



REPUBLIC OF KENYA



KENYA LAW
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**Kithome & another v Haile & another (Land Case E194 of 2024)
[2025] KEELC 4617 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4617 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
LAND CASE E194 OF 2024**

**CG MBOGO, J
JUNE 20, 2025**

BETWEEN

ALICE KITHOME 1ST PLAINTIFF

BRENDA JEBIWOT LAGAT 2ND PLAINTIFF

AND

YUSUF HUSSEIN ARGAMO HAILE 1ST DEFENDANT

**GEORGE N MUIRURI T/A PHILIPS INTERNATIONAL
AUCTIONEERS 2ND DEFENDANT**

JUDGMENT

1. The plaintiffs filed the amended plaint dated 4th June, 2024 seeking judgment against the defendants jointly and severally for: -
 1. A declaration be and is hereby issued that the 1st defendant's notice of forfeiture dated 15th April, 2024 is illegal and unlawful and is therefore null and void ab initio.
 2. A declaration be and is hereby issued that the 1st defendant's distress for rent and notice to vacate dated 2nd February, 2024 is illegal and unlawful and is therefore null and void ab initio.
 3. A declaration be and is hereby issued that the 1st defendant act of obtaining KES. 700,000 from the 1st and 2nd plaintiff and denying them access to the grounds floor was an act of obtaining money by false pretense.
 4. A mandatory injunction restraining the 1st and 2nd defendant, their agents, employees or whosoever acting for them from auctioning the 1st and 2nd plaintiff's property.
 5. A refund of the rental deposit of KES 700,000 with interest at 14.16% p.a. being the commercial lending rate from 1st November 2023.



6. The sum of KES 350,000 as against the 1st defendant in lieu of notice to terminate the subject tenancy with interest at 14.16% p.a. being the commercial lending rate from 1st November 2023.
 7. A refund for renovation and fit out the premises KES 1, 547,316.
 8. Compensation for loss of business profits of KES. 24,212,160.
 9. Compensation for loss of personal belongings of KES 1,030,000 to the 1st plaintiff.
 10. Compensation for loss of and damaged hired property of KES 913,400.
 11. General damages as against the 1st defendant for constructive eviction and subjecting the 1st and 2nd plaintiff to inhuman treatment and annoyance.
 12. General damages as against the 1st defendant and 2nd defendant for eviction and subjecting the 1st and 2nd plaintiff to inhuman treatment and annoyance.
 13. General damages for trespass as against the 1st defendant.
 14. Costs of this suit with interest thereon at court rates.
 15. Any other remedy that this honourable court may deem fit to award.
2. The gist of the amended plaint is that on 16th October, 2023, the plaintiffs entered into a tenancy agreement with the 1st defendant in respect to the premises on LR. No. 209/3746 within Starehe Sub County. They pleaded that at all material times during the commencement and pendency of the tenancy agreement, they were denied access to the grounds floor unit which was locked contrary to the agreement. Further, that it was in bad faith for the 1st defendant to obtain the sum of Kshs.700,000, and thereafter deny them access to the ground floor for fit out purposes as per the tenancy agreement.
 3. The plaintiffs further pleaded that the 1st defendant's malicious nature and trespass was demonstrated through the advertisement of the suit premises while the tenancy agreement was subsisting on 22nd February, 2024. Further, it was pleaded that on 12th April, 2024, the 2nd defendant acting on the instructions of the 1st defendant unlawfully repossessed the goods the plaintiffs had hired from Syngas Limited valued at Kshs.913,400/-, and that due to the careless handling, some goods were damaged. That in the process, the 1st plaintiff lost personal belongings valued at Kshs.1,030,000/-, and thereafter locked them out of the premises which resulted to constructive eviction.
 4. The plaintiffs pleaded that on 15th April, 2024, the 1st defendant served them with a notice of forfeiture which had no value as it came after they had been locked out which was an attempt to sanitize the illegal eviction. Further, that the plaintiffs invested Kshs.1, 547,316/- on the renovation and fit out and further, that they lost business worth Kshs.24,212, 160/- for the entire tenancy period as a result.
 5. The defendants filed their statement of defense and counterclaim dated 2nd July, 2024. The defendants pleaded that this court lacks jurisdiction to hear and determine issues which do not relate to the use or occupation of land i.e. irregular termination of the tenancy, refund for the alleged renovations and fit outs, compensation for loss of business and personal belongings and the hiring of the proclaimed goods. Further, they contended that within the meaning of Clause 7(f) and 5(q) of the tenancy agreement, the plaintiffs are required to indemnify the 1st defendant from all claims which may incur due to their default. Further, that the deposit of rent was paid pursuant to an agreed contractual term, and that the same cannot be said to have been made in bad faith.



