



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.317 OF 2014

BETWEEN

AL YUSRA RESTAURANT LTD.....PETITIONER

AND

KENYA CONFERENCE OF CATHOLIC BISHOPS.....1ST RESPONDENT

KNIGHT FRANK KENYA LIMITED.....2ND RESPONDENT

JUDGMENT

Introduction

1. This Petition concerns alleged discrimination against the Petitioner on account of religious and ethnic affiliation contrary to **Articles 27(5), 32(3) and 40(1)** of the **Constitution**.
2. The Petitioner, Al Yusra Restaurant Limited, is a limited liability company, carrying on the business of a restaurant and catering within Nairobi. The 2nd Respondent, Knight Frank Ltd, was the duly authorized agent of the 1st Respondent's over property known as L.R No. 1870/IX/42 (Waumini House) with the exclusive mandate to market and let Waumini House on terms and conditions agreed upon with the 1st Respondent.
3. On or about November, 2013, the 2nd Respondent acting as such agent offered the Petitioner rental space of part of Waumini House (the suit property) with effect from 1st December, 2013 for a term of six (6) years. On 3rd December, 2013, the Petitioner accepted the offer, and immediately took possession of the suit property and commenced renovations and refurbishments in preparation for the setting up of a restaurant business. While the renovation was on going, the 1st Respondent's Trustees held a meeting on 18th February, 2014, and resolved to discontinue with the then existing relationship with the Petitioner. Subsequently, in an attempt to end the relationship amicably, the Petitioner and the 1st Respondent held a series of meetings, which were however unsuccessful, resulting in the 1st Respondent formally communicating its decision to terminate the relationship and requiring the Petitioner to give vacant possession of the suit property.
4. That decision to terminate the tenancy relationship triggered the filing of this Petition with the Petitioner alleging discrimination arising out of the denial of its right to carry on business at the suit property on account of religious and ethnic affiliation and further seeking appropriate remedies for the

alleged violation of its fundamental rights and freedoms under the Bill of Rights.

5. In its Petition dated 9th July, 2014, the Petitioner therefore seeks the following orders:

a. A declaration that the Respondents are in breach of the Agreement for Lease to let 2132 square feet at Waumini House L.R No. 1870/IX/42 to the Petitioner for a term of six years with effect from 1st December, 2013.

b. A declaration that the Respondents' refusal to allow the Petitioner to carry on with its restaurant business and give access to the demised premises is unlawful and discriminatory and a violation of Articles 27(5), 32(3) and 40(1) of the Constitution.

c. A permanent injunction restraining the Respondents, whether by themselves, their agents and or servants from interfering, trespassing, constructing, alienating, charging, selling, disposing off, dealing or in any way interfering with the Petitioner's quiet possession of the restaurant on [the] Ground Floor of Waumini House, L.R. No. 1870/IX/4 Westlands, Nairobi.

d. A mandatory injunction compelling the 1st and 2nd Respondents to allow the Petitioner access to its restaurant on the Ground Floor of Waumini House, L.R. No. 1870/IX/4 Westlands, Nairobi and sign a lease in favour of the Petitioner in terms of the Heads of Terms signed on 3rd December, 2013.

e. In the alternative to prayers (c) and (d), the Petitioner be awarded compensation for discrimination, loss of right to use the demised property and loss of business in the sum of Kshs. 88,472,782.22/-.

f. Aggravated and punitive damages for subjecting the Petitioner to discrimination of grounds of religion and ethnicity contrary to the Constitution.

g. Costs of this Petition.

h. Any other or further relief as this Honourable Court may deem just and expedient.

6. In answering the Petitioner's allegations, the 1st Respondent filed a *Response to Petition* dated 6th May, 2016, and further claimed damages, by way of Cross-Petition, for alleged 'illegal' occupation of the suit property by the Petitioner under the directions of the 2nd Respondent.

7. Subsequently, both the Petitioner and the 1st Respondent filed corresponding Notice of Motion Applications dated 9th July, 2014 and 1st August, 2014, respectively, each seeking conservatory orders of possession and control of the suit property to the exclusion of the other. Additionally, the 1st Respondent sought orders to strike out various paragraphs in the Petition and the Supporting Affidavit thereof on grounds that those specific paragraphs sought to address a commercial tenancy dispute as a claim for violation of fundamental rights and freedoms and also that the Petitioner had relied on privileged communication and documents. Furthermore, the 1st Respondent sought to expunge the 2nd Respondent from the suit arguing that it was not a necessary party to the proceedings.

8. By a Ruling dated 21st November, 2014, I declined to strike out any of the challenged clauses and held *inter alia* that:

“A Judge must have all material placed before him to make a fair and just decision in the circumstances. In the present case, if there is communication pointing to evidence of alleged violation of the Bill of Rights, the rule of inadmissibility must be made flexible to avoid further injustice being committed.”

9. With regard to whether or not the 2nd Respondent was properly enjoined in the proceedings, I noted that, although the 1st Respondent had sought the removal of the 2nd Respondent from these proceedings, the 2nd Respondent had freely admitted to being properly before the Court and further supports the Petitioner's case. Upon considering the matter, I found it necessary for the 2nd Respondent to continue being a party to the proceedings, for purposes of assisting the Court in unearthing the true state of facts that led to the repudiation of the tenancy relationship in a bid to ascertain whether the Petitioner's allegations of discrimination on grounds of religion or ethnicity are valid.

10. As to the justiciability of the conservatory orders desired by both the Petitioner and the 1st Respondent, by a further Ruling delivered on 11th September, 2015, I allowed the suit property to be restored to the 1st Respondent and gave the Petitioner 30 days to remove its fixtures and fittings while reserving its right to seek damages for any losses incurred should its claim succeed. The disposing off of those preliminary applications paved the way for the hearing of the Petition.

Petitioner's Case

11. The Petitioner's case is as contained in the Petition dated 9th July, 2014, the Supporting Affidavit and the Supplementary Affidavit sworn by Baakai Maalim Kulmia, on 9th July, 2014 and 2nd June, 2016 respectively, as well as the written submissions dated 6th May, 2016.

12. The Petitioner submits that there existed a valid tenancy agreement between it and the 1st Respondent which became binding when the Petitioner accepted the offer to let the suit property and paid a deposit of Kshs.2,055,457.20/- to the 2nd Respondent in accordance with the governing terms. Subsequently, the Petitioner was given possession of the suit property to enable it to carry out renovations and refurbishments necessary for its restaurant business.

13. According to the Petitioner, the tenancy agreement was terminated on or about 18th February, 2014, while it was still undertaking the refurbishments, and thereafter, sometimes in March, 2014, the 1st Respondent invited the Petitioner for a meeting which was also attended by His Eminence Cardinal John Njue, the Very Reverend Father Vincent Wambugu and the Right Reverend Anthony Muheria wherein the 1st Respondent expressed its reservations about the Petitioner's intent to operate a restaurant business in the suit property. The Petitioner contends that at the said meeting, the aforesaid representatives of the 1st Respondent stated that they were uncomfortable with having Somali Muslims at its Headquarters since it was apparent that the restaurant would be patronized by the said Muslims. Thereafter, upon the tenancy agreement being terminated, the Petitioner submits that the suit property was locked at the command of the 1st Respondent thereby blocking any access by the Petitioner.

14. The Petitioner seeks solace in **Article 260** of the **Constitution** which defines 'a person' to include a company, association or other body of persons whether incorporated or unincorporated and hence it submits that, it being a company, enjoys all the rights and freedoms under the Bill of Rights just like a natural person.

15. In proof of the assertion that the 1st Respondent's decision to terminate the tenancy relationship was informed by the fact that the Petitioner's directors were Somali Muslims, the Petitioner relies on an email communication of 5th February, 2014 between the 1st Respondent and the 2nd Respondent, whose contents reveals that the 1st Respondent had requested for profiling of all tenants to determine their ethnicity and religion. The email communication reads in part:

“On the tenant, there are still pending issues that Jacqueline was to deal with and I don't think this has happened. Profiling of all tenants in order to determine their personality and to update our records.

You indicated that we have other Muslim tenants. I asked for details of these but got

none.”

16. In the above context, and according to the Petitioner, the need to know about the existence of Muslim tenants, depicts the underlying motivation by the 1st Respondent in terminating the tenancy and hence goes contrary to the 1st Respondent’s argument that it terminated the tenancy solely for the reason that it was against the setting up of a restaurant at the suit property.

