubator Building Phase I and II. According to him, the Plaintiff was at all material times a tenant of the 2nd Defendant occupying the godown known as S.9 on Incubator Building Phase I under a six year Lease commencing 26th June, 2013 on a full internal repairing and insuring basis at a full exclusive rent with effect from 1st November, 2013 and a copy of terms or Lease were exhibited in the Bundle. It was averred that the rent payable by the Plaintiff per annum was US $ 4,591 excluding service charge of US$ 459,20 p.a.

65. The 1st Defendant, on the other hand was a tenant of the 2nd Defendant on godown No. 4 of Transfleet godown on a long term Lease. However, the 1st Defendant requested the 2nd Defendant for temporary space to store its goods for one week vide a letter dated 8th June, 2015 which request the 2nd Defendant allowed and allocated the 1st Defendant its godown S. 10 at Incubator Building Phase I. According to the witness, he personally inspected the godown S. 10 prior to hand-over to the 1st Defendant and it was in perfect good condition. The 1st

Defendant took possession on 10th June, 2015 to store rolls of garments.

66. It was stated that godown S.9 was rented to the Plaintiff for use in manufacturing, finishing, packaging and dispatching home and decorative items subject to terms and conditions of the EPZ licence issued by the 2nd Defendant. In order for the Plaintiff to operate as an EPZ company, it was required to take out an annual licence and submit quarterly returns of its business performance. The Plaintiff submitted returns for the quarter of April-June 2014 in which it indicated local purchases of handicrafts of Kshs. 1,670,000/= and set out its manpower, wages and cost of rent and utilities. During that quarter, the Plaintiff declared no export sales. The Plaintiff also filed returns for 4th Quarter of 2014 where it declared an export sale of handcrafts worth Kshs. 2,529,540/= to Italy against local purchases worth Kshs. 1,550,000/= and a copy of the Returns was exhibited in the Bundle.

67. It was disclosed that in the Annual Survey of EPZ Enterprises of 31st December, 2014 the Plaintiff declared total exports for the year 2014 to be worth Kshs. 2,529,540/= and total local purchases to be worth Kshs. 1,550,000/=. The paid up capital of the Plaintiff was declared to be Kshs. 1,000,000/= with a total capital investment of Kshs. 4,536,250 and the said copy of that Annual Survey was exhibited in the Bundle. Since the Plaintiff did not make returns for any Quarter of 2015, it is presumed that the Plaintiff made no purchases or exports in that year.

68. According to DW2, the Plaintiff was unable to meet its rent obligations on due dates and had issued bounced cheques and struggled paying its rent which is another indicator of its business performance. Correspondences passing between the parties were exhibited in the Bundle.

69. It was averred that godown S.10 rented to the 1st Defendant is adjacent to godown S.9 rented to the Plaintiff and the two godowns are separated by an internal partition wall. Prior to hand-over of godown S.10 to the 1st Defendant, the 1st and 2nd Defendants inspected the said godown S. 10 and it was in perfect and good condition and upon being satisfied with its condition, the 1st Defendant took immediate possession of godown S.10 and stored its goods. However, the witness got a report that the internal partition wall had collapsed and he visited the premises on 11th June, 2015 and took photos of the premises exhibited in the additional List of Documents. According to him, he observed that:

(a) the rolls of garment were stored directly on the floor surface, stack on each other until the ceiling 20ft. high.

(b) The rolls of garment were stack against the wall rising to the ceiling of the godown which is over 20ft. from the floor level.

(c) the recommended stacking height is 6-7 feet from floor level to allow a person of average height to comfortably reach the highest roll of garment without stepping on an object.

(d) the garment should not be stored directly on the floor surface but on wooden or plastic pallets.

(e) the rolls of garment were stack parallel to one another facing one direction when the proper storage is to place each roll perpendicular to one another at each subsequent row as shown in photos appearing in the Additional List of Documents.

(f) The 1st Defendant ought to have left some space between the stacks. Each stack should act as a stopper for the other stack just in case the adjacent stack was to roll over accidently.

(g) the ill-manner of storing the rolls in one direction against the wall brought burdensome pressure against the partition wall forcing it to collapse.

70. It was the 2nd Defendant's position that the collapsing wall damaged goods of the Plaintiff near that wall and that the 1st Defendant had used the wall as a load bearing wall and loaded goods horizontally until the roof of the premises. This brought undue pressure on the partition wall and it collapsed. He therefore blamed the 1st Defendant for this negligence and wrote to the 1st Defendant immediately vide a letter dated 12th June, 2016, requiring the 1st Defendant to compensate the parties who had suffered loss a letter which he exhibited in the bundle.

71. It was revealed that though the rubble of stone fell into the godown occupied by the Plaintiff, the goods in the said godown S.9 were fewer than claimed and were mainly raw materials. He therefore denied that the Plaintiff had soapstone worth Kshs. 2,348,802.25 or that it had wooden products to the tune of Kshs. 7,093,675.65 or equipment worth Kshs. 2,529,540/=. By a letter delivered on 29th June, 2015 to the 2nd Defendant, which letter was exhibited in the bundle, the Plaintiff made following claims which are inconsistent with the present claim namely: -

(a) Damage to stock Kshs. 7.5 million.

(b) Damage to machines Kshs. 1.02 million.

(c) Loss of profits from existing order Kshs. 2.4 million.

(d) Cost of relocation Kshs. 500,000/=.

(e) Loss of profit for next 6 months Kshs 24.4 million.

(f) Charge-backs from client TBD.

(g) Goodwill Kshs. 6.5 million.

72. The witness however asserted that the said claim just like the present one is false and should be dismissed.

73. It was further averred that from the 2nd Defendant's official records and returns made by the Plaintiff and exhibited in the Bundle, since the Plaintiff declared purchases worth Kshs. 1,550,000/= and exports worth Kshs. 2,529,540/=, it is unlikely that it had goods claimed in the Plaint. Therefore, the claim for a profit of Kshs. 45,000,000/= cannot be sustained in the face of recorded items in stock and declared exports and the summary loss of Kshs. 34,320,000 or consequential loss of Kshs. 1,100,000/= cannot arise from the actual business of the Plaintiff.

74. It was disclosed that in the Annual Survey of 31st December, 2014, the Plaintiff reported an export target of 14,500 pieces for the year 2015, a target that target would have generated annual sales of Kshs. 39,150,000/= on achievement. At June 2015, the Plaintiff had not declared any purchase or export towards that target. The 2nd Defendant averred that the present claim is a mere hope for money.

75. It was further stated that as a result of the collapsed wall, the Plaintiff declined to pay rent and other collectibles for godown S.9 for the period running from 11th June 2015 when the wall collapsed to 31st March 2016 when repair works were concluded. Accordingly, the rent lost in that period was US$ 4,069.02 and reference was made to the terms of Lease dated 25th June, 2013 exhibited in the Bundle.

76. DW2 disclosed that the 2nd Defendant's premises including godown S.9 were insured by Britam and under the existing insurance cover the amount recoverable was limited to one month's rent being US$ 420.65. This insured sum was paid and reduced the rent loss to US$ 3,648.37 which the 2nd Defendant claimed from the 1st Defendant who caused the collapse of the wall. Apart from that the 2nd Defendant constructed and repaired the walls of godown S.9 at a total cost of Kshs. 529,575.00. Of this sum the 2nd Defendant insurer BRITAM covered the maximum sum of Kshs. 409,450/= leaving a deficit/loss of Kshs. 120,125.00, a sum the 2nd Defendant claimed as a loss against the 1st Defendant herein and exhibited correspondence passing between Britam and the 2nd Defendant in the Bundle. Further, the reconstruction of the Incubator Building Phase I godown S.9 partition wall was undertaken by Klean IT Enterprises at a total cost of Kshs. 529,575.00 as shown in their quotation together with Bill of Quantities are exhibited in the Bundle. Though the 2nd Defendant made a demand for compensation of this loss of rent and repair on 16th September, 2016, the 1st Defendant refused or neglected to pay and reference was made to a letter of 16th September, 2016 exhibited in the Bundle.

77. It was the 2nd Defendant's case that the Plaintiff owes the 2nd Defendant US $ 16,038.41 as at 30th June, 2017 in rent arrears and DW2 referred the court to a summary of rent arrears exhibited in the Additional List of Documents which as at 31st January, 2019 stood at US $ 23,084.80.

78. The 2nd Defendant therefore prayed: -

(a) That the Plaintiff's suit be dismissed with costs;

(b) Against the Plaintiff for judgment for the sum of US $ 16,038.41 together with interest.

(c) Against the 1st Defendant for judgment for loss of rental income in the sum of US$ 3,648.37 and for loss on repairs at Kshs. 120,125/= with interest thereon.