6. The defendants further pleaded that the suit premises was in a proper state of repair, and that the same did not require any renovations or fit outs, and that while consent was required before undertaking any work, the same was not done, and that there is no evidence adduced to that effect. Further, that the plaintiffs enjoyed exclusive possession of the suit property until 15th May, 2024 when the 1st defendant exercised the right of forfeiture. That while the matter was reported at Mariguini Police Station, no charges have been preferred against the 1st defendant.
7. The defendants denied locking out the plaintiffs from accessing the ground floor of the suit premises, and advertising the property during the pendency of the impugned tenancy. They contended that the particulars of trespass have not been proved, and the advertisement does not amount to trespass as alleged. The 1st defendant stated that the plaintiffs have never paid rent, and that he instructed the 2nd defendant to levy distress for the arrears of rent amounting to Kshs.1,050,000/-. That in full compliance with the law, the 2nd defendant proclaimed various movables in a notice dated 20th February, 2024. It was stated that by Misc. Appl No. E381 of 2024, dated 7th March, 2024, the defendants obtained an order from Milimani chief magistrates' court which has not been challenged to date, leading to the attachment of the proclaimed goods on 12th April, 2024.
8. The defendants further pleaded that the 1st plaintiff filed objection proceedings alleging that the goods attached belonged to Syngas Limited, and that there is no evidence to show that the goods belonged to the said company. The 1st defendant stated that he issued the plaintiffs with a forfeiture notice dated 15th April, 2024 which required them to settle the arrears of rent and after the lapse of the statutory 30 days' notice, he proceeded to forfeit the lease through a notice dated 16th May, 2024. The defendants denied having entered into a tenancy agreement with Bresyl Limited and stated that the tenancy agreement prohibited the plaintiffs from subletting the suit property without the written consent of the 1st defendant.
9. The defendants denied that the distress for rent was illegal and unlawful, and that the proclaimed goods were handled carelessly. Further, that during the attachment, the plaintiffs and their advocates, the auctioneer and the police were present and none of the items claimed to have been lost was seen to have been present in the suit premises.
10. In their counterclaim, the defendants pray for judgment against the plaintiffs for: -
 - a. A declaration that the plaintiffs to the counterclaim distress for rent against the proclaimed goods was lawful and regular.
 - b. A declaration that the 1st plaintiff to the counterclaim's forfeiture of the tenancy between him and the defendants to the counterclaim was lawful and regular.
 - c. A declaration that the 1st plaintiff to the counterclaim's set off of the deposit of rent of Kshs. 700,000/- against the arrears of rent of Kshs. 1,750,000/- was lawful and regular.
 - d. Arrears of rent in the sum of Kshs. 1,750,000/-.
 - e. Special damages in the sum of Kshs. 462,500/-.
 - f. Auctioneers' fees and related charges from the date of the proclamation.
 - g. In the alternative to (e) and (h), indemnity for the cost of defending the suit, and a sum of Kshs.462,500/-.
 - h. Costs; and