17. On that basis, the Petitioner argues that the actions of the 1st Respondent went contrary to **Article 32(3)** of the **Constitution** which provides that a person may not be denied access to any institution, employment or facility or the enjoyment of any right because of the person’s belief or religion. Further, that the termination of the tenancy amounted to discrimination contrary to **Article 27(5)** of the **Constitution** and also that the actions of the 1st Respondent in assaulting the Petitioner’s guards, ejecting them from the suit property and chaining the main door with a view to ejecting the Petitioner from the suit property violated its right to dignity protected under **Article 28** of the **Constitution**.

18. As a result of the infringement of its fundamental rights and freedoms, the Petitioner seeks relief by way of *inter alia* declarations and compensation. In particular, the Petitioner seeks special damages amounting to Kshs.17,953, 325.00.00 being the amount of money invested in refurbishment of the premises, a further amount of Kshs.68,464,000.000.00 being compensatory damages for loss of business as a result of the termination of the lease and further Kshs.7,000,000.00 being general damages and Kshs.5,000,000.00 as aggravated or punitive damages.

1st Respondent’s case

19. The 1st Respondent’s case is as contained in the response to Petition dated 6th May, 2016, the Affidavit sworn by Fr. Vincent Wambugu on 28th July, 2014, Supporting Affidavit sworn by Joseph Kimani on 27th August, 2014, Further Replying Affidavit sworn by The Very Rev. Daniel Rono on 18th April, 2016, Affidavit sworn by Douglas Mogire Mekenya on 14th April, 2016 and the submissions dated 17th May, 2016.

20. The 1st Respondent submits that the Petition is unmerited because it does not raise any question of constitutional infringement. It submits further that the 2nd Respondent acted on its behalf only to the extent of the scope of the agency agreement dated 1st March, 2013 and denies offering the suit property, vide the alleged tenancy agreement, to the Petitioner and asserts that it had no knowledge of any such offer allegedly made by the 2nd Respondent on its behalf. In that regard, the 1st Respondent submits that the said offer and the resultant ‘tenancy agreement’ is null and void for lack of pertinent authority.

21. The 1st Respondent further contends that it had no knowledge of the alleged tenancy agreement and only found out in January 2014 that the Petitioner was partitioning and renovating the suit property in a bid to carry out a restaurant business and immediately instructed the Petitioner to vacate the suit property.

22. The 1st Respondent also disputes allegations by the Petitioner that the alleged tenancy agreement was terminated due to the Petitioner’s Directors’ religion. Consequently, it denies all the alleged breaches of fundamental rights and freedoms and instead asserts that the present case is a commercial dispute and not a constitutional claim. It further argues that it has leased part of Waumini House to other persons who also profess the Muslim faith and hence the Petitioner’s allegations of discrimination are baseless and made in bad faith.

23. The 1st Respondent in addition contends that it had made a resolution, based on security and commercial reasons not to lease out the suit property to any prospective tenant who intended to carry out a restaurant business and had indeed notified the 2nd Respondent of the said reservations. It asserts that the 2nd Respondent nonetheless proceeded to lease out the suit property to the Petitioner without obtaining the necessary consent from it and also without ensuring that the Heads of Terms agreement that

signifies the creation of a binding relationship, between the tenant and the landlord, had been duly executed. Consequently, it submits that the 2nd Respondent had no authority to issue a lease agreement to the Petitioner without the 1st Respondent's trustees first affixing their signatures on the Heads of Terms and hence denies being bound by any such agreement.

24. In support of the proposition that it had resolved not to allow a restaurant business at Waumini House, it enumerated instances where it had declined to enter into any tenancy agreement with a tenant who intended to put up a restaurant business. It affirms that in all the meetings held with the Petitioner, it repeatedly made it clear that the denial of permission to have a restaurant within the suit property was strictly informed by the security and commercial concerns and not based on the religion of the Petitioner's Directors as claimed.

25. In response to the email relied upon by the Petitioner in proof of its case, the 1st Respondent explained that the communication in that email was intended to assist in showing that indeed, the 1st Respondent had leased out Waumini House to other Muslim tenants and further, that the request for such details was in line with the Government's directive, through the **Nyumba Kumi Initiative**, directing relevant personnel to share information concerning the tenants within their buildings including details such as their nationality, race and tribe.

26. The 1st Respondent also submits that the Petitioner cannot claim discrimination since it is a corporation and its further position is that fundamental rights and freedoms such as human dignity, freedom from torture and freedom of conscience and religion can only be enjoyed by individual persons. Further, the Petitioner lacks ethnicity or religion and as such cannot enjoy such rights.

27. As to the reliefs sought, the 1st Respondent discredits the Quantity Surveyor's report which has been relied upon by the Petitioner in proof of the special damages claimed, and instead attaches its own Bill of Quantities as prepared by its expert showing an approximate amount of money incurred for the renovations and refurbishment of the suit property. In any case, the 1st Respondent asserts that the Petitioner should be indemnified by the 2nd Respondent for any loss incurred by the Petitioner.

28. For the above reasons, the 1st Respondent prays that the Petition be dismissed with costs and its Cross-Petition allowed with costs.

2nd Respondent's Case

29. The 2nd Respondent's case is as contained in the Replying Affidavit and further Replying Affidavit sworn by Margaret Motiri on 4th August, 2014 and 31st May, 2016, respectively, and the submissions dated 18th May, 2016.

30. The 2nd Respondent submits that, it entered into an agency agreement with the 1st Respondent, commencing on 1st March, 2013 and in or around June 2013, when the suit property became vacant, the 2nd Respondent in accordance with the agency agreement marketed the premises to potential tenants. On or about 28th June, 2013, the 2nd Respondent informed the 1st Respondent that the Petitioner had expressed interest in letting the said vacant premises. According to the 2nd Respondent, the 1st Respondent did not object to the potentiality of the Petitioner as a tenant and in fact concurred with the proposal to let the suit property to the Petitioner.

31. The 2nd Respondent asserts that it had both the actual and implied authority to let the suit property to the Petitioner as instructed by the 1st Respondent and submits that it forwarded the Heads of Terms with regard to the Petitioner's tenancy, on 26th July, 2013, to the 1st Respondent for its approval. It further contends that the 1st Respondent thereafter returned the Heads of Terms, duly executed by one of the 1st Respondent's Trustees with an accompanying note from the 1st Respondent's legal officer instructing the

2nd Respondent to approve and sign the Heads of Terms on behalf of the 1st Respondent as it was becoming difficult to find a second Trustee to execute the same. The 2nd Respondent thereafter completed the execution of the Heads of Terms and consequently handed over the suit property to the Petitioner.

32. It is the 2nd Respondent's contention therefore, that the 1st Respondent is bound by the contract to let the suit property to the Petitioner and as such no claim can be founded against it. It thus supports the Petition and states that the 1st Respondent has no proper claim for indemnity from it.

Determination

33. Flowing from the foregoing submissions, the following issues arise for determination :

i. Whether the Petitioner's fundamental rights and freedoms were infringed on account of religion and ethnicity.

i. What remedies should be issued, if at all?

a. Analysis of the facts

34. The determination of this case necessitates me to scrutinize the evidence on record with the ultimate objective of unearthing the mystery behind the termination of a previous existing relationship between the Petitioner and the 1st Respondent because undoubtedly, by an agreement commencing the 1st of March, 2013, the 1st Respondent and 2nd Respondent [**Knight Frank**] entered into an agency relationship whereby Knight Frank was appointed as the sole letting and managing agent for the 2nd Respondent's property referred to as Waumini House.

35. Knight Frank had the exclusive mandate of marketing and letting any vacant space at Waumini House on such terms and conditions to be agreed upon with the 1st Respondent. Among the vacant spaces in Waumini House marketed by Knight Frank to prospective tenants, was the space on the ground floor, the subject matter of this Petition (the suit property). As can be seen from the record, beginning the Month of April 2013, several interested tenants contacted both Knight Frank and the 1st Respondent indicating their desire to let the suit property.

36. In the above context, I trace the genesis of this Petition to an email sent on 28th June, 2013, by Jacqueline Maigua, an officer of Knight Frank, to Stephen Mutisya, an officer of the 1st Respondent and it reads as follows:

“Re: Vacant space at Waumini

“Kindly find attached the application form of the Interested Party and two of the recommendations that he has sent to us. They have one more hotel in Banda Street and are interested in taking up the space formerly used by Exotica.”

