



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC APPEAL NO. E061 OF 2023

X-PRESS SYSTEMS & SERVICES LTD.....
.....APPELLANT

-VERSUS-

KIFARU **ENTERPRISES**
LIMITED.....RESPONDENT

(Being an Appeal for stay of execution of the order of Hon Andrew Mumma issued on 6th December 2023 pending the hearing and determination of an intended appeal against the entire ruling and order of the Tribunal made on 6th December 2023 in BPRT No. E167 of 2023)

JUDGMENT

1. By a Memorandum of Appeal dated 15th December 2023, the Appellant appealed against the Ruling of Hon. Andrew Mumma (Chairman) delivered on 6th December 2023 in BPRT No. E167 of 2023 and set out six grounds of appeal.

BACKGROUND

2. The Appellant filed a Reference dated 13th February 2023, seeking the following orders: -

i. Spent.

ii. That the Landlord/Respondent, his agents namely Mbusera Auctioneers and any other agents, servants, employees, persons claiming under them or any persons by whichever name so described be restrained from attaching, carrying, taking away, selling, disposing goods or interfering with the Tenant's peaceful occupation of Go-down number 2 at Spectrum Business Park Baba Dogo Road Nairobi pending the hearing and determination of the Reference

iii. THAT the Proclamation Notice dated 2nd February 2023 be cancelled or otherwise revoked.

iv. THAT the Honourable Tribunal does order for experts to conduct a joint measurement of Go Down number 2 at Spectrum Business Park, Baba Dogo Road, Nairobi, to establish the square feet of the lettable area.

v. THAT the Honourable Court be pleased to make any such further orders and issue any other relief it deems just and equitable to grant in the interest of justice.

vi. THAT the costs of the application be provided for.

3. On 2nd August 2023, the Tribunal delivered its ruling in the following terms:-

a) The upshot is that the Tenant's application dated 13th February 2023 is allowed in terms of prayers c and e.

b) The tenant shall pay rent for July and August at the 6060 square feet undisputed before the end of August 2023.

c) The tenant is at liberty to vacate on or before the 30th of August 2023 or upon payment of the said two months rent whichever is earlier.

d) Tenant and Landlord experts Kalzman and Geoearth to conduct a joint measurement of the lettable area in 21 days in the presence of an expert from the Tribunal.

e) Tenant and Landlord at liberty to file additional documents thereafter within 7 days.

f) Reference shall proceed to full hearing on determination of arrears if any subject to valuation report filed.

g) Hearing on 18th September 2023.

h) No orders as to costs.

4. A report on the joint measurement conducted on the suit property on 22nd August 2023 indicates that the total lettable area was 575.49 square meters, rounded to 575.5 (6194 square feet).
5. Consequently, the Appellant filed an amended Reference dated 8th September 2023 seeking compensation for forcible detention in the rental premises from January 2023 to September 2023, a refund of the overcharged rent, and costs of the suit.

6. The Respondent filed a replying affidavit dated 13th September 2023 in opposition to the amended reference. He asserted that the relationship between the parties was governed by the lease agreement dated 29th July 2023.
7. In the proceedings before the lower court, the Appellant was the Tenant while the Respondent was the Landlord. The Reference was canvassed by way of written submissions. On 6th December 2023, the Tribunal delivered its ruling in the following terms:-

a) The Tenant Reference and application dated 8th September 2023 is hereby dismissed.

b) The Tenant shall pay all rent arrears and will continue to pay rent as per the lease agreement dated 29th July 2019 and at the same falls due failure to which, the landlord is at liberty to levy distress.

c) The landlord is at liberty to use a valid notice to terminate the relationship between the parties.

d) Each party shall bear their own costs.

8. Aggrieved by the decision, the Appellant appealed on the following grounds: -

i. The court Learned Magistrate erred in law and in fact by finding that the lease dated 29th July 2019 between the parties was based on monthly rent and not square feet.

- ii. The Learned Magistrate erred in law and in fact by failing to consider that the lease dated 29th July 2019 states that the area let out to the leasee was for Go-Down No.2, being 6,800 square feet, and the rent payable is based on that square footage.**
- iii. The learned Magistrate erred in law and in fact and misdirected himself by failing to consider the report on joint measurement of the lettable area under the said lease, which exercise was carried through an order of the Tribunal and was carried out on 22nd August 2023 by both parties, their respective experts, as well as experts from the Tribunal.**
- iv. The Learned Magistrate erred in law and in fact by failing to consider that the report prepared by experts indicated that the lettable area is 575.5 meters (6,194.52 square feet) and not 6,800 square feet.**
- v. The Learned Trial Magistrate erred in law and in fact and misdirected himself when he failed to establish that the area of 6,800 square feet in the lease was the product of fraudulent misrepresentation and deception by the Respondent.**
- vi. The Learned Magistrate erred in law and in fact by failing to consider that the Appellant has been making overpayments for 605.48 square feet per**

month from the inception of the Lease in July 2019, and the Respondent acceded to the same, as a result of which the Appellant has made overpayments to the tune of Kshs 1,166,452.24/=.

vii. The Learned Magistrate erred in law and in fact by failing to consider the Appellants submissions to the effect that the Respondent had deliberately misrepresented to the Appellant the true lettable area and that the Respondent had employed predatory tendencies to harass the Appellant to unlawfully and unfairly pay rent from January 2023 up to the date of the expiry of the lease on 31st My 2024.

viii. The Learned Magistrate's appreciation of the law of contract was fatally flawed and contrary to the facts and the law placed before him.

ix. The Learned Magistrate erred in law and in fact by failing to give reasons for the dismissal of the amended reference, which was supported by evidence and the law.

x. The entire ruling and orders of the Learned Magistrate made on 6th December 2023, and the entire reasoning was fatally flawed and/or erroneous in law.