(d) Cost of the suit and cross-claim

79. In his evidence, DW2 reiterated that the wall that caved in was not a load bearing wall but a partition wall and hence no load ought to have been placed on it. It was therefore the wrong storage that brought undue pressure on the wall. It was his evidence that the 1st Defendant indicated that it was under pressure to bring the garments due to audit where they were moving from. So it was partly due to their haste that made them overlook the requirements and they were entirely to blame for the accident.

80. According to the witness there was no loss adjuster by the 2nd Defendant who came up with Kshs 75 million. To him there was little, if any business going on in godown no 10. According to him, the first returns were for April-June, 2017 where purchases were disclosed as Kshs 1,670,000/- and no sales were disclosed. For the 4th quarter, the sales were disclosed at Kshs 529, 540/= while the purchase were Kshs 1,550,000/=. It was therefore the 2nd Defendant's case that there was no business that could occasion loss of Kshs 93 million.

81. The witness further stated that the 2nd Defendant's counterclaim on rents was USD 23,084.80 as at 31st January, 2019 which as at June, 2019 when the tenancy was terminated had increased to USD 26,605.38 which is what they claimed from the plaintiff. As against the 1st Defendant, the 2nd Defendant claimed USD 3,648.37.

82. In cross-examination by **Mr Wangila** for the Plaintiff, DW2 stated that he was a property manager and not a loss adjuster and that he based the plaintiff's loss on the returns given to them by the plaintiff since they were doing quarterly audit of the tenants based on the information given by them and as verified by the 2nd Defendant. It was his evidence that godown no. 10 was given to the 1st Defendant for free. It was his evidence that they did not charge rent for the period when the premises were not habitable and that the 2nd Defendant wrote to the tenants confirming that the premises had been repaired. It was his evidence that there was no requirement to get an independent certificate from any authority since the 2nd Defendant is mandated to inspect its own premises.

83. DW2 stated that neither the plaintiff nor the 1st defendant complained of the cracks though they had mentioned that there were cracks. According to him though they received claims from the plaintiff they did not determine the value of the loss. To the witness, the 1st defendant having been in the business for over 10 years knew the correct mode of stacking rolls of garments and it was expected that that was the way in which they were to stack them even during the temporary occupation of the space given to them since the wall was supposed to handle nil force. It was his evidence that unless there is suspicion, the 2nd defendant relied on the returns supplied by the tenants.

84. In cross-examination by **Mr Kiprono** for the 1st defendant, DW2 stated that the 1st Defendant had been in the business for over 10 years and they were expected to use godown no. 10 for one week which they accepted and took possession immediately. The 2nd Defendant received the request for occupation on 8th June, 2015 and the request was accepted on 9th June, 2015. According to him the 1st Defendant must have moved in the same day and he was there when they moved in. According to him, there were other people from the 2nd Defendant and no handing over minutes were prepared.

85. Asked about **Mr Maroro**, he accepted that he was with the 2nd Defendant while **Mr Wahome** was his colleague in maintenance of the grounds. Both were however not answerable to DW2. He admitted that there was a meeting that took place after the incident but he was unaware of its exact date. Referred to the 1st Defendant's bundle of documents he confirmed that there were minutes which captured what was said about the structural defects which was communicated to **Mr Maroro**. However, **Mr Maroro** denied the said allegation but the same was not documented. According to DW2, the two officers denied being informed about the cracks on the wall. It was his evidence that he visited S 10 many times. However, after the possession was handed over to the 1st Defendant, the 1st Defendant moved in very quickly and so he did not pay them a visit. He however admitted that they did not advice the 1st Defendant that the wall was not a load bearing wall. In his evidence only the floor was load bearing and not the partition. The 2nd Defendant was however not informed that the load was to be stacked on the wall since it is not normally expected that it would be so since it would exert pressure on the horizontal wall.

86. DW2 admitted that they knew what the 1st Defendant was going to store and how they were to do it. However, the procedure for stacking the rolls is a normal one in the industry and in several factories which is also followed at EPZ. According to the witness, he had been to the 1st Defendant's factory. Though the expected height from the floor is normally 6-7 feet, the top most row was up to the ceiling level which is over 20 feet. Referred to the bundle he admitted that one could not tell where the ceiling was. Referred to the bundle he admitted that the claim was in respect of the period from the date the wall collapsed till the repair. He however clarified that their claim from the plaintiff was separate from that against the 1st defendant. Though they were claiming the cost reconstructing the wall from the 1st defendant in the sum of Kshs 120,000/= he did not have any evidence that the said sum was paid. Though they forwarded the plaintiff's claim to the insurance, the insurance company stated that the policy does not cover the tenants' claims. He however conceded that they did not have any reports contradicting that of the 1st defendant.

87. In re-examination by **Mr Ojiambo**, the witness stated that the report by Saload was prepared after the accident hence there was no report concerning the structure made before the accident. It was his evidence that it took 6 months to restore the premises. DW2 explained that it took three weeks to remove the debris after which there was the procurement process which normally takes time. After the award of the tender, there is mobilisation period and eventual commencement of the work. I was therefore his view that 6 months was reasonable period and he sought an award for the said period though this was not claimed against the plaintiff from whom they only claimed rent.

Plaintiff's Submissions

88. On behalf of the plaintiff, it was submitted that there were three particulars of what the Plaintiff considered to be the negligence of the 1st Defendant. The Plaintiff averred that the 1st Defendant stocked a lot of Garments in in its go down being S 10. The 1st Defendant did not heed to the limit the partition wall can hold. The heavy weight of the garments stored up was the proximate cause of the accident. According to the Plaintiff, the 1st Defendant owed a duty of care to the Plaintiff to ensure that it established that the state of the Partition wall was in safe condition and not to overload and ought to have known that if the Partition Wall was recklessly overloaded, the same would collapse.

89. It was submitted that the 1st Defendant in its statement of defence, did not deny the accident occurred and the Plaintiff suffered loss and damage as a result of the collapse but denied it was liable for the cause of the collapse. According to the Plaintiff, from the facts on record and from the evidence of PW1 and the photographs showing the garments that had spilled over into the Plaintiff's premises due to unreasonable overstocking, it is clearly indicated that the 1st Defendant was negligent and its actions of overloading the stacks of garments was the cause of the collapse of the wall and the eventual loss and damage suffered by the Plaintiff. The evidence of PW1 who is the director of the Plaintiff indicated that they had been in the premises for more than two years prior to the accident and yet there had been no accident before the one forming the subject matter of this suit and there were no signs that the partition wall was going to collapse.

90. According to the Plaintiff the fact that the 1st Defendant indicated that they occupied S 10 on a temporary period from 10th June, 2015 raises fundamental questions that points to the fact that the 1st Defendant exceeded the limit of stocking on the wall or recklessly stacked and/or overloaded the garments on the Partition wall. This is evidenced by the fact that after the incident, a lot of garments was spilled over the Plaintiff's premises.

91. As for the 2nd Defendant's negligence for the loss and damage suffered by the Plaintiff, the Plaintiff in its Plaint has listed three particulars of what it considers to be negligence. It was submitted that the 2nd Defendant was the Landlord and as per the evidence of PW1, they are the ones who were to carry out repairs as per the lease agreement. Section 5(1) of the ***Occupiers Liability Act*** Cap 34 Laws of Kenya whose essence is that where the premises is occupied by tenant and under the term of lease the duty of repair falls on the landlord. The landlord shall owe to all persons who or whose goods may from time to time be lawfully on the premises the same duty in respect of dangers arising from any default by him in carrying out that obligation as if he were an occupier of the premises. In this case since the 2nd Defendant was to carry out repairs, it was incumbent upon it to conduct routine checks and inspection to ensure that the fixtures and the perimeter wall were strong enough to support the load of garments that was stacked on the collapsed partition wall. Had they done this, it would have been

drawn to the attention of the 1st Defendant tenant that the partition wall could not support the load.

92. The Plaintiff relied on the doctrine of *Res Ipsa Loquitor* and the case of **JFA Ogol vs. Wilson Murumbu Murithi (1982-88) KAR 859**, and submitted that in this case the Plaintiff has established that the partition wall suddenly collapsed and damaged the Plaintiff' fragile goods. In view of what has been said about the state of the premises, the doctrine of *Res Ipsa Loquitor* applies and it is up to the 1st and 2nd Defendants to explain how the accident happened. However, they are not to prove how and why the accident or the collapse of the wall happened, but to prove that the collapse of the wall was due to no fault of their own. As this burden has not been discharged, the only conclusion is that the 1st and 2nd Defendants are guilty of negligence, the 1st Defendant because it overloaded the Partition wall without ensuring that it was fit to bear that load and the 2nd Defendant because he failed to inspect the premises and ensure that the fixtures and partition wall were fit and able to support the storage of goods on the partition wall.