37. Although the above communication does not reveal who the interested tenant was, it can be perceived at the outset, that the potential tenant was interested in running a hotel business since emphasis has been laid on the prospective tenant's subsisting hotel business. The record indicates that there was no response to the above email but a later email sent on 26th July, 2013 by Jacqueline Maigua to Stephen Mutisya shows that the discussion on the occupancy of the suit property was still ongoing because through this later email, Mutisya confirms the receipt of the Heads of Terms for tenancy of Al-Yusra Restaurant Limited. Unlike the previous communication, in this instance, the name of the potential tenant is disclosed and further, it confirms that there were still other prospective tenants that were due for consideration in deciding the eventual occupier of the suit property. In particular, the email states as follows:

“Re: Tenancy of Al-Yusra Restaurant Limited

“I have received the Heads of Terms for the above. I thought that we had better rates from the other potential tenant. Al-Yusra Restaurant Ltd were to offer Kshs.120 per sq. ft. Kindly confirm from our last conversation.”

38. It appears that there was no further written communication on this issue until 2nd September, 2013 when Jacqueline Maigua wrote to Stephen Mutisya, reminding him of the pending expression of interest from the Petitioner. This email reads partly as follows:

“I communicated with the Interested Party that you informed me of but as I communicated to you earlier they thought the space was for Kshs.60 per sq. ft. and they had discussed this with you. I sent them the information and have not got back to me. They also have not operated a restaurant before and this might pose to be a risk in term of rent collection due to the fact that the hotel industry is quite volatile. We still have the offer from Al Yusra who are willing to enter the premises now. The more time we take to resolve this matter the more the Landlord is losing. Kindly give me your final answer as to whether we should say no to this offer and move on before close of business today to enable us move forward.”

39. In reply, Mr. Mutisya wrote:

“As I informed in the last communication, Mr. Kimani had advised that we target a minimum rent of Kshs.200,000.00 per month (inclusive of service charge). There was a lady (Angela Munyasya) I had proposed, what happened to her application of Kshs.70.00. She contacted our office enquiring of the space. Kindly contact her so that we conclude on the matter.”

40. I note that Angela Munyasya, whom Mr. Mutisya made reference to was the Director of East African European Chamber of Commerce (EA ECC), which institution was also interested in letting the suit property for purposes of setting up a restaurant business. In this respect, by a letter dated 11th April, 2013, addressed to the 2nd Respondent, Angela Munyasya, stated in part:

“Dear Jacqueline

Re: Expression of Interest for a Business Space

We write to express our interest in leasing the property located at New Waumini House, Westlands, along Waiyaki Way, Nairobi...

Eastern African European Chambers of Commerce (EA ECC) is a locally registered company that deals with business networking, investments and coordination both locally and internationally.

As part of the company investment, we have identified the space and found it suitable and viable for a restaurant/ café/food court. We have surveyed the space and established that it is ideal for the said business.

For these we are willing to provide drawings and other specifications that will be convenient for the business as soon as it is required....”

Yours Sincerely,

Angela M. Munyasya” [Emphasis added.]

41. From the correspondences placed before me, the email by Mr. Mutisya elsewhere above, signified the

end of the conversation with regard to potentiality of prospective clients eyeing the suit property. From what can be deduced from the affidavits of the parties however, in the Month of November, 2013, one of the 1st Respondent's trustees signed the Heads of Terms with respect to the Petitioner's tenancy and thereafter, Angela Lebu, the then 1st Respondent's legal officer, forwarded the partly executed Heads of Terms to the 2nd Respondent with an accompanying note directing the 2nd Respondent to consider approving and signing all future Heads of Terms on behalf of the 1st Respondent, since it was becoming increasingly difficult to get the trustees to execute the documents. The said note reads as follows:

“Please acknowledge receipt of the enclosed Heads of Terms. Kindly discuss the possibility of having Knight & Frank approve and sign all Heads of terms and only giving us copies. It is such a hustle getting trustees to sign both the Terms and leases. If you have time, you can pass by we discuss. ...”

42. The 2nd Respondent submits that, in reliance on the directions given by the 1st Respondent's Legal Officer, it forthwith secured the execution of the Heads of Terms on behalf of the second trustee hence sealing the contractual relationship between the Petitioner and the 1st Respondent. Immediately thereafter, the Petitioner was given possession of the suit property with a go ahead to renovate it to fit its restaurant business.

43. Although the 1st Respondent does not dispute the existence of its Legal Officer's accompanying note, its position is that, to the extent that the Heads of Terms agreement was executed by only one trustee, then it remains invalid and of no legal consequence and in any case the Legal Officer had no authority to change the mandate of execution of documents. Furthermore, the 1st Respondent asserts that the note did not amount to instructions but rather a proposal for consideration and any purported variations of the terms of the agency agreement should have been in writing and executed by both parties.

44. On my part and arising from the materials reviewed above, whatever the controversy as to the validity of the Heads of Terms Agreement, there is no doubt that the Petitioner and the 1st Respondent had a subsisting legal tenancy relationship as at end of November, 2013. Indeed, it is that irrefutable relationship that led to the Petitioner taking possession of the suit property and commencing renovation works, with a view of setting up a restaurant business. However, according to the 1st Respondent, it was not until January 2014 that it became aware of an alleged tenancy relationship with the Petitioner and it allegedly warned the Petitioner against refurbishing the suit property since no consent or authority had been given by it. In addressing that latter contention, I will have to lay bare the communication on record that took place between January, 2014 and the time of filing this Petition.

45. In that regard, on 15th January, 2014, Stephen Mutisya wrote an email to Joseph Kimani, both being officers of the 1st Respondent, detailing a chronological account of all prior communication between the 1st and 2nd Respondent with regard to occupation of the suit property. That email reads as follows:

“I have rechecked my records on the above and there are various emails to it. We began discussing on this matter in mid June 2013. On 1st July, 2013, Knight Frank Ltd informed the potential tenant (Al Yusra) was willing to pay Kshs.100.00 per sq.ft for rent and Kshs.20.00 per sq.ft. On 29th July, 2013, Knight Frank informed on different rates of Kshs.40.00 to Kshs.60.00 per sq. ft. but the service charge remained Kshs.20.00 On 9th and 11th October, they further proposed rental rate of Kshs.65.00 for enclosed space and Kshs.50.00 for the open space.

...On 25th October, 2013, a different potential tenant, Eastern African European Chambers of Commerce who had also applied for the same space in April 2013 offered a rate of Kshs.75.00 per sq. ft. for rent and Kshs.20.00 per sq. ft for service charge. This rate was agreed upon and Knight Frank Kenya Ltd were to give the Heads of Terms to them. This matter was not discussed again until 13th January, 2014 when we observed

construction work ongoing at the space. Upon making enquiry, were informed the former potential tenant (Al Yusra) were constructing despite Knight Frank Kenya Ltd not stating so when we requested....”

46. While this email particularizes the sequential discussion on the suitability of prospective tenants, it is puzzling to note that the 1st Respondent, through its officers, is now trying to dissociate itself from having any knowledge of the existence of any tenancy relationship with the Petitioner, yet as indicated above, the potentiality of the Petitioner as a tenant had been the subject of discussion for the greater part of the year, 2013. Although the 1st Respondent also questions the manner in which the Petitioner was facilitated to enter into a tenancy relationship, it still remains a fact that the 1st Respondent’s officers played a huge part in the creation of that relationship. My interrogation of the issues presently is however, limited to finding out the true reason for the termination of that obvious and subsisting relationship because that is largely what the Petition is about.

