



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO.197 OF 2013

HARITH ALI ABDULKADIR (Suing as the Attorney of

ALI ABDULHARI ABDALLA)PLAINTIFF

VERSUS

DANIEL HALLER.....DEFENDANT

JUDGMENT

BACKGROUND

1. By his Complaint dated 16th October 2013 as Amended on 24th October 2017, Harith Ali Abdulkadir suing as the donee of a power of attorney from one Ali Abdulkadir Abdalla (the Plaintiff) prays for Judgment to be entered against Daniel T. Haller (the Defendant) for:

- a. A declaration that the Defendant has breached Clauses 1(a) (vii) and 1 c, d and e of the lease agreement dated 14.12.2005;**
- b. Damages for breach of contract;**
- c. An order for eviction of (the) Defendant from the suit premises;**
- d. Payment of Kshs 1,406,250.00/- being the total rent due for the current term of five years that commenced on 2.2.2015, together with any other rent arrears as will be due at the time of determination of this suit;**
- e. Payments of the Valuer's fees of Kshs 34,145/-;**
- f. Interest at Court rates in (d) and (e) above; and**
- g. Costs of and incidental to this suit.**

2. These prayers arise out of the Plaintiff's contention that vide a lease agreement dated 14th December 2005, the Plaintiff as the registered owner of all that parcel of land known as Kilifi/Mtwapa/1074 leased the said property to the Defendant for a period of 25 years. It was a term of the agreement that the Defendant would pay all the rents due for each 5-year term and that he would keep the suit property in a habitable and tenantable condition.

3. Contrary to the said Lease Agreement, the Plaintiff avers that the Defendant has failed to remit the rent as and when due and that he has reduced the value and beauty of the suit property by failing to keep the same in a habitable and tenantable condition as agreed.

4. But in his Statement of Defence and Counterclaim dated 17th December 2013 as amended on 18th February 2016, the Defendant while admitting the existence of the lease, avers that by subsequent express and or implied arrangements, practice and or custom, the rent due to the Lessor was paid to him from time to time and he is therefore estopped from the strict enforcement of Clause 1(a) (vii) having acquiesced to the same.

5. The Defendant further asserts that contrary to the allegations by the Plaintiff, only a sum of Kshs 693,750/- remains as the balance due for the period of five (5) years between 1st February 2010 and 31st January 2015. The Defendant further contends that the said balance has only remained outstanding due to confusion and lack of accountability on the part of the Lessor in regard to the agent authorized to collect and receive the same.

6. The Defendant avers that he is at all times ready and willing to pay the rent due to the Lessor and asserts that he has as far as practicable kept and or attempted to keep the premises in a good, habitable and tenantable condition subject to the reasonable wear and tear and other causes beyond his control.

7. By way of the Counterclaim, the Defendant avers that as a result of the failure on the part of the Lessor to undertake repairs of the collapsed portions of the perimeter wall and the poor workmanship thereof, the Defendant's occupation and use of the demised premises has been severely interrupted and compromised and as a result the Defendant has been forced to undertake substantial repairs and reconstructions which have so far cost him Kshs 2,177,966.50/-.

8. The Defendant asserts that a further sum of Kshs 2,177,966.50/- is required to repair and re-do the remaining portions of the wall.

9. Accordingly, the Defendant prays that the Plaintiff's suit be dismissed with costs and that Judgment be entered for himself as against the Plaintiff for:

a. A declaration that the Lessor has acted in breach of the express and or implied terms of the lease with the Defendant.

b. A declaration and an order that the Lessor is under an obligation to undertake and bear the costs of all repairs and damages arising from ordinary and natural wear and tear to the premises and direct a refund and or deduction of all such costs incurred by the Defendant from the rent due to the Lessor or repayment in such manner as this Court may deem fit.

c. Such other and or further orders this Honourable Court may deem fit and just to grant.

The Plaintiff's Case

10. In support of his case, the Plaintiff called two witnesses at the trial and also testified when the Court visited the locus in Quo.

11. PW1-Harith Ali Abdulkadir is the Plaintiff herein and a businessman residing at Mombasa. PW1 told the Court that the suit property is registered in the name of his father Ali Abdulkadir Abdalla who had on 23rd September 2013 donated to him a power of attorney by virtue of which he had instituted these proceedings.

12. PW1 testified that his father entered into a lease agreement with the Defendant for some 25 years with effect from 1st February 2005. The Lease stipulated that the rent payable would go up every five years and that all outstanding rents would be paid in advance. PW1 told the Court that the Defendant complied with those terms of the first five years but did not pay for the second term commencing 1st February 2010.