- i. Interest on (d), (e), (f), (g) and (h) above at court's rate from the date of filing the suit until payment in full.
11. In their counterclaim, the 1st defendant pleaded that the tenancy agreement commenced on 1st November 2023, and that he allowed the plaintiffs one month rent free fit out period being the month of November, 2023. The 1st defendant further stated that he forfeited the tenancy on 15th May, 2024 due to a breach of agreement on failure to pay rent which was in arrears of Kshs.1,750,000/0 as at 16th May, 2024. That owing to the default, he set off the deposit against the arrears reducing the same to Kshs.1,050,000/-, and instructed the 2nd defendant to levy distress for rent. While reiterating the contents of their defence in their counterclaim, the defendants pleaded that the plaintiffs are liable to auctioneer fees and storage costs. The 1st defendant contended that the plaintiffs ought to compensate him for all losses, costs and expenses. He pleaded particulars of special damages in the sum of Kshs.462,500/-.
12. The plaintiffs filed their amended reply to the statement of defence and counter claim dated 4th October, 2024. While reiterating the contents of their amended plaint, the plaintiffs stated that the cause of action arose from the tenancy agreement which is within the jurisdiction of this court. Further, they contended that they were denied access to the ground floor and allowed access on the upper floor. Further, that in a letter dated 4th March, 2024 they had indicated that they were denied exclusive possession of the suit property. In addition, they pleaded that the contact details of the 1st defendant appears in the advertisement notice, and that it is unreasonable for the 1st defendant to expect payment of rent when he unjustifiably denied them exclusive possession of the premises.
13. While further denying the contents of the statement of defence, the plaintiffs pleaded that the proclamation, attachment of goods, and forfeiture was unnecessary during the pendency of the tenancy agreement, and further that the claim of filing multiplicity of suit lacks basis. The plaintiffs denied that the proclamation exercise was procedural.
14. In reply to the counterclaim, the plaintiffs reiterated the contents of their amended reply to the statement of defence and counterclaim and their amended plaint. They stated that they are not parties to the matter before the magistrates' court, and that in any event Syngas Limited is a separate legal entity distinct from its directors. They contended that the defendants cannot wrongfully and illegally bring about a state of affairs that goes against the spirit of the tenancy agreement and expect to be indemnified.
15. The plaintiffs case proceeded for hearing on 28th January, 2025. Alice Sylvia Kithome (PW1) adopted her amended witness statement dated 4th October, 2024 as her evidence in chief. She produced the documents contained in the list of documents dated 4th June, 2024 and 4th October, 2024 as P. Exhibit Numbers 1 to 21 respectively.
16. On cross-examination, PW1 testified that they did not pay the monthly rent of Kshs.350,000/- from the time they got into the premises. She acknowledged receipt of the proclamation notice indicating Kshs.1,050,000/- as rent arrears, and admitted not to have paid the auctioneer fees of Kshs.110,000/-. PW1 testified that the landlord attached her property while she was absent, and that she had no idea if the defendants had police officers. She stated that she saw police officers on the day of the eviction, but that she arrived at the scene when they were leaving. She informed the court that the 2nd plaintiff was not present, and that no one witnessed the proclamation. PW1 further testified that there was a lady known as Talima who was taking care of the property at the time when the goods were proclaimed, but she did not call her as a witness. With regard to the goods hired by Syngas Limited and Bresyl Limited, PW1 testified that together with the 2nd plaintiff, they are the directors of Bresyl Limited and together