47. The 1st Respondent’s position on that issue is that it had resolved, due to commercial and security reasons, not to have a restaurant at the suit property. The 1st Respondent’s stand is however questionable since by its own admission, through the email quoted above, of 15th January, 2014, Stephen Mutisya indicated that Knight Frank were to give the Heads of Terms to EAECC to set up a restaurant business and not any other prospective tenant. This position is further corroborated by a further email communication, dated 2nd September, 2013, referred to earlier, wherein Mutisya asked Jacqueline Maigua to contact Angela Munyasya, an officer of EAECC so that the issue of the proposed tenancy could be concluded. These two emails also contradict paragraph 5 of the 1st Respondent’s Affidavit sworn by Joseph Kimani, in response to Margaret Motiri’s Affidavit. The said paragraph 5 reads:

“That I have noted that paragraphs 7 and 8 fail to mention the application for space by another tenant, Angela M Munyasya of Eastern African European Chambers of Commerce...The agent offered the space to the tenant through a letter dated 13th June, 2013 at rental rates that were quite attractive. However, we did not allow the application for among other reasons, that they wanted to operate a restaurant. We did not mind losing such attractive rental income since we were resolved not to allow restaurant business in the premises.”

48. For avoidance of doubt, the letter dated 13th June, 2013 referred to by Joseph Kimani reads as follows:

“Dear Angela,

Ref: Expression of Interest for a Business Space

Reference is made to the above matter. We received your letter dated 11th of April, 2013 expressing your interest for business space within New Waumini House.

...The rent is Kshs.120.00 per square foot and the service charge is Kshs.20.00 per square foot. We will require a security deposit which is equivalent of three months rental fees. Below is a breakdown of the costs.

- a. Three months’ rent.....Kshs.791,640.00***
- b. Three months service charge.....Kshs.131,940.00***
- c. VAT(on a & b) above.....Kshs.147,772.00***
- d. Security Deposit.....Kshs.1,268,442.00***

e. Deposit for legal costs and expenses....To be confirmed

Total.....Kshs.2,539,794.00

We request that you avail us with the company bank statements for at least one year.....

Yours faithfully,

Jacqueline Maigua”

49. The above letter was in response to the EAECC’s letter dated 11th April, 2013 asking for guidelines on the terms and conditions for the tenancy. The letter also indicates that the 2nd Respondent’s response was limited to delineating the terms of the tenancy, without more. In any case, the 1st Respondent does not attach any evidence at all showing that it had rejected the EAECC offer for any reason including that it could not allow the operation of a restaurant business. In addition, the email dated 2nd September, 2013 contradicts the 1st Respondent’s position since through that email, Stephen Mutisya enquires from Knight Frank of the fate of the proposal by Angela Munyasya. For clarity, the relevant part reads thus:

“There was this lady (Angela Munyasya) I had proposed. What happened to her application of Kshs.70/-. She contacted our office enquiring of the space. Kindly contact her so that we conclude on the matter.”

In response, Jacqueline stated;

“I communicated with the interested party that you informed me of but as I communicated to you earlier they thought the space was for 60shs per square foot and they had discussed this with you. I sent them the information and have not got back to me. They also have not operated a restaurant before and this might pose to be a risk...”

50. Arising from above, it is clear that the 1st Respondent is not being forthright in adopting a resolute argument to the effect that it had resolved not to have a restaurant in the suit property. In stating so, I do not doubt that previously the 1st Respondent may have taken such a firm position and indeed communicated its resolve to its former property agent, M/s. Tysons Limited. One such communication is the email dated 27th November, 2012, between Joseph Kimani (of the 1st Respondent) and Wycliff Ong’wae (of Tysons Ltd) which provides as follows:

“In the meantime, kindly note we have declined to accept a tenant undertake restaurant business.”

51. Similarly, I have seen a letter dated 28th November, 2012 from Tysons Ltd to the then potential tenant, M/s. Petma Restaurant Limited, indicating that the 1st Respondent had declined to accept a restaurant business in its premises. Particularly, the letter stated in part:

“We write further to your meeting with the undersigned and wish to inform you that the Landlord has declined to accept your intention to use the premises as a restaurant.”

52. The 1st Respondent seeks to rely on the above communication to demonstrate that it had resolved not to have a restaurant business at Waumini House but the 1st Respondent has not given any further evidence to show that the position taken during the period when Tysons Ltd was the property agent, still stood, and that such information was communicated to its current property agents, Knight Frank Ltd. In my view, nothing would have prevented the 1st Respondent from categorically informing it’s agent, Knight Frank that it would not allow a restaurant business in the suit property. Knight Frank indeed acted as if it had no such knowledge and its position is vindicated by my analysis of the facts above. Officers of the 1st Respondent similarly acted as if such an edict did not exist so did the Petitioner.

53. I also note that the Heads of Terms which were as a matter of fact signed by one of the 1st Respondent's Trustees contained an express clause providing that the tenant shall conduct a restaurant business only. In that regard, clause 13 of the Heads of Terms provides, ***"the premises are to be used as a restaurant only and change of user will not be permitted during the period of the lease without the lessor's consent."*** It is on this basis, and after carefully analyzing the evidence on record, that I refuse to accept the 1st Respondent's claim that the reason for the termination of the tenancy relationship was because of its affirmative decision not to have a restaurant business in the suit property.

54. Having disregarded the 1st Respondent's argument as above, the next critical question that still remains unanswered is what truly led to the discontinuation of the relationship previously existing between the Petitioner and the 1st Respondent.

55. Whereas the 1st Respondent submits that the disengagement was based on the decision made by the Trustees not to have a restaurant business in the suit property, which claim I have already dismissed, the Petitioner alleges that, the decision was informed by the fact that the Petitioner's directors were Somali Muslims and that the restaurant would be mostly patronized by Somali Muslims.

56. In that regard, the first formal communication seeking to terminate the tenancy relationship between the Petitioner and the 1st Respondent was effected through an email dated 21st February, 2014, from Joseph Kimani to Jacqueline Maigua, an officer of Knight Frank detailing as follows:

"Further to the Trustees meeting held on Tuesday, 18th February, 2014:

The Trustees further resolved they don't want to have a hotel in the building and we are to disengage from the tenancy agreement with Al-Yusra. As a consequence, we should refund them all the amounts they have paid. (Emphasis added)

57. In response to this email, by a letter dated 3rd March, 2014, Jacqueline Maigua wrote:

"Ref: Termination of Al-Yusra Restaurant Tenancy

"We refer to Mr. Joseph Kimani's email dated.....and a meeting held on 18th February, 2014 at which the undersigned was in attendance. The email instructs Knight Frank to commence termination proceedings against the above mentioned tenant. We note that duly executed Heads of Terms already exist and the lease has no termination clause. In order to avoid a legal engagement between the tenant and the landlord, we recommend that the landlord's advocate is approached to give a legal opinion on the matter."

58. By a further letter dated 5th March, 2014, the 1st Respondent wrote to Knight Frank in the following terms:

"After discussion and careful reflection on this matter, the Trustees have considered and resolved as follows:-

- i. Given that they did not sign the HOTs, they are not bound by the said HOT signed on 1st December, 2013.***
- ii. The trustees never approved letting for restaurant business and have rejected many offers for the same type of business.***
- iii. In any event, and without admitting validity of the HOT, the tenant did not comply with the HOT (s.16 of HOT's dated 1st December, 2013). The trustees will not enter into a lease agreement with the said tenant, rendering the HOT inapplicable in the circumstances...."***

59. As can be seen from the above communication on this subject, there is an indication that over and above the decision not to have a restaurant business, the 1st Respondent also questions the validity of the tenancy agreement, and in any event, it submits that the Petitioner was in breach of the said agreement by failing to obtain the consent of the 1st Respondent before commencing renovations of the suit property. On that issue it seems that the first point of open disagreement between the Petitioner and the 1st Respondent arose in or about January, 2014 more than a month before the 1st Respondent's trustees had a meeting on 18th February, 2014 with the Petitioner's Directors, since as the record indicates, the Petitioner had been stopped from continuing with the renovations on or about 23rd January, 2014. On the same day however, the 1st Respondent, through one Fr. Anthony, granted the approval to proceed with the renovations. That information can be deduced from an email communication dated 23rd January, 2014 from James Kinuthia of Knight Frank to Fr. Antony of the 1st Respondent which reads as follows:

“Dear Fr. Anthony,

...as you are aware, the tenant has been stopped from doing their fit out works. You indicated to me that you held discussions with Fr. Vincent Wambugu of KCCB and it was agreed that the tenant can continue with their fit out. Please confirm this position.”

Fr. Anthony's response on the same day was as follows:

“ Dear Mr. Kinuthia,

...I write to confirm that I did discuss the matter with Fr. Vincent Wambugu of KCCB and we agreed that the tenant should proceed with his fit out.”