13. PW1 testified that the Defendant was required to pay Kshs 1.2 Million but he only paid Kshs 281,000/-. When demand letters were written to him, the Defendant never responded. PW1 told the Court that the Defendant had completely destroyed the farm contrary to the Lease Agreement. PW1 further told the Court that the Defendant kept crocodiles on the farm and that he allowed the perimeter wall to fall and one of the crocodiles escaped and bit someone.

14. Following the destruction, PW1 told the Court that they carried out a valuation to assess what was required to return the farm to its former condition. According to the Valuer, they required a sum of Kshs 5,774,000/- to do so. PW1 further told the Court that after they came to Court, the Defendant paid the outstanding rent for 2010-2015 but has never paid for the third term commencing February 2015. He denied that the Defendant had used any money for repairs or for maintenance of the suit property.

15. On cross examination, PW1 told the Court that the Power of Attorney mandated him to file suit and prosecute matters related to the suit property. It does not give him power to receive rent which should be paid to his father (the Lessor). PW1 told the Court that his father is alive and that he currently resides in Tanga, Tanzania.

16. PW1 further told the Court that he was not there when his father and the Defendant executed the Agreement. He denied that their case as filed in Court only sought rent from February 2010 to 2015. He told the Court he was paid Kshs 500,000/- when he filed the suit. However due to a miscalculation of the amount on their part, they were not paid Kshs 1,012,500/-.

17. PW1 denied that they miscalculated the amount because part of the money had been paid through an agent. He however conceded that a sum of Kshs 111,500/- which had earlier been paid through an agent was not accounted for. He further conceded that Kshs 150,000/- was paid on 5th October 2010 and that Kshs 168,000/- was paid on 3rd May 2011.

18. PW1 told the Court that their agent was one Said Ahmed and that it was the agent and not himself who was receiving money. He did not have any records from the agent showing the payments that had been made.

19. On being shown Clause 3(b) of the Lease Agreement, PW1 told the Court that it allowed suspension of rent when part of the suit property was destroyed. He however told the Court it was the Defendant's duty to keep the land in a good condition similar to when it was leased to him. He denied filing the suit because he wanted to sell the land and conceded that under the Agreement, the Defendant had the first option to buy the property.

20. PW2-George Dan Kihiru is a Valuer and an Estate Agent. He testified that he was given instructions by the Plaintiff to carry out a valuation of the renovations and repairs needed for the suit property. He did as instructed and prepared a Report dated 8th October 2013 putting the value at Kshs 5,774,000/-.

21. On cross-examination he told the Court his report differed from that of the Quantity Surveyor engaged by the Defendant. He told the Court he could not tell if the report by the Quantity Surveyor was correct as they belong to different professions. He however conceded that he used data from a Quantity Surveyor to prepare his Report.

22. PW2 told the Court that he visited the site on 15th September 2013 at a time when the boundary wall had collapsed. While he could tell how high the wall had been, he told the Court it was not easy to tell how long ago it had been built. He further admitted that in his Report he had recommended the re-roofing of an equipment store which had no roof when he visited the suit property. He relied on what the Plaintiff had told him in making some of the recommendations.

23. PW2 told the Court he did not know what had been handed over to the Defendant when he took over the land and testified that his Report was meant to help the place revert back to a dairy farm.

The Defence Case

24. On his part the Defendant called a total of four (4) witnesses in support of his case.

25. DW1- Joseph Kahindi Noti is an employee at the Defendant's Crocodile Farm. He testified that he was employed in 2008 and his duties entailed construction and carrying out repairs at the Farm. In this respect he told the Court they have constantly been forced to repair the perimeter wall as it had a weak foundation. Many times sections of the wall and the store would collapse and the same have to be repaired.

26. On cross-examination, DW1 told the Court his main work is to carry out construction but he can also engage in general duties. He denied that there was a wind mill when he was employed on the Farm. He further testified that they have had to re-build the wall severally. He further told the Court that the crocodile ponds were already there when he joined and no new ones had been added.

27. DW2- Juma Omar Said is also an employee of the Defendant at the Farm. He told the Court he was engaged as a Caretaker of the Farm in 2004. At that time, there was neither a windmill nor a borehole and none has been there ever since. At the back of the Farm the wall had crumbled and it was covered with iron sheets. He told the Court the place was old and the perimeter wall and the wall for the staff quarters would collapse every often. They always repaired the walls in time as the crocodiles could escape.