93. It was submitted that in respect of the Stock (Soap Stones and Wooden Products) that was in the premises at the time the partition wall collapsed, the sum of Kshs. 9,442,477.87 was claimed on the basis that the goods were set to be sold at a profit and thus the Plaintiff was deprived from realizing that profit following the damage of its property and goods. Reliance was placed on ***MC Gregor on Damages***, 15th Edition in which it is stated that:

"where the plaintiff's goods have been damaged he may be allowed damages for loss of profits, or where no specific profit can be shown, he may be awarded damages for general loss of use, or in default an award of interest may be given, similarly, where goods have been destroyed successful claims have ranged from damages for loss of profits to awards on interest.''

94. In support of Special Damages, the Plaintiff relied on the evidence of PW 2, one **Moses Kariuki** the director of Epic Marine and General Assessors Limited which was appointed by the Plaintiff Company to do loss assessment on the Plaintiff's premises. He was responsible for preparation of the loss statement. After preparing the statement, the company issued a Final Adjustment Report dated 12th December, 2016 to the Plaintiff which detailed the loss by the Plaintiff that occurred on the 11th June, 2015 which report set out the inventory at cost of various goods, the quantities, pieces, cost per unit and the total cost. All these items are still in the Plaintiff's premises and the list was obtained from the back-up of stocks.

95. According to the Plaintiff, a total of Kshs. 1,298,968.00 is claimed under Loss of property, Plant, Equipment, Tools and Machinery Installed by the Plaintiff. This is supported by the Quotation/Proforma Invoice by the Superior Sew –Tech dated the 10th July, 2015 which clearly indicated the prices of the Machinery that were bought by the Plaintiff. The same is attached on the Plaintiff's List of Documents dated the 16th May, 2017. Since the defendants have not tendered any evidence to the contrary, it was submitted that the same has been proved and this Court should award the claimed amount.

96. As regards the loss of profits, it was submitted that the same resulted from the demolition of the Plaintiff's Business and a sum of Kshs. 45,600,000 has been claimed in respect thereof based on the assessor's report and the total sales per month being the projection of the Plaintiff's business in the months that it wasn't conducting business being 19 months. It was further submitted that the Plaintiff claims a total of Kshs. 1,100,000.00 being the loss of un-refundable prepaid expenses as well provided for in the assessor's report. Under loss of orders, the Plaintiff claims a total sum of Kshs. 34,320,000.00 being the projection of lost orders. Under assessors fees the Plaintiff claims a sum of Kshs. 3,238,453.00 and the Plaintiff has attached in her bundle of Documents the Fee Note dated the 12th December, 2016.

97. It was noted that the Defendants have not provided any expert evidence to controvert the Plaintiff's case and the case of **Mutonyi vs. Republic Cr. Appeal No. 92 of 1981**.

98. The Plaintiff further submitted that it is misdirection if the court is to determine that only receipts, invoices, audited accounts, waybills of lading etc. would support a claim for special damages since special damages could be proved by other means and the court is entitled to consider the evidence adduced whether oral or documentary and arrive at its findings on whether or not special damages though pleaded were proved. For this proposition, the Plaintiff relied on the **Mitchell Cotts (K) Ltd vs. Musa Freighters (2011) eKLR**.

99. In view of the foregoing, it was the Plaintiff's submissions that it proved its case and should be awarded the orders as prayed for in the Plaint together with the costs of the suit.

1st Defendant's Submissions

100. It was submitted on behalf of the 1st Defendant that It is not in dispute that the plaintiff occupied godown S9 on a long term lease whereas the 1st defendant occupied godown S10 from 10th June 2019 on a short term arrangement. It is also common ground that the wall partitioning the two godowns collapsed on 11th June 2015. What is in dispute is what caused the wall to collapse.

101. It was submitted that the plaintiff's evidence is that the collapse of the wall was caused by (i) wrong stacking of rolls of garment by the 1st defendant in godown number S10, and (ii) failure by the 2nd defendant to repair the walls of the premises whose walls collapsed on 11th June 2019. The plaintiff's witness (PW 2) indicated that the walls were in a dilapidated condition and he produced the report prepared by Epic Marine in support of the same in which the condition of the premises the report states as follows;

> **"A) Dilapidation. The structure itself appeared neglected. The gutters on the roof had decayed, and some portions had actually fallen off, leaving the rain –water to chart its own course.**
>
> **B) Structural Weakness. We also noted that there were some cracks on the walls, suggesting that the walls, or perhaps the entire building, had structural weakness.**

C) <u>Inadequate Maintenance.</u> On close observation, we noted that some electrical cables and wires were hanging loosely, others were bare, i.e, without insulation, thus posing injury risk to employees and the public generally, as well as posing serious fire hazards."

102. The 1st defendant's evidence, it was submitted was that the wall collapsed as a result of structural weakness. **Mr. Isinga (DW1)** informed the court that they had noticed cracks on the wall and had raised the same with the 2nd defendant's maintenance team but the 2nd defendant's employees assured the 1st defendant of the godown's integrity.

103. On its part the 2nd defendant blamed the 1st defendant for the incident. **Mr. Njuru (DW 2)** stated in his evidence that the 1st defendant had wrongfully stacked the rolls of garment on a non-load bearing wall. He however admitted that the 2nd defendant had neither advised the 1st defendant on how to stack the rolls of garment nor informed them that the partitioning wall was a non-load bearing wall. The letter dated 9th June 2015 allowing the 1st defendant to use the premises is silent on the same.

104. According to the 1st Defendant, in the absence of advice and/or information on the part of the 2nd defendant to the 1st defendant on conditions and/or restrictions on the temporary use of godown S10, the 2nd defendant's particulars of negligence at paragraph 9 of its amended defense, cross-claim and counter-claim cannot be sustained. In addition, unlike the plaintiff and the 1st defendant, the 2nd defendant did not produce any report to show what caused the wall to collapse. The reports by Epic Marine and Saload are unanimous that the walls of the godowns were in a dilapidated state. The 2nd defendant merely produced photographs showing what it termed as wrong stacking and correct stacking of rolls of fabric. It also did not demonstrate to the court that it had advised the 1st defendant how to stack the fabric in godown S10 and more so when it knew what the 1st defendant was to store in the godown and that the partitioning wall was a non-load bearing wall. According to the 1st Defendant, the fact that the 1st defendant had operated at the Export Processing Zone for close to ten years is not sufficient for the court to make the assumption that the 1st defendant ought to know how to stack fabric. Since **Mr. Njuru** admitted on cross-examination that he did not see how the fabric had been stack before the incident the subject matter of this court proceedings, he cannot allege that the fabric were stack wrongly.

105. The 1st defendant agreed with the plaintiff's submission that had the 2nd defendant carried out periodical checks and inspection on its premises, it would have noticed the dilapidated state in which the subject godown was in. It was therefore submitted that the 2nd defendant was guilty of dereliction of duty because it failed to inform the 1st defendant how to stack its rolls of garment and that the partitioning wall was a non-load bearing wall.

106. The 1st defendant however disagreed with the plaintiff's submission that the 1st defendant is guilty of negligence because it overloaded the partitioning wall without ensuring that it was fit to bear the load for the reason that the 2nd defendant had not informed the 1st defendant that the partitioning wall was not a load bearing wall. It was the 1st defendant's submission that the proximate cause of the incident, which is defined by ***Black's Law Dictionary*** as proximate cause as a cause that directly produces an event and without which the event would not have occurred, was the dilapidated state of the walls. According to the 1st defendant the wall would not have come down if there were no cracks on it. The weight of the fabrics, if any, is what ***Black's Law Dictionary*** terms as the immediate cause. Immediate cause is defined in the said dictionary as follows;

"The last event in a chain of events, though not necessarily the proximate cause of what follows."

107. It was submitted that there are documents showing that the 2nd defendant had lodged the plaintiff's claim with its underwriters (Britam) and were even frustrated at the slow pace in which the underwriter was addressing the claim. From the aforesaid emails, it was the 1st defendant's submission that the 2nd defendant was in the process of addressing the plaintiff's claim until its underwriters indicated that the 2nd defendant's insurance cover did not cover claims raised by tenants and it is at that point that DW 2 informed **Mr. Kidenda** that the plaintiff had been advised to lodge its claim or institute litigation against the 1st defendant.

108. In view of the foregoing submissions, the 1st defendant urged the court to find that the 2nd defendant is solely to blame for the collapse of the partitioning wall on 11th June 2015.

109. As to whether the plaintiff has suffered loss and damages as a result of the defendants' actions, it was submitted that the plaintiff's claim for Kshs. 96,298,200/- is in the nature of special damages and it is trite law that special damages must not only be pleaded but must be strictly proved based on **<u>Hahn vs. Singh, Civil Appeal No. 42 of 1983 [185] KLR 716</u>** and **<u>Douglas Odhiambo Ape & Anor –vs- Telkom Kenya Ltd, CA No. 115 of 2006.</u>**

110. In this case it was submitted that plaintiff's basis for the claim for lost stock worth Kshs. 9,442,477.87 was that it was deprived from realizing the profit following the damage to its property and goods. In support of this claim, the plaintiff relies on the report prepared by Epic Marine. The report however is itself erroneous and has computational errors. For instance;

a) The total figure of Kshs. 9,442,477.87 is a product of the quantity and the selling price and not the profit thereof,

b) The item, walking elephant, under soapstone, that is, 129 items at a selling price of Kshs.386.25 per piece comes to Kshs. 49,826.25 and not 498,262.50 as presented in the report.