60. Thereafter, by an email dated 23rd January, 2014, Knight Frank informed the Petitioner that it could proceed with the refurbishments. Interestingly, the 1st Respondent detaches itself from this communication and submits that it was issued by persons without authority. I note however that Fr. Antony's communication, which gave the clearance for the Petitioner to proceed with the renovations, was copied to both Fr. Vincent Wambugu and Joseph Kimani who have both sworn affidavits in this Petition and Fr. Wambugu, who is said to have been consulted, does not dispute giving any such authorization. I shall say no more on this issue.

61. Turning to the attempts at resolving the impasse, the Petitioner submits that sometimes in March, 2014, at the request of the 1st Respondent, a meeting was held between the Petitioner and the Respondents wherein the representatives of the 1st Respondent expressed reservations about the Petitioner operating a restaurant at Waumini House. According to the Petitioner, the only explanation given by the Bishops was that they were uncomfortable with having Somali Muslims at the Headquarters of the Kenya Conference of Catholic Bishops and that they were fearful that the restaurant would be patronized by Somalis. I note that there is no evidence on record indicating that such an express reservation, on the basis of the Petitioner's religion, was ever made by the 1st Respondent but the Petitioner further relies on an email communication dated 5th February, 2014, attached to the affidavit sworn by Margaret Motiri wherein the 1st Respondent requested the 2nd Respondent for a profile of all tenants in the building. In particular, the email stated thus:

“We are waiting for a meeting of trustees to discuss the issue of this tenant [Al Yusra] and we will follow their resolutions. On the tenant [Al Yusra], there are still pending issues that Jacqueline was to deal with and I don't think this happened....Profiling of all tenants in order to determine their personality and to update our records. You indicated we have other Muslim tenants. I asked for details of these but got none.”

62. On the basis of the above email communication, the Petitioner alleges that it was subjected to

unlawful profiling and in response, at paragraph 15 of the 1st Respondent's Affidavit sworn by Joseph Kimani, the 1st Respondent submits that after the dispute involving the Petitioner's tenancy arose, the 2nd Respondent confirmed to the 1st Respondent that they have other Muslim tenants on the suit property but the said assertion is refuted by the 2nd Respondent who at paragraph 31 of the affidavit sworn by Margaret Motiri, affirms that although the 1st Respondent had requested for details of other Muslim tenants, it did not accede to the request since complying with the 1st Respondent's command would have been tantamount to validating the 1st Respondent's bias towards the Petitioner and other Muslim tenants.

63. With the above denial firmly on record, I am at pains to understand why the 1st Respondent was interested in knowing the details of other Muslim tenants since there is nothing on record to suggest that the 1st Respondent had insinuated, at any given time, that it abhorred the then existing relationship with the Petitioner on the basis of religion or that the Petitioner was apprehensive that the 1st Respondent was uncomfortable with the Petitioner's Directors' religion, and hence the need to refute such claims. Even assuming that there was need for such ascertainment, I have not been shown any document showing the ethnic or religious affiliations of other tenants, and even if the 2nd Respondent had indeed failed to yield to the 1st Respondent's request, the 1st Respondent, being the landlord, is not handicapped from acquiring any relevant statistics particularly where such information is key in proof of its case but none has been tendered. That fact notwithstanding, I am unable to find any plausible reason why the 1st Respondent would have required such information at that stage of the dispute since no evidence has been submitted to justify the need for such facts. To this extent, the 1st Respondent's standpoint is also questionable.

64. The other reason given by the 1st Respondent explaining why it required a database of other Muslim tenants was that the Government of Kenya had for security purposes and as part of the **Nyumba Kumi Initiative**, requested for that information from all landlords. In this regard, the 1st Respondent relies on a letter dated 8th May, 2014, from the Chief, Langata Location, addressed to the '**Great Jubilee Centre**' which states as follows:

"Re: Nyumba Kumi Initiative

The above initiative was launched in the country so as to ensure that each one of us is a brother's keeper and it entails that everyone should know at least ten of his or her neighbours. The initiative will tighten security and enhance peace and harmony among all communities in the country.

Therefore, I do request you to forward to this office on or before 30th May, 2014, record of information regarding every person regardless of nationality, age, race, tribe, profession etc who is in your institution, building, residence associations/courts, village. (NB. Include all family members, workers etc)"

65. With regard to the above note, I have the following to state; firstly, the 1st Respondent has not shown any connection between Waumini House, which is the subject of this dispute and the 'Great Jubilee Centre' which is the subject of this letter; secondly, the said letter is dated 8th May, 2014, yet the 1st Respondent is trying to prove an allegation that arose on 5th February, 2014 three months before it was issued. Lastly, the letter does not request for information concerning the ethnic or religious affiliation of tenants. I however note that, the particulars of information required is not exhaustive and the addressee has the discretion to go over and above and provide any other additional information as is necessary. However, in this case, the 1st Respondent has not even provided any evidence to confirm compliance with the said directive.

66. Arising from the above analysis, I find that the 1st Respondent has not provided any satisfactory evidence to corroborate its position on why there was need to provide details of other possible Muslim tenants particularly bearing in mind the strong accusations that have been levelled against it and I

therefore find that no tangible explanation has been offered to refute the Petitioner's claim on this issue.

b. Application of the Law to the facts

67. Having analysed the evidence on record, I now turn to consider whether the Petitioner's claim is merited when the above facts are applied to the law and vice versa. In that regard, it must be recalled that the Petitioner alleges that the denial of access and the right to carry on its business at Waumini House is discriminatory and that the actions of the 1st Respondent in terminating the tenancy agreement constituted a breach of the Petitioner's fundamental rights and freedoms as enshrined in **Articles 27(5), 32(3) and 40(1)** of the **Constitution**.

68. I note from the onset however that the 1st Respondent has contended that the Petitioner cannot claim discrimination since it is a corporation and as such it is not in a position to enjoy any fundamental rights and freedoms, which can only be enjoyed by individual persons. The 1st Respondent also submits that the Petitioner lacks ethnicity and religion and as such it cannot enjoy any rights predicated an alleged discrimination on the said grounds.

69. In answer to the 1st Respondent's contention, I must begin by making reference to **Chapter Four** of the **Constitution** which contains the general provisions relating to the Bill of Rights. **Article 19** is particularly important as a foundational provision. It provides:

1. The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.

2. The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.

3. The rights and fundamental freedoms in the Bill of Rights?

a. belong to each individual and are not granted by the State;

b. ...

c. ... [Emphasis added]

70. Further **Article 20** provides:

1. The Bill of Rights applies to all law and binds all State organs and all persons.

2. Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom....[Emphasis added.]

71. Whereas **Article 19** of the **Constitution** therefore provides that the rights and fundamental freedoms in the Bill of Rights are inherent upon all individuals and therefore are not granted by the State, **Article 20** on the other hand provides that every person shall enjoy those rights and freedoms to the greatest extent but limited the enjoyment being consistent with the nature of the right and fundamental freedom.

Specifically, in answer to the 1st Respondent's claim that a company or juristic person cannot suffer discrimination on grounds of ethnicity or religion, South Africa, which has provisions on equal treatment similar to Kenya's has had to confront the same issue in the past. Thus in **Michael Weare & Anor v Joel Sibusiso Naebel N. O. & 4 Others, High Court at Natal Case No.8337/06**, Rall A.J. set a general principle on the connection between a natural and juristic person in matters of fundamental rights. He stated:

“In deciding whether or not a particular right may be claimed by a juristic person, one should also not lose sight of the fact that although a juristic person has a separate existence from the persons involved in it, whether they be members, directors or employees, the fact remains that all juristic persons have natural persons who have an interest in them and can only operate through natural persons. This means that the denial of a right to a juristic person can have a direct effect on natural persons.”

72. In a subsequent decision at the High Court at Cape of Good Hope Province (sitting as the Equality Court), Moosa J in **Manong & Associates (Pty) Ltd v City Manager, City of Cape Town & Anor** [2009] JOL 22914(c) stated thus:

“i) for certain purposes, a Court must look behind the artificial personae – the corporation – and take account of and be guided by the personalities of the natural persons, the incorporators.

ii) there is certainly a difficulty in addressing prohibition of unfair discrimination on certain specified grounds, which essentially embraces human attributes for example discrimination on grounds of race.”