- with Edwin Kithome, they are the directors of Syngas Limited. She agreed that the companies are not parties to this suit.
17. With regard to the hired goods, PW1 testified that there are receipts which would identify the goods but the same do not contain serial numbers of the terms or any distinguishing feature. That while Syngas Limited and Bresyl limited are not parties to the tenancy agreement, Bresyl Limited ended up in the suit premises because they were operating under the company. Further, she did not recall that the defendants had obtained an order from the chief magistrates' court at Milimani for the provision of security during the attachment of goods. She agreed that Syngas Limited filed objection proceedings at the chief magistrates' court where the question of ownership of the proclaimed goods is still pending.
 18. PW1 further testified that they paid the agreed deposit of Kshs.700,000/- and took possession in November 2023, and that from inception, they were denied access from the ground floor. While she gave evidence of the images of padlocks on the suit premises, PW1 testified that she took these images from December 2023 and that she did so continuously. She did not provide evidence to show that it was the 2nd defendant who locked down the premises. On the costs of renovations, PW1 testified that they had access to the upper floor which was damaged, and that they had to work on the same from November, 2023. Further, that as per page 63 of the documents produced, the costs are the estimates of what they incurred. She stated that while the agreement provides for no alteration without the written consent of the 2nd defendant, they obtained a written consent and development approvals from the 1st defendant and the Nairobi City County but the same are not filed. She agreed that the landlord was not required to compensate the tenants for the alterations.
 19. PW1 testified that the 2nd defendant advertised the premises for letting even though she did not have the evidence to show that the 2nd defendant made the advertisement. She stated that after the advertisement, people visited the premises claiming to have hired the same. On the forfeiture notice dated 15th April, 2024, PW1 testified that the notice required them to pay the rent but she did not comply with the same. However, it was her evidence that she received the said notice on 16th May, 2024 at the time when eviction had already taken place on 12th April, 2024. She testified that the 1st defendant took the keys to the premises and packed all their belongings on the said date, and that she lost income after the said eviction. While indicating to the court that the calculations for the loss of Kshs.24, 212,160/- projected for 3 years was prepared by the accountant, the said accountant was not called as a witness to this case. She agreed that they were also not registered for VAT even though she brought the documents to justify the amounts. She stated that personal belongings were lost, but she did not provide evidence to show when the photos were taken. She also stated that there were many items that were attached but not indicated including basins, detergents, electronics, clothes and mobile phone. She stated that the notification of sale cannot be a basis for sale, and that page 9 of the amended witness statement confirms what is written.
 20. On re-examination, PW1 testified that they were to fit bathrooms in in every room, but she was not allowed access to the premises by the 2nd defendant, and neither was she required to obtain consent from the 2nd defendant to carry out the renovations. She testified that the advertisement provides his contact, and that the projections of the costs were based on their business plan. She stated that they only carried out renovations on the 1st floor, and that they have never had access to the ground floor. Further, that the pictures taken were of the ground floor in the year 2023. It was her testimony that they were trying to discuss on paying rent for half of the premises but the same was not successful.
 21. On 27th February, 2025, Yusuf Hussein Argamo Haile Mosim (DW1) adopted his witness statement dated 2nd July, 2024 as his evidence in chief. He produced the documents in the list of documents dated



7th July, 2024 and 22nd October 2024 as D. Exhibits number 1 to 17 respectively, and the further list of documents as D. Exhibit no. 18.