111. Similarly, the report by Epic Marine on the loss of stock contains the cost of purchasing each of the items and the selling price. However, the plaintiff neither presented to court any payment receipts to show that it had purchased the said items nor documents that it had

previously sold similar items at the same prices. The plaintiff did not even submit to court stock records to show that it had the said items as part of its stock.

112. As for the claim for Equipment, tools and machinery worth Kshs. 1,298,968.00, damaged during the incident it was submitted that the plaintiff failed to show whether or not it had acquired the said equipment, tools and machinery. The plaintiff produced quotation/proforma invoice in support of the same. No receipts or delivery notes were produced to show that the plaintiff had actually acquired the said items. According to the 1st Defendant, the quotation/proforma invoice submitted by the plaintiff is not proof that the plaintiff had paid for and/or acquired the said items. The same is only evidence that the plaintiff had the intention to acquire the said items and reliance was placed on **Total Kenya Ltd vs. Janevams Ltd [2015] eKLR**, in which the Court of Appeal adopted the decision in **Great Lakes Transport Co (U) Ltd vs. Kenya Revenue Authority (2009) eKLR** where the court had held that a proforma invoice is not proof of payment.

113. Whereas the plaintiff claimed Kshs. 45,600,000/- as loss of profit, it was submitted that this claim is not supported by any evidence other than the Assessor's report which report is itself a projection prepared by the plaintiff with the intended suit in mind and thus lacks objectivity. According to the 1st Defendant, the plaintiff should have demonstrated from sales records and/or financial statements that it had made similar profits in the past as a basis for this claim. It was submitted that special damages, in this case loss of profits, should not issue in the absence of clear and non-speculative evidence on how the figures have been arrived at. In this case it was submitted that the alleged loss of profits is highly speculative as the plaintiff is unable to explain how it arrived at the same and in support of this contention the 1st Defendant relied on **Nzoia Sugar Company Ltd vs. Capital Insurance Brokers Ltd [2014] eKLR** and **National Conservation Forum vs. Attorney General (2013) eKLR**, where the Court of Appeal espoused the position that a relief cannot be hinged on what could only be deemed as a hypothesis and speculation and that the court should determine actual earnings and treat future earnings as opportunistic and unreasonable.

114. It was therefore submitted that this limb of the plaintiff's claim is based on projections whose foundation has not been established by the plaintiff and thus the same should fail.

115. As for the claim for loss of orders of Kshs. 34,320,000/-, it was submitted that this claim, just like the claim for loss of profits is speculative and based on erroneous projections. The plaintiff did not submit any evidence of previous orders in support of this claim and this claim cannot be sustained. Just like the claim for loss of equipment, tools and machinery, it was submitted that the claim for loss of consequential loss, assessor's fees and cost of relocation are not supported by payment receipts. For instance;

a) The plaintiff did not adduce any documentary evidence to show that it had made payments towards the un-refundable prepaid expenses.

b) The plaintiff did not adduce any receipts or any form of payment acknowledgement from the assessor to show that the plaintiff had paid the assessment fees.

c) The plaintiff did not adduce any documentary evidence in support of the cost of relocation and PW1 admitted on cross-examination that she had not incurred the cost of relocation.

116. According to the 1st Defendant, in an attempt to justify the foregoing claims, the plaintiff in its submissions takes the erroneous view that once it alleges that it had incurred losses and supported the same with the report prepared by the assessor without any source documents (stock records, payment receipts, etc.) to support the same, the burden shifted to the defendants to demonstrate the contrary. The 1st defendant submitted that under section 107 of the ***Evidence Act***, the burden lay upon the plaintiff to prove its case on a balance of probability, a burden that the plaintiff failed to discharge. The Court was invited to consider and note that the plaintiff's claim kept mutating in value from time to time.

a) In an undated letter received by the 2nd defendant on 29th June 2015, the plaintiff claimed Kshs.32.7 Million.

b) In the demand letter dated 27/11/2015 by Solonka & Co. Advocates, the plaintiff claims Kshs. 75,299,247.87.

c) In the plaint the plaintiff claims Kshs. 96,298,200/-.

117. The foregoing, it was submitted, shows the inconsistency in the plaintiff's claim and is evidence that the claim is, build on quick sand and the same should not be sustained by this honourable court.

118. Regarding the 1st Defendant's liability to the 2nd defendant as claimed by the 2nd defendant in its cross-claim in the sum of USD 3,648.37 being rent for the period June 2015 to March 2016, the 1st defendant submitted that this claim should not be entertained for the following reasons;

a) The 1st defendant is not liable for the collapse of the partitioning wall on 11th June 2015.

b) The insurance company has since compensated the 2nd defendant by paying one (1) month's rent which is the period that the repairs should have taken. The 2nd defendant demands for rent payment yet it was not receiving any rent from the plaintiff prior to the incident.

c) The 2nd defendant has billed the plaintiff for the same period June 2015 to March 2016).

119. The 2nd defendant also claimed Kshs. 120,125/- from the 1st defendant being the deficit on the cost of reinstating the partitioning wall after Britam had settled Kshs. 409,450/-. The 1st defendant submitted that the 2nd defendant has not demonstrated that it incurred a total of Kshs. 529,575/- in repairing the wall and noted;

a) That other than the quotation by Klean Enterprises there is no document to show that the said amount was incurred by the 2nd defendant in reinstating the partitioning wall.

b) That the offer by Britam was based on estimates by Klean Enterprises and not the actual cost. Britam gave its offer in September 2015 whereas the construction works are said to have been completed in March 2016.

c) That the 2nd defendant did not exhibit payment receipts to show that it had paid Klean Enterprises for the repairs of the partitioning wall.

120. In view of the foregoing, the 1st Defendant urged the court to dismiss the 2nd defendant's cross-claim with costs to the 1st defendant.

121. On costs of the suit, the 1st defendant submitted that the successful party/parties in the main suit and cross-claim is/are entitled to costs. It was therefore its position that the plaintiff and 2nd defendant have not proved their respective cases against the 1st defendant on a balance of probability and the same should be dismissed with costs to the 1st defendant.

2nd Defendant's Submissions

122. The submissions made on behalf of the 2nd Defendant were to the effect that its witness, **Andrew Njuru**, confirmed to this court that he personally jointly with the officers of the 1st Defendant inspected Godown No. 10 before giving it to the 1st Defendant and the Godown was in perfect and good condition. The 1stDefendant being satisfied with its condition took possession of Godown 10 and stored its goods starting 10th June, 2015. Godown 10 had no cracks or visible weakness on the separating wall with Godown 9 as alleged by the 1st Defendant. Further, the Plaintiff who had occupied Godown 9 for over a year confirmed in the evidence of PW1 that no cracks or weakness had been seen in the partition wall before this accident.

123. It was submitted that as the 1st Defendant had been storing garments for more than 10 years in the Transfleet Godown, they cannot be heard to say that the 2nd Defendant did not train them or teach them how to store the rolls of garments in Godown 10. It negligently loaded rolls of garment on the partitioning wall so excessively that it brought down the wall and the rolls of garment fell into the Godown No. 9 damaging the curio and other crafts belonging to the Plaintiff.

124. According to the 2nd Defendant, from the photos of rolls of garment taken after the accident are exhibited in the List of Documents filed on 4th September, 2017 and marked No. 1, 2, 3 and 4 thereof, it is evident that the rolls were stack on each other high to the ceiling of the building and were arranged against the partitioning wall and it was the weight of the garment against the partitioning wall that brought it down damaging the goods of the Plaintiff. It was submitted that the proper mode of storing garments is shown at pages 5 to 8 thereof and that the recommended stacking height is 6-7 feet from the floor level and not directly on the floor and not against the wall. However, the 1st Defendant stack the rolls from floor level to ceiling level about 20 feet high. Again the rolls ought to have been stored on wooden or plastic pallets and not directly on the floor. This would have prevented them from rolling.

125. It was submitted that the excessive rolls of garments were incorrectly stored parallel to one another facing one direction instead of perpendicular to one another at each subsequent row. Further, the 1st Defendant did not leave spaces between stacks to assist as a stopper of other stacks in the event of roll over. The ill manner of storage in one direction on top of each other high up to ceiling all against the wall was an overload which brought great and excessive pressure upon the partition wall, breaking it and forcing it to collapse. It was therefore submitted that the immediate and proximate cause of the accident is the loading of the rolls of garment by the 1st Defendant against the partitioning wall and the 1st Defendant is solely answerable to the Plaintiff and the 2nd Defendant for this accident.