The learned Judge however then concluded that in the case before him;

“The racial profile of the company was determined by the racial profile of the shareholders controlling the company and the company, despite its separate corporate personality, suffered the same fate and racial discrimination as its controlling shareholders. I therefore see no reason why in principle on the basis of public policy, such companies cannot benefit from the constitutional measures designed to protect or advance persons (including juristic persons) or categories of persons (including juristic persons) disadvantaged by unfair discrimination. I am of the view that the racial profile of the company can be determined by the racial profile of its controlling shareholders. The racial profile of each company can be determined by the racial profile of its controlling shareholders. The racial profile of each company will depend on its own fact and circumstances. I can see no reason why a company in which women, the disabled, ethnic and religious minorities and other disadvantaged class of persons who hold the controlling interest, cannot be discriminated against. I therefore conclude that, as a matter of principle and public policy, a juristic person, like that of a natural person, can be discriminated against on the grounds of race.”

73. On an appeal in the **Michael Weare case (supra)**, the Constitutional Court of South Africa in Case CCT 15/08 [2008] ZACC 20 stated thus per Van Der Westhuizen J;

“Can a juristic person be the bearer of the right to equality before the law?

Two of the three kinds of differentiation relied upon affect juristic persons. The argument that these form of differentiation violate Section 9(1) requires it to be shown that juristic persons can be bearers of the Section 9(1) right, under Section 8(4) of the Constitution. The High Court found that juristic persons were entitled to rely on the Section 9 (1) right. In view of the conclusion I reach on the applicants’ Section 9(1) challenge, it is not necessary to consider to correctness of the High Court’s interpretation of Sections 8(4) and 9(1). For purposes of this judgment, I assume in favour of the applicants that a juristic person could indeed be the bearer of the right guaranteed in Section 9(1).”

74. I am in complete agreement with the reasoning expressed above and in a nutshell, subject only to the limitation implicit in **Article 20** above and the general limitations expressed in **Articles 24** and **25** of the **Constitution**, it is my finding that a juristic person through the natural persons that form it can enjoy the right to equality before the law and is also capable of being discriminated against including on grounds of

ethnicity and religion.

75. Further to the above, the term ‘person’ is defined in **Article 260** of the **Constitution** to include a company, association or other body of persons whether incorporated or unincorporated. Therefore, it follows that enjoyment or infringement of a right or freedom can either occur against a ‘person’ in the natural capacity or in the artificial nature but subject to the limitation above so that where for example a right cannot conceivably be enjoyed by a company (e.g. right to a family in **Article 45**), then a claim to such a right cannot be upheld.

76. In regards to the Petitioner’s claim on discrimination therefore, **Article 27** of the **Constitution** guarantees equality and freedom from discrimination as follows:

“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) ...

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) ...

(7) ...

(8)”

77. According to the Petitioner and in the above context, the 1st Respondent terminated the existing tenancy relationship between them for the reason that its directors are Somali Muslims and consequently, the restaurant business which the Petitioner intended to operate would as a matter of fact, be frequented by Somali patrons. Consequently, the Petitioner claims that the actions of the 1st Respondent were contrary to **Article 27(5)** of the **Constitution** and amounts to discrimination on religious and ethnic grounds.

78. Indeed **Article 27** of the **Constitution** recognizes that all persons, whether natural or juristic, are equal before the law and should enjoy full and equal benefits of all rights and fundamental freedoms enshrined in the Bill of Rights. The discrimination contemplated under **Article 27(5)** is both direct and indirect discrimination. Comparative jurisprudence from other jurisdiction lays out the meaning of the term ‘direct discrimination’ and ‘indirect discrimination’ as follows:

European Union Law

79. The **Council of European Union Directive 2000/78/EC of 27 November 2000** establishing a general framework for equal treatment in employment and occupation adopted the following directive with regard to the concept of discrimination:

Article 1

The purpose of this Directive is to lay down a general framework for combating

discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2

1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless...

Canada

80. The Supreme Court of Canada in the case of ***Ontario Human Rights Commission and O'Malley v Simpsons-Sears Ltd.***[1985] 2 S.C.R. 536, drew a distinction between direct discrimination and adverse discrimination(in our case indirect discrimination) by holding as follows:

"A distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here." ... On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply." [Emphasis added.]

81. In addition, in the case of, ***British Columbia (Public Service Employee Relations Commission) v. BCGSEU***, [1999] 3 SCR 3, the Supreme Court of Canada further crafted the test for determining whether discrimination has occurred or not and explained that;

"The conventional approach to applying human rights legislation in the workplace requires the tribunal to decide at the outset into which of two categories the case falls: (1) "direct discrimination" where the standard is discriminatory on its face, or (2) "adverse effect discrimination", where the facially neutral standard discriminates in effect.... If a prima facie case of either form of discrimination is established, the burden shifts to the employer to justify it."

82. Referring to a South Africa's v Constitution's provision on discrimination [similar to our **Article 27**], the Constitutional Court of South Africa observed in the case of ***City Council of Pretoria v Walker*** [1998] ZACC that at [paragraph 31]:

“The inclusion of both direct and indirect discrimination within the ambit of the prohibition imposed by section 8(2) evinces a concern for the consequences rather than the form of conduct. It recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination, and if it does, that it falls within the purview of Section 8(2).”

83. Arising from the above comparative jurisprudence, it is clear that Courts in the identified jurisdictions have adopted a common approach in delineating the meaning of the terms ‘direct’ and ‘indirect’ discrimination. In my understanding therefore, in order for a person to bring themselves within the confines of **Article 27(4) & (5)**, one must show how the alleged conduct amounts to either direct or indirect discrimination. With regard to direct discrimination, which seems to be the likely form of discrimination alleged herein, the Petitioner must show how it was subjected to differential treatment on account of religion or ethnicity or that the reason given for the termination of the tenancy agreement was out rightly based on any of the relevant prohibited grounds under **Article 27(4)** namely; **religion, conscience, belief or ethnic origin.**

84. In this case, the Petitioner ought therefore to prove on a balance of probabilities, that the 1st Respondent terminated the tenancy relationship on account of its Directors’ religion and ethnicity. In this regard, the Petitioner submits that the 1st Respondent informed it that the reason for the termination was that it would reflect badly for the Kenya Conference of Catholic Bishops to have Somali Muslims as tenants at its Headquarters. As already indicated in an earlier part of this decision, the Petitioner’s proposition in this regard is not supported by any material evidence and as such cannot form the basis for any substantive determination. In further proof of its case, the Petitioner however relies on an email communication between the 1st Respondent and the 2nd Respondent wherein the 1st Respondent requested for details of ‘other Muslim tenants’ occupying rental space at Waumini House. According to the Petitioner, the need for such information portrays a deliberate attempt to profile the Petitioner’s Directors based on their religion.

85. The 1st Respondent on its part is emphatic that it did not want a restaurant business within the suit property and hence it had to terminate the tenancy relationship with the Petitioner. I have gone into details earlier on, to show why this particular justification preferred by the 1st Respondent is untenable. Most importantly, the 1st Respondent does not sufficiently answer the question as to why it requested for details concerning other Muslim tenants. A critical analysis of this case shows that there is an underlying issue that led to the termination of the tenancy and the 1st Respondent’s explanation only heightens the already created doubts imputing possibility of an ulterior motive in the termination of the tenancy.

86. In that context, in order for a claim of discrimination to suffice, there has to be a relationship between the termination and the claim of religious ethnic discrimination as the basis thereof. In this particular case, there is no direct evidence on record which can prove the allegation. However, I hold the view that, it is possible to find discrimination by inference, so that as long as the relationship between the act and the prohibited ground for discrimination is so strong that in the mind of a reasonable person confronted with the same facts, it would only lead to the conclusion that indeed, the underlying reason for the said decision was motivated by any of the prohibited grounds, then the claim must be upheld.

87. In making the above finding, I certainly recognize the difficulties facing persons confronted with the requirement to prove instances of discrimination in cases such as this one, where there is no direct evidence and where the real intent only lies in the mind of the alleged perpetrators. It is because of such realities that Einfeld J of Australia in the case of **Bennet v Everitt & Whyalla Fish Factory (1988) HREOCA 7(1 December, 1988)** observed thus in a different context but nonetheless relevant:

“Decisions made in the secrecy of boardrooms or the minds of employers will rarely, if ever, . . . find expression to the employee in directly discriminatory terms. Still less will they be exposed to the potentially corroborative eye of a witness, especially as the most likely witnesses, fellow employees, may well entertain the fear of losing their own jobs at the hands of the same employer. . . This means

that many discrimination cases ... have to be proved by comparatively weak circumstantial evidence, without direct or perhaps any witnesses and based only on an intuition or a deeply held if correct belief that there has been discrimination.