22. On cross examination, DW1 testified that he entered into a lease agreement with the plaintiffs. He stated that the suit premises is one storey building with a staircase from the ground floor to the 1st floor. Further, that the ground floor has six rooms as well as the first floor, and that the agreement provided for one-month grace period to enable the tenants carry out the repairs. While acknowledging that the mobile number 0722708072 belongs to him, he denied receiving any message on 5th March, 2024 where the tenants complained to have been denied access. DW1 also admitted to have brought the auctioneers, but he did not know if the email in the plaintiffs' documents dated 5th March, 2024 is similar to the one contained in the proclamation notice. He did not know whether the auctioneers responded to that email as well.
23. DW1 further testified that he did not know of the repairs, and neither did he bother to find out. While he identified the building in the video marked SK20, he admitted that there were repairs being carried out in his house. However, it was his testimony that while he did not know which floor is on the video clip, the said repairs were not proper because he did not allow the same. According to DW1, the plaintiffs needed to know where the beds and toilets were to be placed. While being referred to clause 4 (e) of the tenancy agreement, DW1 testified that he allowed the plaintiffs to carry out some repairs at their own expense. While admitting that the photos taken were of the suit premises, DW1 denied that he locked the suit premises, and stated that he only went to demand for rent. He testified that the auctioneers visited the suit premises on 12th April, 2024 and that they carried whatever was in the house. He stated that he did not lock the gate after the auctioneers left and that he hired guards to look after the premises. He agreed to have sent the tenants away at this time. He denied granting the plaintiffs access to the ground floor of the premises, and stated that he claimed rent for five months amounting to Kshs.1,050,000/-. He did not have evidence to show that the premises did not require any repairs.
24. On re-examination, DW1 testified that he allowed the plaintiffs one month rent free. With regard to the video, he testified that he is not the one who made the video clip, and that they have not shown the status of suit premises before the video clip was made. He denied receiving the letter that was sent to him, and stated that he was not shown the email that was sent to the auctioneer. He further testified that the video clip does not show the areas that required to be repaired, and that he is not obliged to produce any photographs of the suit premises. Further, that the images do not show who locked the premises, and according to him, he did not evict the tenants, but only recovered the rent due. He testified that the tenants left the premises in May, 2024 with rent arrears of five months.
25. The plaintiffs filed their written submissions dated 10th March, 2025 where they raised the following issues for determination: -
 - a. Whether the 1st and 2nd plaintiffs were constructively evicted.
 - b. Whether the 1st and 2nd plaintiffs were illegally evicted.
 - c. Whether the 1st defendant act of advertising of the suit premises during the pendency of the tenancy amounts to trespass.
 - d. Whether the 1st defendant notice of forfeiture dated 15th April, 2024 is illegal and unlawful.
 - e. Whether the counterclaim has merit.
 - f. Whether the 1st and 2nd plaintiff should be awarded all the orders and reliefs sought.



26. On the first and second issues, the plaintiffs submitted that by being denied access to the ground floor, a fact that was admitted during the cross examination by the 1st defendant, the same amounted to constructive eviction. Further, that while the court order dated 8th March, 2024 did not amount to an order of eviction, they were evicted from the suit premises on 12th April, 2024. To buttress on these issues, the plaintiffs relied on the cases of *Teresia Irungu v Jackton Ocharo & 2 others* [2013] eKLR, *Gusii Mwalimu Investment Co. Ltd & 2 Others v Mwalimu Hotel Kisii Ltd, Civil Appeal No. 160 of 1995*, *Shish Vendors & 3 others v Officer Commanding Police Station-Kwale & another; Postal Corporation of Ken & another (Interested Parties) (Environment & Land Miscellaneous Case E001 of 2024)*[2024] KEELC 1192 (KLR), *Boniface Ngure Ndungu v Gathu Holdings Limited & another* [2021] eKLR, and *Godfrey Kamau Kimani v Ruth Wambura & 4 others* [2020] eKLR.
27. On the third issue, the plaintiffs submitted that on 22nd February, 2024, the 1st defendant trespassed into the suit premises and placed an advertisement for letting when the tenancy agreement was subsisting. Reliance was placed in the case of *Abdulrazak Khafan & Another v Supersonic Travel & Tours Ltd & Another* [2005] eKLR.
28. On the fourth issue, the plaintiffs submitted that the notice of forfeiture served was illegal and unlawful, and of no value as it came after the tenancy agreement had been terminated. On the fifth issue, the plaintiffs submitted that pursuant to Section 77 (1) of the *Land Act*, and while relying on the case of *Wambui v Frann Investment (Environment & Land Case 207 of 2019)* [2023] KEELC 21781 (KLR), the counterclaim lacks merit owing to the constructive eviction.
29. On the sixth issue, the plaintiffs submitted that they have proved that they are entitled to the orders sought in the amended plaint. They also prayed to be awarded costs as it was held in the case of *Al-Riaz International Limited v Ganjoni Properties Limited & another (Civil Suit 24 of 2018)* [2024] KEHC 14497 (KLR).
30. The defendants filed their written submissions dated 15th April, 2025 where they raised the following issues for determination: -
 - a. Whether the defendants' impugned distress for rent was lawful and regular and whether the defendants are liable to compensate the plaintiffs for the distress.
 - b. Whether the plaintiffs were evicted constructively.
 - c. Whether the plaintiffs were illegally evicted by the defendants.
 - d. Whether the forfeiture of tenancy agreement was lawful and regular and whether the defendants are liable to compensate the plaintiffs for the forfeiture.
 - e. Whether the forfeiture of Tenancy Agreement was lawful and regular and whether the defendants are liable to compensate the plaintiffs for the forfeiture.
 - f. Whether the 1st defendant received the rental deposit by false pretences and whether the same should be refunded to the plaintiffs.
 - g. Whether the 1st defendant trespassed into the suit premises during the pendency of the tenancy.
 - h. Whether the defendants attached the plaintiffs' personal property or are liable for their alleged loss or damage.
 - i. Whether the plaintiffs' claim on behalf of Syngas or Bresyl Limited is lawful.