126. According to the 2nd Defendant, the Plaintiff has not disclosed any good reason for joining the 2nd Defendant in the present proceeding except that the 2nd Defendant was the landlord owner of the Godown No. 9. In the submissions filed before court the Plaintiff has properly blamed the 1st Defendant for the accident. The only connection is that the 2nd Defendant is the landlord and that link is tenuous. Ownership of Godown does not in itself carry or establish liability. Since PW1 led evidence that the Godown had no cracks or visible weakness in the period of her stay, the Plaintiff has failed to establish liability against the 2nd Defendant and the only liable party here is the 1st Defendant as properly set out in the evidence adduced by the parties.

127. As regards the damages due to the Plaintiff, it was submitted that whereas the 1st Defendant is answerable for any loss suffered by the Plaintiff, the Plaintiff remains under duty to prove its loss as pleaded. The Plaintiff has made false and shifting claims of loss in this matter. First was a claim for Kshs. 37 million, then came Kshs. 75 million and now Kshs. 96 million. To the 2nd Defendant, the entire claim is a mere hope for money.

128. It was submitted that the Plaintiff was a newly registered company into Export Processing Zones status and did not exhibit its trading records or financial income for the short period of its trading and the Plaintiff chose to be silent on this important matter. In cross-examination, the Plaintiff's Witness PW1 confirmed that the Plaintiff had operated for just one year and did not exhibit any evidence of its exports or trading with any buyer in the international market as pleaded and in cross-examination, PW1 admitted that the Plaintiff was not known in the international market by the time of this accident and that her orders were few. No valid order was exhibited by the Plaintiff from these few.

129. According to the 2nd Defendant, the profits claimed are founded in surmise and had the Plaintiff attended international trade fairs/exhibitions or sold any of their products then they would have made profit. The profit is calculated without considering expenses. No evidence of purchases and expenses on which the profit is calculated. The Plaintiff entirely based her claim on the assessor's report produced by PW2, **Moses Kariuki Njoroge**, of Epic Marine & General Assessors Limited. This assessor admitted in cross-examination that he in turn made the report purely on narrations of cash-flow given to him by PW1. PW2 did no more than reproduce the information given by the PW1 and did not attach the purported orders, that the Plaintiff had received for export of their products but admitted that the documents on which he based his report were not available. Worse, he made profit estimates based on profit-mark-up of 30% on would be sales without considering expenses.

130. According to the 2nd Defendant, the report is a projection of would be profits as dreamt by PW1 and it is of no expert value. The expert did not asses the Plaintiff based on its one year performance and no reference to its actual financial performance. Reproducing the claims by PW1 into an expert report does not give it validity and the Court was urged not to award any costs for such a report.

131. It was submitted that the expert report has estimated profit performance on monthly basis while the PW1 admitted in her evidence that the curio market and exhibitions occur seasonally every 6 months. The Plaintiff had not attended a single trade fair in their one year stint at Export Processing Zones and there were no sales or profits to look at. According to the 2nd Defendant, this case presented by the Plaintiff does not meet the basic threshold of proof of special damage. The law requires the Plaintiff, not only to plead, but to strictly prove the allegations of loss. The report is not proof of income accepted in accounting practice and no special damages can issue in the circumstances of this case.

132. Regarding claim for Kshs. 2,348,802.25 for Soapstones products, it was submitted that the Plaintiff had no evidence to support this claim. There is no record showing the purchase of such products before the 30% mark up to get the selling price of Kshs. 2,348,802.25 and the figure was just thrown at the Court.

133. As for the claim for Kshs. 7,093,675.62 for Wooden products, it was submitted that the Plaintiff had no evidence to show this loss which was the selling price for the wooden products but no receipts have been produced to show the actual buying price or when they were brought. The Plaintiff had declared export of its products and no fresh purchases were made. Regarding the claim for Kshs. 1,298,968/= for repair of Equipment, the 2nd Defendant submitted that there is no evidence of damage to the said equipment or repair of the said equipment and this claim fails. With respect to consequential Loss of Kshs. 1,936,800/=, it was submitted that this claim is alleged to arise from intended travel to exhibit at Trade exhibitions abroad. However, no such trip was made and no actual expenses were exhibited in the Plaintiff's evidence and the claim must fail.

134. As regards loss of Profit Kshs. 45,600,000/=, it was noted that the Plaintiff claimed compensation for goods and items destroyed as tabulated in its Quantum Loss in the report of Epic Marine & General Assessors Limited and particularly for Soapstone at Kshs. 2,348,802.25 and wooden product at Kshs. 7,093,675.62 all totalling Kshs. 9,442,477.87. From the report this sum of Kshs. 9,442,477.87 is not the buying price but estimated selling price inclusive of the 30% profit mark up. The Plaintiff having claimed profit in the Kshs. 9,442,477.87 cannot again claim a further profit to the tune of Kshs. 45,600,000/=. Worse for the Plaintiff are her statutory returns to the 2nd Defendant which do not show profit and admission in evidence that their sales were few and mainly an Exhibitions twice a year hence the claim for profit at Kshs. 45,600,000/= is false in the circumstances.

135. According to the 2nd defendant, the statutory returns made by the Plaintiff to the 2nd Defendant show no such purchase of goods. The Plaintiff had declared purchase of Kshs. 1,550,000/= for the entire period and exports valued at Kshs. 2,529,540/=. Since there was little or minimal stock left which stock the Plaintiff failed to show to Court, the claim ought to be dismissed based on the decision in **Ryce Motors Limited & Another vs. Muroki (1995-98) 2 EA 363** that the report produced before Court is not acceptable evidence of income, expenses and profit of the Plaintiff. The Report is not limited to the items damaged but encompasses the entire trade of the Plaintiff

136. It was submitted that an award of general damages is available to a claimant whenever a legal right is tortuously invaded. The Plaintiff has lodged and proved a claim in negligence against its neighbour, the 1st Defendant. It is against this 1st Defendant that general damages can issue. However, the Plaintiff's case against the 2nd Defendant is that it did not maintain the premises resulting in the accident. By its own evidence PW1 absolved the 2nd Defendant from such accusations. She told the Court that the Godown had no cracks or visible weakness for the period prior to this accident.

137. As regards section 5(1) of the ***Occupier's Liability Act*** Cap 34 that apparently the premises needed repair this is in complete contrast to the evidence PW1 led before the Court in which she said the property was not in need of repair. In any event the Plaintiff had never reported the property to be in need of any repair. The wall in question was a separating wall not a retaining or loading wall. Section 5(4) and (5) of the ***Occupier's Liability Act*** absolves the 2nd Defendant from the great duties now placed on it by the Plaintiff and the 1st Defendant. The hard facts of this case blame the 1st Defendant and there is nothing in Cap 34 that would shift liability to the 2nd Defendant. In any event, Section 5(1) cannot be invoked where the person causing damage (the 1st Defendant) had a contract with the Landlord to be in the property.

138. It was submitted that the 2nd Defendant's witness confirmed that he inspected premises together with the officers of the 1st Defendant and found it in good condition and the officers of the 1st Defendant accepted the Godown to be in good condition and occupied it. There have been belated attempts to blame the 2nd Defendant for not maintaining gutters and exterior paints following a purported survey one year after the accident. This is not relevant evidence for purposes of assessing the cause of the accident.

139. It was therefore the 2nd Defendant's case that there is no breach of contract to maintain the property. Even if there was breach of contract, general damages are not a remedy available to the Plaintiff as against the 2nd Defendant and to accept less would be to relax old and intelligible principles.

140. The 2nd Defendant therefore prayed that the suit be dismissed with cost to the 2nd Defendant.

141. Regarding the 2nd Defendant's counter-claim Against the Plaintiff, it was submitted that the Plaintiff was in arrears of rent and remained in occupation of the Godown No. 9 long after the accident insisting to be paid before she could vacate. The Plaintiff has thereby incurred a total bill of USD 26,604.33 at June 2019 when their Lease expired. The Plaintiff is under obligation to pay this rent under the terms of Lease dated 25th June, 2013 signed by both parties exhibited at pages 1 to 3 of the 2nd Defendant's Bundle of Documents dated 16th June, 2017 and the Rent Statement annexed to the Further Additional List of Documents dated 4th February, 2019. It was noted that since the rent is not contested by the Plaintiff, judgment should be entered against the Plaintiff in the sum of USD 26,604.33 with interest and costs.

142. As for the cross-claim against the 1st Defendant, it was submitted that the 1stDefendant expected the 1stDefendant to exercise same care in storage of garments as carried out in Transfleet Godown and particularly to store the garments on plastic or wooden pallets on the floor. Instead, the 1st Defendant loaded the rolls of garment against the wall rising to the ceiling, a height estimated at 20 feet thereby bringing unbearable pressure on the partition wall.