28. On cross-examination, DW2 testified that the crocodiles were brought into the Farm after he had been employed there. There were previously no ponds and DW2 and other workers dug them for purposes of rearing crocodiles.

29. DW3- Erastus Mwanjama Katani is a Quantity Surveyor. He testified that sometimes in April 2015, the Defendant instructed him to proceed to the suit property and to inspect the boundary wall and all other remedial works done therein. When he went to the land, some part of the wall had actually collapsed. He prepared a Bill of Quantities thereafter giving the figure as Kshs 4,353,933.40/.

30. On cross-examination, DW3 told the Court that it was possible age and normal wear and tear can cause weaknesses to the mortar that had been used in the construction to join the materials. The remedial measures had been done using better materials.

31. DW3 conceded that his Report does not give a breakdown of the prices. He however told the Court it gives the exact number of materials that would be used. The terms of his reference dealt with the boundary wall and not what was within the enclosure.

32. DW4- Daniel Thomas Haller is the Defendant herein. He testified that he entered into a Lease Agreement with Ali Abdulkadir for 25 years. Initially, DW4 used to pay rent directly to the Lessor but later on when he left for Tanzania, DW4 was asked to pay through an Advocate. DW4 told the Court that he was not being given receipts for the payments and that he did not know the Lessor's son who subsequently filed this suit on the basis of a power of attorney.

33. DW4 told the Court he was never shown the power of attorney before the suit was filed and that in any event, he came to realise it did not authorize the donee to collect rent. Initially, DW4 told the Court he paid to the Lessor himself. Later he paid rent to Said Abeid Advocates but after sometime, the Advocates told DW4 that they had no more instructions.

34. DW4 testified that he then tried to locate the Lessor through the caretaker of another farm which he knew the Lessor owned a kilometer away but he was not successful. Later on he saw a sign fixed outside the suit property advertising it for sale. The Lease Agreement had given him the option to be the first to buy the land and no one had offered him the land for sale.

35. DW4 told the Court that shortly thereafter he saw the claim herein. He denied damaging the wall and told the Court it has been continuously collapsing ever since he took up the land for crocodile farming. He would always repair the same. DW4 testified that he had maintained the suit property as best as he could and denied damaging anything within it.

36. DW4 told the Court it is the Lessor who had personally handed over the land to him in the absence of his son and denied that there was ever a windmill on the property. The premises were given to him to breed crocodiles and the Lease Agreement allowed him to modify the land into a crocodile farm. He urged the Court to give him compensation for the money used to build the wall stating it was not his duty under the Agreement.

37. On cross- examination, DW4 told the Court he paid rent directly to the Lessor and later on to his Advocates- Said Abedi Said. However on 20th November 2012 when he went to the Advocates, they told him they no longer represented the Lessor. Later on, DW4 received a letter from L.N Munyi Advocates asking for rent. DW4 did not pay as he was unaware that they represented the Lessor.

38. DW4 conceded that when the matter came to Court, there were some arrears. He testified however that he cleared those arrears when the Court ordered him to do so. He told the Court he tried to contact the Lessor about the repairs but he could not be reached in Tanzania where he had gone.

Analysis and Determination

39. I have perused and considered the pleadings filed by the parties, the oral testimonies of their witnesses and the evidence adduced at the trial. I have equally perused and considered the written submissions and authorities placed before me by the Learned Advocates for the parties- Mr. Wachira for the Plaintiff and Mr. Onyango for the Defendant.

40. By a Lease Agreement dated 14th December 2005, Ali Abdulkadir Abdalla (hereinafter the Lessor) and the Defendant herein entered into an agreement in which the Lessor agreed to lease all that parcel of land known as Kilifi/Mtwapa/1074 measuring approximately 2 Ha (the suit property) for use as a crocodile farm for a period of 25 years.

41. It is apparent that a couple of years after the 25-years period commenced, the Agreement ran into some headwinds. By this suit instituted on 8th November 2013, the Plaintiff who is a son of the Lessor and the Donee of a power of attorney from the Lessor dated 17th September 2013 instituted this suit against the Defendant seeking a declaration that the Defendant has breached Clauses 1(a) (vii) and 1 c, d, and e of the Lease Agreement. The Plaintiff as a result prays for damages for the alleged breach of contract, an order for eviction of the Defendant, payment of the sum of Kshs 1,406,250/- being the rent due for the five years commencing on 2nd February 2015 as well as a sum of Kshs 34,145/- as the Valuer's fees.