- j. Whether the proclaimed goods belonged to Syngas Limited and whether the question of ownership of the proclaimed goods is sub judice.
 - k. Whether the court's jurisdiction extends to issues that do not relate to use or occupation of land.
 - l. Whether the defendants are liable to compensate the plaintiffs for the costs of repair of the suit premises.
 - m. Whether the plaintiffs lost any profits and whether the defendants were liable for the same.
31. On the first and second issues, the defendants submitted that the plaintiffs have admitted to the terms of the tenancy agreement, and pursuant to Section 3 of the *Distress for Rent Act*, the 1st defendant was within his right to levy distress for rent. Thus, it was lawful for the defendants to invoke Section 4 (1) of the said Act. To buttress on this issue, the defendants relied on the cases of *Peter Ntbenge v Daniel Itumo & Another Hccc No. 1242 of 1974* Nairobi, Royal Gardens Hospital v Ebrahim Omenyi Amwere & Another (Civil Suit Number 10/2018, the High Court Kakamega), C.Y.O Owayo v George Hannington Zephania Aduda T/A Aduda Auctioneers & Another [2007] KEHC 1390 (KLR), and Mocha Hotel Limited v Kwanza Estates Limited (Environment & Land Case 14 of 2022)[2023] KEELC 18407(KLR) (29 June 2023)(Ruling).
32. On the third and fourth issues, the defendants submitted that it was not demonstrated by the plaintiffs how they accessed the 1st floor without going through the ground floor, and that the certificate of electronic evidence does not state the facts of the place and time the pictures were said to have been taken. Further, that no evidence has been adduced before the Business Premises Rent Tribunal which was seized of jurisdiction in the matter complaining of the alleged constructive eviction. Reliance was placed in the case of *Njoki v Pussy* (Environment and Land Appeal E006 of 2022) [2023] KEELC 945 (KLR)(16 February 2023)(Judgment). The defendants further submitted that contrary to the plaintiffs' allegations, they abandoned the suit premises after the distress for rent, and that if they were evicted illegally nothing stopped them from seeking the appropriate reliefs under Section 152F of the *Land Act*.
33. On the fifth and sixth issues, the defendants submitted that in compliance with the provisions of Section 75 of the *Land Act*, and having not complied with the same, they were issued with a notice dated 16th May, 2024 notifying them that he had forfeited the tenancy. They submitted that they complied with the law, and urged the court to be persuaded by the decision in *Nyoro v Karinstreap Investment Limited* (Environment & Land Case E100 of 2020) [2023] KEELC 16911(KLR) (20 April 2023) (Judgment), and *Wambua v Kenya Railways Corporation* [2022] KEELC 4752 (KLR). The defendants further submitted that pursuant to the terms of the agreement, the plaintiffs were mandated to pay Kshs.700,000/-, and that it is thus preposterous for the plaintiffs to allege that the rental deposit was obtained in bad faith and by false pretenses.
34. On the seventh and eighth issues, the defendants submitted that merely including the 1st defendant's mobile number is not sufficient proof that it was done by the 1st defendant, and equally so, the same does not amount to trespass into the suit premises as the terms of the tenancy agreement allowed the landlord to access the premises for inspection. Further, it was submitted that during the cross examination, PW1 could not identify the particular items that were lost or damaged, and that even if it were so, it has not been proven that the said items were exempted from distress for rent within the meaning of Section 16 of the *Distress for Rent Act*. Reliance was placed in the case of *David Bagine v Martin Bundi* [1997] eKLR.