143. To the 2nd Defendant, the 1st Defendant is to blame for this accident. The storage of garment was the approximate and only cause for the collapse of the wall. As a result of the collapsed wall, the 2nd Defendant was denied use of the Godown 9 rented to the Plaintiff for a considerable period of time during the repair and renovations. The insurance paid the 2ndDefendant rent for Godown 9 for one month and the 2nd Defendant claims against the 1st Defendant loss of rent in the sum of USD 3,648.37 for period June 2015 to March 2016.

144. The 2nd Defendant also incurred cost in repair and construction of the broken premises at a cost of Kshs. 529,575/= of which sum the insurer BRITAM paid Kshs. 409,450/= leaving a deficit of Kshs. 120,125/=. This sum the 2nd Defendant claims against the 1st Defendant with interest thereon.

145. The 2nd Defendant also prayed for costs of this Cross-claim against the 1st Defendant.

Determinations

146. Having considered the pleadings, the evidence adduced, the issues and the submissions made as well as the authorities relied upon by the parties herein, this is the view I form of the matter.

147. From the pleadings and the evidence adduced, it is my view that he following are the issues that fall for determination in this suit:

(a) Whether the collapse of the partition wall between Unit 9 and Unit 10 in the suit premises was caused by the negligence of the Defendants?

(b) Whether as a result of the collapse of the said wall the Plaintiff suffered loss and damages?

(c) If the answer to issue (b) is in the affirmative the quantum of loss and damages suffered.

(d) Whether the Plaintiff is liable to the 2nd Defendant in respect of unpaid rents and if so how much?

(e) Whether the 1st Defendant is liable to the 2nd Defendant as a result of the loss, if any, resulting from the collapse of the said wall?

(f) Who should bear the costs of the suit?

148. Regarding the issue whether the collapse of the partition wall between Unit 9 and Unit 10 in the suit premises was caused by the negligence of the Defendants, there is no doubt that part if not the sole cause of the collapse of the wall was the fact that the 1st Defendant stacked its bales on the said partition wall. That this was a factor that contributed to the said incident is admitted by the 1st Defendant. However, the 1st Defendant contends that its action was the immediate cause of the incident while the proximate cause of the incident was the dilapidated state of the walls. It was its case that when they were offered a space in Unit 10 aforesaid it noticed the said cracks and raised its concerns with the 2nd defendant's maintenance team, that is, **Mr. Maroro** and **Mr. Steve Wahome** and a copy of the minutes of the meeting held on 16th June, 2015 were exhibited. A perusal of the exhibited minutes however does not show that the said two persons were present. The said minutes are only signed on behalf of the 1st Defendant. It also noteworthy that the date of the alleged meeting was after the incident. DW2 testified that though a meeting did take place but **Mr Maroro** denied the allegations made by the 1st Defendant. Since the said minutes were not signed by any other party to this suit, they canoe be the basis upon which this court can find that it was admitted that the partition wall had cracks.

149. The other evidence relied upon to prove the existence of the cracks was the report compiled by Saload Adjusters (K) Ltd. That report was dated 4th September, 2015 while the incident took place on 11th August, 2015. In the said report, a report produced by the 1st Defendant, the results of the investigations were that:

The main case of collapse of the wall…was mainly attributed to the excess lateral loading by the stock at Unit S 10 that resulted in failure of the wall perpendicular to the bedding. The wall panel-partitioning Unit S 9 and S 10 was designed as a non-load bearing wall, which only supports its own weight…The fabric appeared to have been placed in stacks that were as high as the

gable level of the wall. The cumulative weight of the fabric that had been placed against the wall exerted lateral force in excess of the resisting bending moments and shear of the non-loading bearing wall, which ultimately led to the collapse of the wall."

150. The Report however found that the wall also had some shortcomings that may have augmented the impact of the fabric loaded against the wall such as the ratio of the effective length to the effective thickness, lack of lateral support or stiffeners to the wall and lack of expansion joints or control joints. The report however concluded that the stacking of the rolls of fabric was the final straw in the chain of events in a weak wall though it was not the only factor that led to the collapse of the wall.

151. If I understand the report correctly, the report was to the effect that the partition wall did not have the strength to withstand the weight which was loaded onto it. The report did not indicate the existence of any cracks on the said wall as alleged by the 1st Defendant. In fact according to PW1 no such cracks were noticed by it from its side of the wall. Though there was allegation by PW2 that the structure was dilapidated, PW2 stated that while the incident was on 11th June, 2015, he received the instructions on 5th June, 2016 almost a year later. By that time the collapsed wall had been repaired and the shortcomings he noted were with respect to the gutter and the pillars. Moreover, he was not an engineer. He could not therefore testify as to the state of the partitioning wall before the its collapse.

152. From the evidence adduced, it is clear that notwithstanding the alleged shortcomings of the wall what actually caused the collapse of the wall was the fact that the 1st Defendant loaded rolls of fabrics on a wall which was a non-loading wall and which was not meant to carry any load apart from its own weight. Whereas, going by the report of Saload Adjuster (K) Ltd, had the structure been reinforced it would have to some extent ameliorated the occurrence of the incident, it is clear that had the 1st Defendant not loaded its rolls onto the wall the same would not have collapse.

153. The 1st Defendant however contended that it was not advised that the wall was a non-loading and they were never given any specifications on how to store the fabrics and that they were just availed the space without conditions. There was however evidence that the 1st Defendant was not a stranger to the 2nd Defendant's premises and in fact it had used the said premises before. It was not contended by the 1st Defendant that they had never stacked goods in such premises before. It follows that the failure by the 1st Defendant to adhere to the known practice of stacking the fabrics cannot be excused on the ground that it was not warned.

154. Apart from that, according to DW2, the rolls of garment were stored directly on the floor surface, stack on each other until the ceiling 20ft. high. That the rolls were highly stacked was supported by Saload's Report whose investigations revealed that the fabric appeared to have been placed in stacks that were as high as the gable. This was against the recommended stacking height is 6-7 feet from floor level which was to allow a person of average height to comfortably reach the highest roll of garment without stepping on an object. It was also disclosed that the garments should not be stored directly on the floor surface but on wooden or plastic pallets. This would have prevented them from rolling. However, the garments were placed directly on the floor surface hence easily rolled once the wall caved in. In addition, the excessive rolls of garments were incorrectly stored parallel to one another facing one direction instead of perpendicular to one another at each subsequent row and the 1st Defendant ought to have left some space between the stacks. Each stack should act as a stopper for the other stack just in case the adjacent stack was to roll over accidently. All these allegations were not expressly denied by the 1st Defendant. According to DW2, the 1st defendant having been in the business for over 10 years knew the correct mode of stacking rolls of garments and it was expected that that was the way in which they were to stack them even during the temporary occupation of the space. This unchallenged evidence clearly point out to the fact that the collapse of the wall was caused by the improper stacking of the garments since there was no convincing evidence that there were cracks on the partitioning wall and the shortcomings on the wall were not what led to the incident.

155. In the premises, I find that the incident was caused by the sole negligence of the 1st Defendant and the 2nd Defendant is not to blame for the same.

156. The next issue for determination is whether as a result of the collapse of the said wall the Plaintiff suffered loss and damages. It is not in doubt that the Plaintiff was in lawful occupation of S 9. It is also not in doubt that the Plaintiff was in the business of manufacturing, finishing, packaging and dispatching home and decorative items to various markets. It was also not challenged that it was in the aforesaid business as an exporter and supplier of the said handmade items and in particular, arts and crafts and artefacts. No one has challenged the fact that it had properties in the said Unit. I therefore have no hesitation in finding that as a result of the collapse of the said wall the Plaintiff suffered loss and damages.