42. The Defendant on his part denies the contention by the Plaintiff that he has breached the contract between the parties. Instead, it is his case that he has kept his bargain but the Plaintiff and/or the Lessor have not done their part thereby causing him to incur a sum of Kshs 2,177,966.50/- to repair and re-do the perimeter wall of the suit premises.

43. While conceding that as at the commencement of this suit there was an outstanding balance of Kshs 693,750/- unpaid rent, the Defendant asserts that the failure to pay was wholly attributable to the Lessor who kept on changing the agents to whom he wanted the rent paid. It is otherwise the Defendant's case that he was at all times material ready and willing to pay the rent due and to keep the suit premises in a good, habitable and tenantable condition.

44. By way of his Counterclaim, the Defendant demands from the Plaintiff payment of the said sum of Kshs 2,177,966.50/- incurred as a result of the repairs and reconstructions that were neglected by the Plaintiff and or the Lessor. He also urges this Court to find that the Lessor has acted in breach of the Agreement and to direct a refund or deduction of all costs incurred towards the repairs and damages from ordinary wear and tear of the demised premises.

45. A perusal of the Lease Agreement executed between the Lessor and the Defendant reveals that the Defendant was to pay Kshs 12,000/- as rent per month for the first two years and Kshs 15,000/- as the monthly rent for the next three years. Thereafter, the rent would increase by 25% at the end of every five (5) years period until it ran the full course of 25 years.

46. Clauses 1 a (viii) and 1 (c) (d) and (e) which the Plaintiff accuses the Defendant of breaching provided that:

“The Lessee Hereby Agrees with the Lessor as follows:

1(a) (viii)

All the rents for each five (5) year term shall be paid in advance as shall be modified and agreed between both parties from time to time.

1(c)

To keep the Property and all additions thereto in as good and tenantable state of repair condition and decoration as that in which the same are at the commencement of the said term (reasonable wear and tear and damage by fire earthquake storm war civil disturbance or other causes beyond the Lessee's control only excepted).

1(d)

The Lessee shall seriously take all the necessary safety and security measures to ensure that there is no pilfering of goods and/or any other items from the Property.

1(e)

Other than in the construction development and setting up of a Crocodile Farm the Lessee is not to injure cut maim or otherwise in any way deface the property and or erect any fixtures therein which are not in line with a Crocodile Farm without the prior written consent of the Lessor and to keep all grounds forming part of the said Property in a clean and tidy condition and not to alter the established layout of the surrounding areas without the Lessor's consent in writing first had and obtained, which said consent shall not be un-reasonably withheld.”

47. In his testimony before the Court, the Plaintiff told the Court that the Defendant had been paying rent to his father through his father's agent by the name Said Abeid. The Plaintiff told the Court that he had no dispute with the first five-year term of the Lease Agreement. It was however his case that while the Defendant was required to pay to his father the sum of Kshs 1,293,750/- for the five years commencing on 1st February 2010, the Defendant had only paid a sum of Kshs 281,250/- thereby leaving an outstanding balance of Kshs 1,012,500/- as at the time he instituted this suit on 8th November 2013 aforesaid.

48. The Plaintiff further testified that when the Defendant took possession of the suit property, the property was a "running" farm with a working windmill, generator, cow sheds, beehives, equipment store, a concrete perimeter wall, water well and working sewage system together with "other equipment required to run such a farm properly".

49. The Plaintiff told the Court that contrary to the terms requiring the Defendant to keep the premises in a proper repair and tenantable condition, the Defendant had since neglected the suit property in such a manner that the property had depreciated in value and lost all beauty. The houses had collapsed and the walls were demolished. The windmill had fallen and the water well had collapsed. He told the Court that the Defendants had dug different crocodile pools and thereby destroyed the hitherto flat land which was being used for agricultural purposes.

50. To assess the extent of the damage, the Plaintiff had acquired the services of a Valuer (PW2) whose Report dated 8th October 2013 assessed the works required to as it were restore the suit property to its former condition at Kshs 5,774,000/-.

51. On cross-examination however the Plaintiff conceded that the power of attorney granted to him by his father did not authorize him to collect rent from the suit premises. The rent was instead payable, according to him, to an agent of his father by the name Said Abeid. The said agent was not called to give evidence and the Plaintiff told the Court that he did not have any record of the rent collections from the said agent.