88. Similar sentiments were expressed in the journal article titled, '***An Analysis of the Methods of Proof in Direct Discrimination Cases in Australia***', (1998) 20(1) University of Queensland Law Journal 90 by Pelma J. Rajapakse in which the author agreed with the contents of excerpts from the Article by Willborn S, '***Proof of Discrimination in the United Kingdom and the United States***' (1986) 5 Civil Justice Quarterly 32 1 at 32 1 where the following opinion was rendered:

“... [a] case of direct discrimination involves an inquiry into the motivation of an employment decision. If the employer makes an employment decision because of an employee's race or sex, the decision is directly discriminatory. If the decision is made for any other reason, it is permissible. Persons claiming discrimination under this theory face two imposing obstacles. First, proving motivation is an extremely difficult and subtle task. The 'true' motivation for an employment decision is to be found in the mind of the employer. But proving the state of the employer's mind at the time an employment decision is made is an extremely delicate task. The employer wishes to avoid liability for employment discrimination, so his statements about his state of mind are less than reliable.” [Emphasis added.]

89. Though the above quoted excerpts are with regard to employment and work related matters, I still find relevance in them because they relate to the approach to take when confronted by decisions which are made in board rooms or generally to the exclusion of the aggrieved person. Consequently therefore, in order to address the hard realities expressed above, I take the position that, over and above direct evidence, parties would in appropriate circumstances rely on circumstantial evidence to prove discrimination related cases. I therefore embark to find out whether any discriminatory intent could be inferred upon the 1st Respondent by distilling all possible legitimate reasons for the termination of the tenancy agreement in issue.

90. In that regard, in an email communication dated 15th January, 2014 between Stephen Mutisya and Joseph Kimani, both being officers of the 1st Respondent, it is clear that the 1st Respondent was agreeable to having the Eastern African European Chambers of Commerce (EAECC) as a tenant in the suit property. The 1st Respondent's desire to have EAECC as a tenant can also be inferred from an email communication dated 2nd September, 2013 wherein Mr. Mutisya, the 1st Respondent's officer was inquiring from Knight Frank about the status of EAECC as a potential tenant. In that email, the 1st Respondent, through its officer, Mr. Mutisya, advised Knight Frank to contact the representative of EAECC so that the matter of the intended tenancy could be concluded. Further, on the same day, Knight Frank informed the 1st Respondent that one of the potential tenants that the 1st Respondent was interested with may pose a risk in rent collection since the said tenant had not operated a restaurant before and hence may be faced with the hiccups of setting up an hotel for the very first time which would translate to them not meeting their expenses. I would have expect that the 1st Respondent would at such a time have come out very strongly to express its reservations in allowing a hotel or restaurant business within the suit property. That did not happen, and indeed, it seemed not to have been a factor for consideration at that time either as regards EAECC or the Petitioner. I have elsewhere above extensively explained why I have taken that position.

91. Upon carefully examining the facts on this case, therefore, the evidence on record, seen as a whole, can only render the inference that the action of the 1st Respondent was driven by the ethnic and religious affiliation of the Petitioner's Directors and prospective tenants since there is no other plausible reason that can be inferred for the termination of the tenancy relationship and particularly in this case where the 1st Respondent has been unable to give any solid reason to explain it's actions. Consequently, I hold that the

1st Respondent terminated the tenancy relationship on account of the Petitioner's Directors' religion and ethnicity as claimed. I so find.

92. The Petitioner further relies on **Article 32(3)** of the **Constitution** which provides that:

“A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person's belief or religion.”

93. I do not see how the Petitioner's case fall within the confines of this provision as the suit property neither qualifies as an institution or a facility and neither does the Petitioner show which of its fundamental right or freedom has been curtailed in this regard. It had access to the suit property, commenced renovations and only upon termination was it denied access, a matter I have extensively analysed above. **Article 40** of the **Constitution** does not also apply to this case because the right to property protected therein cannot be the basis for a claim such as the one before me. The claim for loss by reason of the refurbishments can stand alone as a civil claim which I will address below.

Remedies

94. In the above regard, it is no surprise that parties are in agreement that the Petitioner has incurred loss by reason of the resultant refurbishment of the suit property, but disagree on the amount of loss suffered. Justice thus demands that I assess the proper compensation to be awarded to the Petitioner for the loss suffered. The Petitioner in that regard claims compensation in the sum of **Kshs.88,472,782.22** against the Respondents jointly and severally for the loss and damage sustained as a result of the breach of the tenancy agreement. The particulars of loss and damages are:

a. Costs of partitions, refurbishment & equipment ?Kshs.17,953,325.00

b. Refund of Rent and Deposits?Kshs.2,055,457.20

c. Loss of Business and Profits for Six Years?Kshs.68,464,000.00

Amount Due?Kshs.88,472,782.22.00

95. In order to prove the alleged cost of partitions, refurbishment & equipment the Petitioner has attached a Quantity Surveyor's report which estimates the total costs incurred in refurbishment as being Kshs.17,953,325.00. The 1st Respondent however disputes the said Quantity Surveyor's report and attaches its own Bill of Quantities dated 14th April, 2016 which shows that the estimated total cost of refurbishment was Kshs.8,284,284.00.

96. Whereas the Petitioner alleges that it had agreed with the 1st Respondent to engage a shared valuer for purposing of valuing the cost taken to refurbish the suit property, this proposition has been denied by the 1st Respondent which further asserts that the Petitioner removed its fixtures and fittings on 11th September, 2015, pursuant to this Court's Ruling. I note in that regard that OBRA International, the Quantity Surveyor who prepared the Bill of Quantities presented by the Petitioner advised the parties by way of an email communication dated 8th May, 2014 that it was compiling the cost for all the equipment and furniture that had already been delivered to the site as at that date. This therefore means that if indeed the Petitioner had removed some movable items from the site in compliance with this Court's order of 11th September, 2015 and as confirmed by the 1st Respondent, then it would mean that some of the items valued by OBRA International are already in possession of the Petitioner, although the resale value may be lower taking into account the likelihood of depreciation. This means that the Bill of Quantities presented by the Petitioner does not necessarily reflect the actual amount of loss suffered. In order to ensure that the ends of justice are met therefore I will estimate the financial value of refurbishments as an average value of the combined reports of the Petitioner and the 1st Respondent which is approximately **Kshs.13,118,818.00** but finally award the Petitioner **Kshs.10,000,000** after taking into consideration the probable cost of furniture and equipment that was retrieved from the suit property. I find nothing

unlawful about this approach where two professionals give differing costs of the same thing.

97. The Petitioner also seeks a refund of rent and deposit being **Kshs. 2,055,457.20**. In proof of this claim, it has attached copies of the cheques written in favour of Knight Frank on the Kenya Episcopal Conference Account. I note further that by an email communication dated 21st February, 2014, the 1st Respondent, through its officer, Joseph Kimani, advised the 2nd Respondent to refund to the Petitioner all the money that it had received from it. I cannot infer from the record whether the said amount of money was refunded to the Petitioner and therefore, my order is that the 2nd Respondent should refund the amount of money received from the Petitioner as payment for rent and deposit and if the 2nd Respondent had already transferred the said amount to the 1st Respondent, then the 1st Respondent should refund back to the 2nd Respondent who will in turn remit the same to the Petitioner. If the Petitioner has already received the said monies then my order will lapse upon such confirmation by the said Respondents.

98. The Petitioner also claims compensation for loss of business and profits for a projected period of six years at an amount of **Kshs.68,464,000.00**. In order to justify this amount it relies on the report of a financial consultant who projected the loss of business and profits for the six years based on what the Petitioner's business would reasonably have been expected to perform. This amount is strongly contested by the 1st Respondent which argues that the Petitioner should strictly provide the necessary proof of such a claim. Certainly this limb of claim was not sufficiently canvassed before me and I am therefore handicapped to make a proper determination on it without sufficient materials on record. I therefore dismiss the Petitioner's claim in this regard.