35. On the ninth and tenth issues, the defendants submitted that Syngas and Bresyl Limited cannot sue through the plaintiffs' and convert this suit into objection proceedings in the manner they seek to do. They submitted that the claim regarding the ownership of the proclaimed goods is sub judice by virtue of the matter before the magistrates' court in Civil Appl. No. E381 of 2024. To buttress on this, the defendants relied on the cases of Kenya National Commission on Human Rights v Attorney General; *Independent Electoral & Boundaries Commission & 16 others (Interested Parties) (Advisory Opinion Reference 1 of 2017)* [2020] KESC 54 (KLR) (Constitutional and Human Rights) (7 February 2020) (Ruling) and Spinners and Spinners Limited v Kimilili Wholesalers Limited; Jayantilal Uniforms Kenya Limited (Objector) (Civil Suit 7 of 2020)[2024] KEHC 12935(KLR) (25 October 2024) (Ruling). The defendants further submitted that pursuant to Article 162 (2)(b) of *the Constitution*, this court's jurisdiction is only confined to the occupation of land, the use and the title to the land. Further, that the damages out of hired goods, loss of personal items, loss of business, the alleged renovations and fit outs are irrelevant to the use of land as they are not relative to the intrinsic/application of land to its original purpose. Reliance was placed in the case of Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR.
36. On the eleventh and twelfth issues, the defendants submitted that there is no provision under the tenancy agreement for the reimbursement of the repairs, and that neither was the 1st defendant's permission sought to carry out the said repairs. They further submitted that the loss of business has not been proven. Reliance was placed in the case of Hydro Water Well (K) Limited v Sechere 2 others (Sued in their representative capacity as the officers of Chae Kenya Society) (Civil Suit E212 of 2019) 2021 KEHC 22 (KLR) (Commercial and Tax).
37. On whether the counter claim is merited, the defendants submitted that by the date the 1st defendant forfeited the lease, the plaintiffs had occupied the suit premises for a period of six months and in offsetting the same against the deposit, the rent arrears is now as Kshs.1, 750,000/-. Further, that a party who breaches a contractual obligation which occasions a loss to the other side is liable to compensate the other party for the loss which is occasioned by the default. They pleaded special damages of Kshs.462,500/-, and indemnity for any judgment which the court may enter against him. In conclusion, the defendants urged this court to find it fair, just and equitable to award the costs for pain and time spent in prosecuting this suit.
38. I have carefully analyzed and considered the pleadings, the evidence tendered and the written submissions as well as the authorities cited. I am of the view that the issues for determination are as follows: -
1. Whether the prayers sought in the amended plaint and the counter claim are available to grant.
 2. Who bears the costs.
39. It is common ground that the plaintiffs and the 1st defendant entered into a tenancy agreement dated 16th October, 2023 for a term of three and a half years with effect from 1st November, 2023. The agreement in itself bound the parties and the parties were to adhere to the terms contained therein. It was a term of the agreement that rent amounting to Kshs.350,000/- would be payable monthly in advance which ought to be on or before the fifth day of every month. The plaintiffs were allowed one-month rent free fit out period from 1st November, 2023 to enable them to fit out the premises. Under clause 5 (a), the tenant agreed to pay the rent as reserved whether demanded or not. Clause 5 (e) gave the tenants/ plaintiffs the permission to make alterations to the suit premises at their expense and the 1st defendant was not in any way required to compensate them for the alterations. Under clause 5(q),



the plaintiffs agreed to indemnify the landlord against all claims, damage loss or injury occasioned to the premises caused by any wrongful act, default negligence or omission of the tenant.