52. That being the case, it was difficult to find a basis for the Plaintiff's claim that as at the time he filed this suit, the sum of Kshs 1,012,500/- was outstanding as rent due to his father. Indeed, even if there was any rent outstanding between 1st February 2010 and 22nd September 2013, the Plaintiff's power to collect the same was rather dubious. His power of attorney was executed on 23rd September 2013 and could not in my view have retrospective effect.

53. As it were, the Defendant on the other hand told the Court that he was initially paying the rent due to the Lessor in person before the Lessor instructed him to pay the rent to the said agent- Said Abeid. From the Plaintiff's own documents, produced at the trial herein, there was evidence of handwritten documents executed between the Lessor and the Defendant.

54. One of the documents is an undated acknowledgment note by the Lessor of rent from 1st October 2010 to 3rd June 2011. That sum was paid through a cheque No. 5059 for Kshs 168,750/- from Nile Crocodile Ltd, presumably the name under which the Defendant traded. That note is equally signed by the Defendant. The second handwritten document is dated 24th October 2011 and is an acknowledgment of another payment for rent for a sum of Kshs 112,500/- being rent for 1st July 2011 to 31st December 2011.

55. It was not contested by either party in this dispute that sometime after entering into the Lease Agreement, the Plaintiff moved away and settled in Tanzania and hence the basis of relying upon an agent to collect rent which was sometimes paid directly to himself. The confusion in the receipt of payments made can be seen from a letter produced by the Plaintiff dated 11th April 2011 authored by the agent Said Abeid Said in which he writes to the Defendant as follows:

"Re: Lease Agreement –Kilifi/Mtwapa APA/1074

We refer to the above lease and make reference specifically to Clause 1, viii).

In case the matter has escaped your attention we have noted that the lease rental are payable in advance. We shall therefore, be grateful to receive lease rentals in advance as scheduled in the lease agreement.

We do understand that part payments of the lease have been made and we therefore only demand the balance outstanding.

Payments should be made payable to Said Abeid & Company in favour of Ali Abdulkadir Abdalla....."

56. Arising from the foregoing, while it is possible that the Defendant took advantage of the situation to delay and possibly not pay some rent due, it was clear to me that the confusion on the payments had largely been brought about by the Lessor and his agents. While the Lease Agreement may have required the rent to be paid in advance, it was also evident that by the seventh year of the Lease, the parties had largely abandoned the practice and would pay and receive rent in arrears and or upon demand. A perusal of Clause 1(Vi) and (Vii) reveals that indeed the parties were free to discuss, and agree to modify from time to time when and how the rent was to be paid.

57. It was further clear that the Plaintiff's demand for rent in the sum of Kshs 1,012,500/- in the absence of any records from either his father's agent and or the father himself was unsupported and without proof. At the time of filing his Statement of Defence and Counterclaim, the Defendant conceded owing the sum of Kshs 693,750/- to the Lessor and in the absence of any proof of any other outstanding sum, this Court can only but accept that that was the sum due and owing from the Defendant at the time.

58. In regard to the condition of the premises, this Court notes further that there was no record or inventory taken of the condition of the suit property and all that was therein upon the execution of the Lease Agreement. The Plaintiff conceded that the was not there and the Defendant and his witnesses deny that the premises were in the condition which the Plaintiff claims it was in. This Court visited the locus in

quo and in particular noted the absence of a windmill, a generator and other items which the Plaintiff had claimed had been damaged by the Defendant. DW2- the Defendant's caretaker told the Court that in fact those items were not there when they took over the premises. In the absence of any evidence on the contrary, this Court was unable to dis believe him.

59. As it were, the Lease Agreement at Clause 1 (c) had exempted the Defendant from responsibility for damage arising from reasonable wear and tear. In a situation where the Lessor suspected damage being done to the property, Clause 1 (f) provided as follows:

“(f) (The Lessee shall) permit the Lessor and his agent/agents, on giving a minimum of three (3) days notice, at all reasonable times during the said term with or without workmen or others to enter upon and examine the condition of the Property and in case the same or any part thereof shall be found to be defective or out of repair and notice in writing of such defects or matters for which the Lessee is liable under the provision herein contained shall be given to the Lessee to make good the same in a proper manner to the satisfaction of the Lessor within a reasonable time (not exceeding one month) after such notice shall have been given as aforesaid.”