157. That brings us to the issue of the quantum of loss and damages suffered by the Plaintiff. According to the Plaintiff as a result of the foregoing, it suffered loss and damage in the sum of Kshs 96,298,200.00 whose particulars were set out as follows:

a) Value of soapstone products	Kshs 2,348,805.25.
b) Wooden products	Kshs 7,093,675.62.
c) Equipment, tools and machinery	Kshs 1,298,968.00
d) Loss of profit	Kshs 45,600,000.00.
e) Consequential loss	Kshs 1,100,000.00
f) Summary loss	Kshs 34,320,000.00
g) Cost of relocation	Kshs 461,183.00

h) Assessor's fees Kshs 3,238,770.00

Grand total loss Kshs 96,298,200.00

158. In his evidence PW2 stated that some goods were damaged while others were not though he only captured the damaged items. In his evidence, he however categorically mentioned that the soap stones and some of the timber were cracked while other timber were contaminated by dust hence could not be sold. He never specified the equipment, tools and machinery if any which were damaged. In fact, according to the PW1, the only reason why she had not removed her undamaged properties from the premises was because she had not been authorised to do so by the 2nd Defendant and she was also waiting for this suit to be determined. With due respect, those were lame excuses. The Plaintiff was clearly under a duty to mitigate its losses. It ought to have removed the undamaged properties from the premises for use elsewhere instead of leaving them there to go to waste and then claim their value from the Defendants. That was the position of the Court in **Jackson K Kiptoo vs. The Hon Attorney General [2009] KLR 657** where the court expressed itself inter alia as follows:

> **"…the appellant was under a duty to mitigate his loss and there is nothing on record to show what attempts were made in that regard. The guiding principle of law in mitigation of losses is as follows. It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realises that an interest of his has been injured by a breach of contract or tort, and he is then bound to act, as best as he may, not only in his interests, but also in those of the defendant. He is, however, under no obligation to injure himself, his character, his business, or his property, to reduce the damages or embark on dubious litigation. The question what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being on the defendant."**

159. In this case, there was no evidence to support the claim for damage to equipment, tools and machinery due to the accident. Accordingly, that claim must fail. As regards the claim for the value of soapstone products (Kshs 2,348,805.25) and wooden products (Kshs 7,093,675.62), the only evidence on record is from PW2. I agree with the holding in **Mutonyi vs. Republic Cr. Appeal No. 92 of 1981** that:

> **"expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, form facts reported to him or discovered by him by tests, measurements and the like.''**

160. In **Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29,** it was held that:

> "It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of *Elizabeth Kamene Ndolo vs. George Matata Ndolo* , Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-
>
> *"The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."..."*

161. Similarly, in **Vaghella vs. Vaghella [1999] 2 EA 351 (CAT)**, it was held that:

> **"On professional and technical issues, courts should not make assumptions based on nothing but conjecture. Opinions of professional and technical people in the field is invaluable to enable the Court to make an informed finding…However opinion evidence is by no means conclusive. They are relevant but not binding; the weight to be attached on these opinions would depend on the nature of each case since many matters of common experience in respect of which persons with no special qualifications are permitted to state what is really a matter of opinion and such opinion is no less relevant than the opinion of a trained person."**

162. The rationale behind this caution according to **Institute of the Blessed Virgin Mary, Kenya (Registered Trustee) vs. The Commissioner of Lands [1980] KLR 5; [1976-80] 1 KLR 1493 is** due to the fact that:

> **"valuation is not an exact science; otherwise at least two experts of the appellants would have arrived at the same figure."**

163. This view given impetus by the decision of the East African Court of Appeal in **The Collector vs. Kassam Shivji Bhimji and Two Others Civil Appeals Nos. 58 and 60 of 1959 [1959] EA 1063** when it held that:

> **"It is no doubt true that the valuation of immovable property is not an exact science and the very best efforts of an expert or a court to fix a market value for a property can never amount to much more than a *quasi* scientific guess, which the court should in the case of compulsory acquisition temper with liberally. The judge ought to be liberal in the sense that he should not be too meticulous or pedantic in dealing with the evidence."**

164. However, when all is said and done, as was held by the Court of Appeal in **Juliet Karisa vs. Joseph Barawa & Another Civil Appeal**

No. 108 of 1988, expert evidence is entitled to the highest possible regard and though the Court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it, such evidence must not be rejected except on firm grounds. This was the view expressed by **Onyango-Otieno, J** (as he then was) in **Musa & Sons Ltd & Another vs. First National Finance Bank & Another [2002] 1 KLR 581** where he held that:

> **"Without the applicant's valuation report by an independent valuer to challenge the respondent's valuation, the allegation that the value of the property would be reduced cannot stand in law."**

165. I also agree with the holding in **Mitchell Cotts (K) Ltd vs. Musa Freighters (2011) eKLR** in which the Court expressed itself thus;

> **"……in the light of the above and in the circumstance we cannot fault the superior court which accepted the only evidence which was tendered to the court on the issue, the appellant having failed to give any evidence on the value of the tires it had conceded it could not deliver to the respondent when called upon to do so. In this country civil cases are decided on the basis of a balance of probabilities. In the circumstances, the respondent had obviously put something on their side of the scales whereas the appellant had failed to do so resulting in the balance titling in favour of the respondent on the critical issue of the value of the uncollected tires. The court did its best and cannot be faulted. In addition, the loss was specially pleaded in paragraph 4 of the plaint. In view of the admission by the respondent, the critical issues for consideration were whether special damages were pleaded and if so whether they were proved. In our view, the respondent has proved both issues and for this reason, our inclination is not to disturb the judgment of the superior court…''**

166. Therefore, in the absence of any other credible evidence there is no basis upon which this Court can discredit PW2's evidence regarding those two items.

167. The Plaintiff also claimed loss of profit in the sum of Kshs 45,600,000.00. It is however trite that a claim for loss of profit is in the nature of special damages. That brings us to the question: what are special damages? Special damages are those damages which are ascertainable and quantifiable at the date of the action. The distinction between general and special damages was explained by the Court of Appeal in **Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177** where it was stated that:

> **"The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded."**

168. In **Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003, Kimaru, J** held that:

> **"In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred…Special damages and general damages are used in corresponding senses. Thus in personal injury claims, 'special damages' refers to past expenses and lost earnings, whilst 'general damages' will include anticipated loss as well as damages for pain and suffering and loss of amenities…Special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses. Therefore in the instant case the loss of income as a direct consequence of this fraud would be both a general damage as well as a special damage. General damages particularly extent thereof would be unknown at the time of the trial and must await the conclusion of the case so that they may be assessed. Special damages on the other hand consist of those losses that could be calculated at the time of the trial. Special damages must be pleaded, but so must future pecuniary loss if it may lead to surprise. Non-pecuniary damage must not be quantified in a pleading…There ought to be a distinction between past pecuniary losses or expenses already incurred and could easily be calculated by say reference to receipts obtained and anticipated future pecuniary loss or expenses which is continuing and which though one may know the multiplicand you will not normally know how long the loss will take. Such an anticipated loss is general damage, which must of necessity await the completion of the suit to be assessed by the Court. Special damages on the other hand is calculable at the date of the trial out of which a round figure will be obtained. General damages are such as the law will presume to be the direct natural or probable consequences of the action complained of. Special damages on the other hand, are such as the law will infer, from the nature of the act. They do not follow in the ordinary course but are exceptional in their character and, therefore, they must be claimed specifically and proved strictly…Specific loss of profits consequential upon the loss of use of an article for a specific period to the date of the plaint is special damage, which must be pleaded. However, in certain circumstances loss of profits could be included within a claim for general damages…General damages consist of the nature of prospective loss of income while special damages consist of out of pocket expenses and loss of earnings or income incurred down to the date of trial and is generally capable of substantially exact calculation. Where damages has become crystallised and concrete since the wrong the defendant could be surprised at the trial by the detail of its amount."**

169. In the same case, the learned judge expressed himself as hereunder:

> **"In civil cases the burden of proving claims in suits rests on the plaintiff, and that standard of proof is on the balance of probabilities and it is trite law that special damages and loss of profits must be specifically pleaded and be proved strictly and this rule applies where a suit proceeds inter partes or ex parte since the standard of proof does not become any less… Specific loss of profits consequential upon the loss of use of an article for a specific period to the date of the plaint is special damage, which must be pleaded. However, in certain circumstances loss of profits could be included within a claim for general damages."**

170. According to **Kimani vs. Attorney General Civil Appeal No. 6 of 1969 [1969] EA 502:**

> **"A claim for loss of profits is clearly "special damages" though in certain circumstances it could be included within a claim for general damages. This claim, however, relates to a special loss of profits consequent on the loss of use of the article for a specific period prior to the date of the plaint which is clearly special damages which must be pleaded and proved. The reason for this rule is that a defendant must be given an opportunity of knowing precisely what specific claims are made and thus be in a position to call evidence to show that the claim in respect of the details is not correct."**

171. In this case, it was the Plaintiff's evidence that the profits were projected based on orders and clients and according to PW1, she had LPOs to that effect. Prior to going to EPZ in 2010, they had an order from Italy. It was however clear that before going to EPZ, PW1 operated under a different entity. Accordingly, the alleged order from Italy could not be the basis of calculating loss of profits. It was further stated by PW2 that according to his information, while some of the said orders were in writing, others were verbal. Obviously the alleged verbal orders were based on the information given by PW1. The alleged formal orders were however not adduced as evidence before this court.

172. While PW2 testified that loss of profits is the projected profits and not specific orders, he readily conceded that there were specific orders which were to be captured but were not satisfied. In his opinion, the orders must have been prior to the incident but he had no actual dates though he saw the emails confirming the said orders. While conceding that the 19 months he applied did not capture the actual loss he insisted that he projected profit loss.