40. Under clause 6 (c), the landlord agreed to permit the tenant upon paying rent and observing the agreements, to peaceful and quiet possession of the premises without any interruption. Both parties agreed under clause 7 (b), that if rent is unpaid for seven days after becoming due, the landlord shall serve a notice upon the tenant specifying the nonpayment or breach and that if there was non-compliance on the part of the tenant, then the landlord was at liberty to re-enter the premises and repossess the suit premises as in its former state. Clause 7 (f) shielded the 1st defendant from any loss or damage arising out of the occupation and use of the premises and any act or default negligent or otherwise. Looking at the pleadings and the evidence tendered, it is clear that the relationship between the parties became immediately upon signing of the tenancy agreement. In their amended plaint, the plaintiffs pleaded that at all material times during the commencement and pendency of the tenancy agreement, they were denied access to the ground floor unit which was locked contrary to the agreement. They contended that in was in bad faith for the 1st defendant to collect deposit and thereafter deny them access.
41. While the 1st defendant indicated that the suit premises is a one storey building, it was not clear how the plaintiffs would access the upper floor without the entrance to the ground floor. However, it is clear that they never got to utilize the ground floor. This is from the letter dated 4th March, 2024. From the evidence of the 1st defendant, it was clear that he sanctioned all the acts against the plaintiffs with the reason being that the plaintiffs did not pay the rent as and when it was due.
42. One may wonder what transpired between the parties during the one month rent free period of the fit out of the premises? If the plaintiffs were denied access at this time taking into consideration the time and money spent, what would have stopped them from moving the court to enforce the terms of the agreement? While they proceeded to access the upper floor, did it justify their failure to pay the rent? In my view, both parties are to blame for breach of contract. No material evidence was placed before the court to explain what transpired immediately rent became due in December, 2023 as it appears there was no negotiations between the parties. However, since both parties signed the agreement, there is no justification by the plaintiffs to refuse to pay rent.
43. While the 1st defendant may have been justified to demand rent in the manner he did, there was a procedure to be followed as provided in the tenancy agreement. Clause 7 (b) of the agreement provided as follows: -

“If the rent or any part thereof shall at any time be unpaid for Seven (7) days after becoming payable (whether lawfully demanded or not) or if there shall be any breach non-performance or non-observance by the tenant of any of the conditions herein contained and on the tenant’s part to be performed or observed then and in any such case, it shall be lawful for the landlord although may not have taken advantage of some previous default of a like nature serve a notice upon the tenant in writing specifying such non-payment or breach and requiring the tenant forthwith to remedy the same and if the tenant shall not within seven (7) days comply with such notice, the landlord may at any time thereafter re-enter upon the said premises or any part thereof in the name of the whole and repossess and enjoy the same again as in its former estate anything herein contained to the contrary notwithstanding and without prejudice to any right of action or remedy of the landlord in respect of any antecedent breach of any covenants herein contained or implied on the party of the tenant to be performed or observed.”



44. From the above clause, the 1st defendant ought to have given seven days' notice to the plaintiffs, for the rent owing. It appears that none of that was done. In my view, the plaintiffs and the 1st defendant contributed to the fundamental breach of the terms of the agreement. There was failure by the plaintiffs to pay the rent as and when it was due, and there was failure by the 1st defendant to serve notice of the rent due upon the plaintiffs. It thus follows, and as I would agree with the plaintiffs that the forfeiture was of no value.
45. From my analysis, none of the parties has persuaded the court even on a balance of probabilities to find in their favour. The amended plaint dated 4th June, 2024, and the counterclaim dated 2nd July, 2024 are dismissed. Each party to bear their own costs.

Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY THIS 20TH DAY OF JUNE, 2025.

HON. MBOGO C.G.

JUDGE

20/06/2025.

In the presence of:

Hilda - Court assistant

Mr. Adiel Majau for the Defendant

Mr. Chenger for the Plaintiff