60. The Plaintiff did not place any evidence before me that he had sought entry into the premises and or that he had given any notice in writing to the Defendant about any defects that required repair as provided in the above Clause. He could not therefore be heard to complain about the alleged state of repair when he had failed to follow the provisions of the Agreement. It was indeed interesting to hear the Plaintiff complain that the Defendant had damaged the hitherto flat land by digging pools for use by the crocodiles. The Agreement that his father signed was for use of the land as a crocodile farm and it allowed the Defendant to modify the farm for those purposes. And while he claimed that a crocodile had escaped and bitten someone due to the damaged walls, he neither presented the name of the person allegedly bitten, nor any other evidence of the incident.

61. In the premises, I did not find any basis for the Plaintiff's suit as filed. The sum of Kshs 1,406,250/- demanded by the Plaintiff is for the rent due for the current term of five years commencing 2nd February 2015. The demand for the sum followed upon a consent order entered into by the Plaintiffs herein on 7th October 2014 in which the Plaintiff accepted the payment of the sum of Kshs 693,750/- which had been admitted as owing by the Defendant. The said consent executed in writing by the parties reads in part as follows:

“BY CONSENT:

1. In consideration of the sum of Kshs 693,750/- paid by the Defendant to the Plaintiffs Advocates vide Cheque No. 07738 dated June 16, 2014 being the balance of advance rent due and withheld by the Defendant for the lease term ending February 2, 2015, the Plaintiff's application dated April 9, 2014 be and is hereby marked as settled with no order as to costs.

2. The Defendant be granted leave to file and serve an Amended Defence within fifteen (15) days from the date of this consent.”

62. As I have stated before, the Plaintiff had filed this suit on 8th November 2013 seeking inter alia, payment of the sum of Kshs 1,012,500/- which he claimed to be the rent arrears due for the period February 2010 to February 2015. By the above Consent Order, the Plaintiff accepted the sum of Kshs 693,750/- admitted by the Defendant, as the sum due and owing for that period.

63. The sum of Kshs 1,406,250/- that the Plaintiff now demands in his amended pleadings is for the period February 2015 to February 2020. That sum was not due when the Plaintiff instituted this matter in November 2013. Having elected to institute these proceedings for determination of the lease and the eviction of the Defendant, I am unable to see how the Plaintiff could demand payment for a period when the lease could have been terminated if this Court were to grant his request in good time.

64. On his part, the Defendant Counterclaimed for a sum of Kshs 2,177,966.50/- which sum he told the Court he had used to undertake repairs and reconstruction of the perimeter wall and to take care of the ordinary wear and tear as a result of the failure on the part of the Lessor to undertake the same. In addition, the Defendant sought a further Kshs 2,177,966.50 which he claims is still needed to repair and re-do the remaining portions of the wall.

65. In support of this contention, the Defendant relied on a Bill of Quantities prepared by a Quantity Surveyor (DW3) dated April 2015. That Report does not however support the conclusion by the Defendant that he had spent a sum of Kshs 2,177,966.50/- and that he needs a similar figure to conclude the remaining repairs. The three- paragraph Report simply concludes as follows:

“Recommendations

Based on the foregoing observations and conclusions, we recommend demolition of the remaining portions of the old boundary walling and the reconstruction of the boundary walling in its entirety; and we have determined the costs of Kshs Four Million, Three Hundred and Fifty Thousand, Nine Hundred and Thirty Three and Forty Cents (Kshs 4,355,933.40) in accordance with the attached details.”

66. As it were, the attached details do not show anything that the Defendant had expended nor is there a breakdown of the prices or receipts for what is alleged to have been spent. I did not therefore find any evidence that the Defendant had spent the sum of Kshs 2,177,966.50/- as claimed and that a similar sum was required for further repairs. While it was clear to this Court during the visit to the locus in quo that some repairs had been done by the Defendant, no receipts were produced for the works and this Court is unable to make any award in that regard.

67. At any rate, while indeed it was the duty of the Lessor under Clause 2 (c) of the Agreement to keep and maintain the property and its surroundings in good and tenable repair and condition, Clause 3 (b) only allowed the Defendant to retain the rent where any part of the

property was destroyed or damaged and rendered unfit for use. The Defendant did not place any evidence before me of any notice given to the Lessor or his representative as required under Clause 6 of the Agreement to the effect that the premises or any sections thereof had been so destroyed or damaged.

68. In the premises, this Court neither found merit in the Plaintiff's case nor in the Defendant's Counterclaim. Accordingly, both the Plaintiff's suit and the Defendants Counterclaim are dismissed.

69. The Defendant shall however have the costs of the Plaintiff's suit.

Dated, signed and delivered at Malindi this 24th day of July, 2020.

J.O. OLOLA

JUDGE