99. The Petitioner also seeks Kshs.7,000,000.00 being general damages and Kshs.5,000,000.00 as aggravated or punitive damages for the discrimination suffered on grounds of religion and ethnicity. Having already held that the 1st Respondent indeed discriminated against the Petitioner on account of religion and ethnicity, this Court has powers under **Article 23** of the **Constitution** to grant appropriate reliefs including a declaration of rights and an order for compensation. In the case of **Fose v Minister of Safety and Security 1997(7) BCLR 851(CC)** the Constitutional Court of South Africa elaborated on the principles to guide the Court in determining the proper amount of damages necessary to remedy a constitutional breach. The Court thus observed:

“...what the measure of damages would be, would depend on the circumstances of each case and the particular right which had been infringed....Such an award would have to be necessary in order to vindicate the fundamental right alleged to have been infringed and to deter and prevent future infringements of those rights...”

100. Further, in the case of **Vancouver (City) v Ward, 2010 SCC 27, [2010] 2 S.C.R. 28**, the Supreme Court of Canada discussed the manner in which quantum of damages for constitutional claims arising under **Section 24(1) of Canadian Charter of Rights and Freedoms** ought to be assessed. It thus observed:

“To be “appropriate and just”, an award of damages must represent a meaningful response to the seriousness of the breach and the objectives of s. 24(1) damages. Where the objective of compensation is engaged, the concern is to restore the claimant to the position he or she would have been in had the breach not been committed. With the objectives of vindication and deterrence, the appropriate determination is an exercise in rationality and proportionality. Generally, the more egregious the breach and the more serious the repercussions on the claimant, the higher the award for vindication or deterrence will be. ... Damages under s. 24(1) should also not duplicate damages awarded under private law causes of action, such as tort, where compensation of personal loss is at issue..” [Emphasis added.]

101. Similarly, the European Court of Human Rights held in **Anufrijeva v Southwark London Borough Council; R (n) v Secretary of State for the Home Department; R (m) v Secretary of State for the Home Department [2003] EWCA Civ 1406** that:

“...the fundamental principle underlying the award of compensation is that the court should achieve what it describes as restitutio in integrum. The applicant should, insofar as this is possible, be placed in the same position as if his European Convention rights had not been infringed. Where the breach of a European Convention right has clearly caused significant pecuniary loss, this will usually be assessed and awarded.”

102. I have in the above context already found that the 1st Respondent discriminated against the Petitioner on grounds of ethnicity and religion. I have thus awarded the Petitioner special damages for loss incurred in refurbishment and renovations of the suit property. Compensation by way of damages however would still qualify as an appropriate remedy necessary to enforce the fundamental right infringed, although in this case it would not serve the purpose of restitution as that has already been taken care of. Having reflected on the Petitioner’s claim in this regard, I am conscious of the fact that the Petitioner is a Catholic Church agency comprising of Bishops of that church with specific mandates including acquiring and letting out properties in the wider interests of the Church. Being a religious agency therefore it is driven by certain ecumenical tenets borne of a long history of Catholicism. That fact notwithstanding, once it decided to enter into the commercial world, its tenets and business decency must be married with constitutional imperatives including the equal treatment of its tenants. I have shown in that context that whereas it had instructed its previous letting agents, M/s Tysons Limited, not to invite any potential tenants who had intentions of setting up a restaurant business at Waumini House, there is no evidence before me that the same instructions were ever given to Knight Frank once it was appointed the 1st Respondent’s agent. I reiterate therefore that the actions of the 1st Respondent’s officers were vicariously binding on it.

103. I have also found that by specifically targeting Muslim and Somali tenants and terminating the tenancy relationship between it and the Petitioner on these grounds, the 1st Respondent was in breach of **Articles 27(4) and (5) of the Constitution**.

104. In that regard, one of the appropriate remedies for breach of fundamental rights and freedoms under **Article 23(3) of the Constitution** is compensation for reasons elsewhere expressed above. Although the Petitioner has sought Kshs.12,000,000.00 as such compensation, it is the view of this Court that punitive and aggravated damages are only awarded as a punishment to a Respondent for continued unconstitutional actions. There is no evidence at all that, save for the present incident the 1st Respondent is in the habit of discriminating Muslim Somalis. The said claim is therefore unfounded.

105. On the principles to be applied in the award of general damages for violation of rights our Courts have largely held that the same is a matter of discretion from case to case subject to rationality and proportionally in doing so. Thus in the case of **Koigi Wamwere v Attorney General, Civil Appeal No.86 of 2013; [2015]eKLR**, The Court of Appeal observed thus:

“Accepting that the award of damages is not an exact science, and knowing that no monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entailed, we find and hold that the appellants are entitled instead to damages in the global sum of Kshs.12 Million with interest at Court rates from the date of the judgment of the High Court appealed against.”

106. The above case related to physical and mental pain exerted on the Petitioner in violation of their constitutional rights. This is not the case in the present Petition and noting that the aspect of restitution has already been addressed and there being no evidence of the Petitioner having been profiled denoting further loss, in the totality of the facts before me, a global award of Kshs.3,000,000.00 in damages is sufficient recompense to the Petitioner.

107. Having so held, I note that the 1st Respondent had also filed a Cross-Petition dated 6th May, 2016 on grounds that it had incurred substantial loss of user of the suit property and rental income for more than one and half years amounting to Kshs.4,954,437.00. The particularized loss and damages are as follows:

a. Rental income at the rate of Kshs.181,005.00

from January 2014 to November 2014(9 months).....Kshs.1,991,055.00.

b. Rental income at the rate of Kshs.219,016.00

from December 2014-Sep.2015(91/2 months).....Kshs.2,080,652.00.

c. Service charge at the rate of Kshs.43,060.000.00

from January 2014-September 2015.....Kshs.882,730.00.

TOTAL.....Kshs.4,954,437.00

108. The 1st Respondent's position is that the Petitioner took possession of the suit property illegally having obtained 'irregular' consent from the 2nd Respondent. Arising from the 1st Respondent's submissions, it is clear that the 1st Respondent places blame on the 2nd Respondent. If indeed the 1st Respondent is aggrieved by the acts of the 2nd Respondent, there is a proper legal regime through which a principal can sue an agent for breach of the agency agreement. My mandate in this case is restricted to claims arising out of constitutional violations and neither party sufficiently canvassed other surrounding issues thus making me handicapped in delving into the justiciability of the 1st Respondent's claim. I therefore decline to make any finding with regard to the 1st Respondent's Cross-Petition and as such the same must be dismissed with no order as to costs.

109. For avoidance of doubt, I hold that the 2nd Respondent is without fault in as far as this Petition is concerned and save for the orders made with regard to refund of the amount paid by the Petitioner, I make no adverse orders against it. I say so because the 2nd Respondent acted within its terms of appointment in regard to the negotiations with the Petitioner.

Conclusion

110. This Petition has brought to the fore the century's old conflict between religions yet the issue would have simply rested as a tenancy dispute. I have however shown that contrary to the 1st Respondent's contention, the tenancy dispute certainly morphed because of the underlying and fundamental issues of violation of the right to equal treatment even as the tenancy relationship broke down. I have said why so and the reason why I have also attempted to balance the interests of all the parties to the dispute while staying true to the dictates of the Constitution.

111. In concluding this Judgment, I owe the parties an apology for the delay in delivering this judgment caused partly by my elevation to the Supreme Court and all disruptions attendant to that fact.

Disposition

112. Flowing from my findings above and looking at the prayers in the Petition, the proper orders to make are the following only:

a) It is hereby allowed that the 1st Respondent's refusal to allow the Petitioner to carry on with its restaurant business was unlawful and discriminatory as well as a violation of Articles 27(5) of the Constitution.

b) The Petitioner is hereby awarded Kshs.10,000,000.00 being the cost of refurbishing the ground floor of Waumini House, L.R. no.1870/IX/4, Westlands, Nairobi.

c) The Petitioner is hereby awarded Kshs.3,000,000.00 as compensation for discrimination as declared in (a) above.

d) The 1st Respondent's Cross-Petition is hereby dismissed with no orders as to costs and save for the Orders herein all other claims by the Petitioner are dismissed.

e) The Petitioner shall have the costs of this Petition.

113. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 5TH DAY OF JUNE, 2017

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 6TH DAY

OF JUNE, 2017

JOHN M. MATIVO

JUDGE