173. From the evidence adduced, it was clear that the Plaintiff's business was not operational the whole year but the exhibitions were only twice a year. Therefore, it was improper for PW2 to calculate the profits for the said 19 months. PW2 also based his calculation on alleged orders when he had no actual orders but based on verbal information purportedly obtained from the Plaintiff. In addition while admitting that there were orders which were not satisfied PW2 did not tell the court the basis upon which he calculated the loss of profits without ascertaining that the orders would be satisfied. In **Uganda Telecom Limited vs. Tanzanite Corporation [2005] 2 EA 331,** the Supreme Court of Uganda held that:

> **"In a claim for loss of profits, the normal measure of damages is that contract price less the market price at the contractual time for the acceptance and this represents the amount the seller must obtain to put himself in the position he would have been had the contract been carried out, since he can sell the goods in the market."**

174. According to the decision in **Bank of Baroda (Kenya) Limited vs. Timwood Products Ltd Civil Appeal No. 132 of 2001 (CAK) [2008] KLR 236:**

> **"As to loss of profits, apart from the fact that no particular paragraph of the plaint specifically dealt with the circumstances surrounding such loss, there was no evidence of what contracts, if any, were lost…It was, for example, not proved that prior to the [incident]…Timwood had been making such and such profits but that subsequent[ly]…the profits decreased or were wiped out altogether. No specific contract was identified as having been lost as a result of the [incident]…No trading accounts were produced. It may be that Kenya's economy is topsy-turvy and it may be that management accounts kept by companies such as Timwood may not be very useful, but if such accounts are kept and one is claiming damages for loss of profits, such accounts ought to be produced to assist the court in coming to a conclusion on the issue of whether there has in fact been a loss, and if so, the magnitude of the loss."**

175. In this case, PW2 did not even state whether in arriving at his calculations he took into account the expenditures that would have been incurred in making the said profits. In **Woodruff vs. Dupont [1964] EA 404**, the East African Court of Appeal opined that:

> **"In considering therefore the loss of profit in the instant case the plaintiff must be placed in the same position as if the safari had taken place: the full contract price would have to be paid and all other expenditure necessary for undertaking the safari would have to be incurred before any profit could be earned at all. It is after this amount of loss of profit had been computed that the deposit would be deducted in order to arrive at the sum due to the plaintiff. It is plain that the appellant has failed to prove sufficiently what expenditure he would have incurred in order to earn profit. It was incumbent upon the appellant to adduce all the material evidence to enable the court to quantify the damages that he claimed as difficulty of proof does not dispense with necessity of proof."**

176. It is my view that the report given by PW2 lest a lot of areas to speculation. It did not prove with specificity the loss of profits claimed by the plaintiff. This claim is akin to what the Court dealt with in **Nzoia Sugar Company Ltd** (supra) in which the Court of Appeal held as follows;

> **"On our own perusal and consideration of the evidence and the entire record, we come to the conclusion that the respondent's case on premiums was so mired in uncertainty and appeared so speculative that it could not form a firm or secure basis upon which the learned Judge could properly find as he did."**

177. Considering the statutory returns which the Plaintiff was making to the 2nd Defendant which were a far cry from the healthy financial position that the Plaintiff was being portrayed to be in, it was incumbent on the Plaintiff to have furnished satisfactory evidence to show not only that it was not operating at a loss but that it was making the profits claimed. In this case it was even conceded that the Plaintiff even had difficulties meeting its rental obligations.

178. Based on the material on record, I am not satisfied that the Plaintiff has proved that it was making profits to the tune claimed in the plaint and I decline to make that award. My decision is also grounded on the decision of the Court of Appeal in **Great Lakes Transport Co**

(U) Ltd vs. Kenya Revenue Authority [2009] eKLR that:

> **"From the judgment, the respondent produced proforma invoices in support of the claim for the retained petrol station equipment. A proforma invoice is considered a commitment to purchase goods at a specified price. It is not a receipt, and as such cannot attest to the existence of or the acquisition of goods. We consider a proforma invoice was not satisfactory proof of the respondent's loss,…and the learned judge misdirected himself in finding that the proforma invoices were sufficient proof of special damages…"**

179. That Plaintiff also made a claim for consequential loss (Kshs 1,100,000.00). This was based on an intended travel to exhibit at Trade exhibitions abroad. It is however clear that no such trip was made and the Plaintiff did not exhibit evidence of actual expenses incurred towards that end. Accordingly, that claim too must fail. Regarding the claim for Summary loss (Kshs 34,320,000.00), apart from pleading the same, no evidence was led to prove it. The Court in **Mtali vs. Mtali [2008] 2 EA 229**, had this to say on the issue:

> **"In the present case the appellant had claimed special damages arising from loss of profits from his business of the pharmacy and transport. Special damages have to be proved and it is not enough to tabulate in the plaint as the appellant did in the original suit that he suffered loss of so much many days while preparing his defence, or replying to preliminary objection, etc. The appellant has to prove by evidence that he was earning so much money per day. In the final analysis, apart from the fact that damages are not payable where the suit has not been proved, the special damages claimed have not been proved and the appeal is dismissed with costs."**

180. It was therefore held by the Court of Appeal in **Douglas Odhiambo Ape & Anor –vs- Telkom Kenya Ltd, CA No. 115 of 2006**, that:

> **"…a plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied in the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court…unless a consent is entered into for a specific sum, then it behoves the claiming party to produce evidence to prove the special damages claimed…"**

181. Accordingly, that claim is for dismissal.

182. There was also a claim for Cost of relocation (Kshs 461,183.00). PW1 however testified that the plaintiff had not relocated from the suit premises. Though she stated that she was operating from Jamhuri Park, it was her evidence that she was operating therein in her own name and not as the Plaintiff herein. It follows that this item is yet to be incurred and cannot be awarded.

183. As for the assessor's fees Kshs 3,238,770.00, it was PW1's evidence that she paid the loss assessor's fees and was given receipts. Under assessors fees the Plaintiff claims a sum of Kshs. 3,238,453.00. The Plaintiff attached in its bundle of documents the Fee Note dated the 12th December, 2016. Whereas, it would have been prudent for the Plaintiff to have produced the actual receipt for the payment to the assessor, in this case, there is no doubt that the Plaintiff retained the services of PW2 to undertake the assessment which was in fact carried out and the report produced before this court.

184. Whereas a claim for special damages should not only be pleaded but strictly proved what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were done. See **Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited Civil Appeal No. 88 of 2002 [2004] 2 KLR 269**, **Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98, Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992.**

185. It was therefore held by the Court of Appeal in **Jackson K Kiptoo vs. The Hon Attorney General [2009] KLR 657** that:

> **"The court is conscious that the degree of certainty and particularity of proof required depends on the circumstances and the nature of acts complained of."**

186. Similarly, in **Hahn vs. Singh, Civil Appeal No. 42 of 1983 [185] KLR 716**, the Court of Appeal held as follows;

> **"Special damages must not only be specifically claimed (pleaded) but also strictly proved…for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."**

187. That was the position in **Woodruff vs. Dupont [1964] EA 404** where it was held by the East African Court of Appeal that:

> **"The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided cases are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them… The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are "such as may fairly and reasonably be considered as a rising according to the usual course of things, from the breach of the contract itself". The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant."**

188. Taking into account the circumstances of this case, I am prepared to accept that the payment of the assessor's fees was adequately proved.

189. Has the 2nd Defendant proved that the Plaintiff owed it USD 26,604.33 at June 2019 when their Lease expired. According to the 2nd Defendant, the Plaintiff not only had rent arrears before the incident but since construction works were completed in March, 2016, it has neither moved out nor paid the rents which have accrued to US $ 26,605.38. The Plaintiff did not seriously dispute this figure but only contended that it was awaiting the determination of this suit. Accordingly, the 2nd Defendant has proved to my satisfaction that the said amount is owed to it by the Plaintiff.

190. The 2nd Defendant also claimed against the 1st Defendant loss of rent in the sum of USD 3,648.37 for period June 2015 to March 2016. It also incurred cost in repair and construction of the broken premises at a cost of Kshs. 529,575/= of which sum the insurer Britam paid Kshs. 409,450/= leaving a deficit of Kshs. 120,125/=. In light of my finding on liability, the 1st Defendant's defence against this claim cannot be sustained.

191. Having considered the material placed before me in this case, I make the following orders:

(a) I enter judgement for the plaintiff against the 1st Defendant in the sum of Kshs 9,442,488.87 with interests at court rates from the date of filing suit till payment in full and costs.

(b) I however dismiss the Plaintiff's suit against the 2nd Defendant with costs and enter judgement for the 2nd Defendant against the Plaintiff in the sum of US $ 26,605.38 with interest at court rates from the date of filing the counterclaim till payment in full with costs.

(c) I enter judgement for the 2nd Defendant against the 1st Defendant in the sum of USD 3,648.37 and Kshs. 120,125/= with interest at court rates from the date of the cross-claim till payment in full together with costs.

192. That is the judgement of this court and it is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 6th day of February, 2020.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Magina for Dr Nancy Barasa for the Plaintiff

Mr Kiprono for the 1st Defendant

CA Geoffrey