9. The Appellant prays for:

a. THAT the appeal herein be allowed.

- b. THAT the Ruling and Orders made on 6th December 2023 in BPRT No. 1 of 2023 be vacated and/or set aside, and the same be substituted with the orders herein.***
- c. That the Appellant be granted a refund for the overpayment of rent in the amount of Kshs. 1,166462.24/=.***
- d. That the Appellant be granted a refund of any payments of rent paid for Go-down number 2, Spectrum Business Park, Baba Dogo, Nairobi, for January 2023 until the determination of the appeal.***
- e. That the Appellant be granted compensation for forceful detention on the premises from January 2021 to 31st May 2024.***
- f. That a permanent injunction be issued restraining the Respondent from distressing for rent against the Appellant.***
- g. That a permanent injunction be issued restraining the Respondent from preventing the Appellant from vacating the rental premises.***
- h. That the costs of this Appeal and the costs of the suit at the Tribunal be borne by the Respondent.***

10. The Appeal was canvassed by way of written submissions.

THE APPELLANT'S SUBMISSIONS.

11. The Appellant filed its submissions dated 13th March 2025.

12. On behalf of the Appellant, Counsel outlined the following issues for the court's determination:-
- a) *Whether the Honourable Tribunal erred in finding that the Respondent's misrepresentation as to the true size of the leasable area had no bearing on the monthly rent payable?*
 - b) *Whether the Tribunal erred in finding that the Appellant was not entitled to a refund for overcharged rent paid due to the Respondent's breach of contract?*
 - c) *Whether the Tribunal erred in finding that the Appellant was not entitled to compensation for forceful detention in the rental premises from January 2023 to 31st May 2024.*
13. Regarding the first issue, Counsel submitted that it was undisputed that the Tribunal determined there was a misrepresentation of a material fact regarding the size of the property before the parties signed the lease agreement. Counsel argued that if the Respondent had disclosed the actual size of the premises, the Appellant would not have agreed to the rent terms specified in the lease.
14. It was argued that although the Tribunal found there was misrepresentation, it erred in law and fact by concluding that the rent payable was for the entire suit premises rather than being calculated on a per-square-foot basis.
15. It was further argued that the Tribunal erred in finding that the misrepresentation about the lettable area would only prejudice the tenant if the landlord had charged based on square footage, which does not apply in this case. Additionally, the Tribunal erred in concluding that the lettable area is

irrelevant, given that the rent agreed upon is independent of the lettable space; specifically, the rent is not calculated per square foot.

16. Counsel argued that the Tribunal misinterpreted the lease because Clause 1 clearly states that the premises are 6800 square feet based on the specified rent. It was contended that if the parties intended the rent to cover the entire premises, the square footage would not have been explicitly mentioned in the lease.
17. Counsel further argued that the inaccurate description of the property's size caused the Appellant to pay higher rent, resulting in financial harm. It was claimed that if the Appellant had been informed of the actual size, a fair and equitable rental agreement would have been negotiated.
18. Counsel argued that the Respondent's misrepresentation was fraudulent because it caused the Appellant to enter into the agreement. It was also noted that the Respondent did not dispute the claim of misleading the Appellant. In explaining the standards for fraudulent misrepresentation, the case of **Sachin Shaha v Jagat Mahendra Kumar Shah & another (2020) ECLR** was referenced. Counsel asserted that fraudulent misrepresentation, as in this case, is a valid ground to rescind a contract. To support this argument, reliance was placed on the cases of **Transport Workers Union v Consolbase Ltd (2015) ECLR**, **African Cotton Industries Ltd v Rural Development Services Ltd (2021) ECLR**, and **Sakunda v**

Pyrotechnics Company Limited (Civil Appeal 71 of 2021)
(2022) KEHC 10612.

19. Counsel argued that the Respondent's misrepresentation justified the Appellant's right to rescind the lease. It was also contended that the Tribunal erred in assuming the misrepresentation was insignificant to the rent calculation. Counsel urged the court to set aside the Tribunal's decision and to find that the misrepresentation was a breach of contract.
20. Regarding the second issue, Counsel submitted that the Tribunal erred in concluding that it should not order the refund of Kshs 1.166,452/=, asserting that such a decision would interfere with the lease agreement between the parties. Citing Black's Law Dictionary, Counsel maintained that there are valid grounds to rescind the lease and award damages to the Appellant. It was submitted that the doctrine of freedom of contract is not absolute, as it is limited by legality, public policy, and fairness. To support this argument, Counsel relied on the case of **Rodgers Mwema Nzioka v The Attorney General & Others, Nairobi HCCC No. 613 of 2006.**
21. Counsel further argued that Section 12(10) (b) of the Landlord and Tenant (Shops, Hotels, and Catering Establishments) grants the Tribunal the authority to assess rent based on relevant circumstances. Counsel supported this argument by citing the case of **Karibu House (19173) Ltd v Travel Bureau Ltd (1977) eKLR.**

22. Counsel contended that the Respondent should not be permitted to charge rent for a non-existent space, and any payments above that amount should be regarded as overpayments.
23. The Appellant contended that it determined the rent for 6192 square feet of lettable space based on a joint measurement report and submitted this calculation for the Tribunal's review, which was ultimately not considered. It was also argued that the Respondent did not challenge the Appellant's calculation, which indicated an overpayment of Kshs 1.166.242.24/= during the lease period. Counsel asserts that the Appellant deserves a refund of this amount, as it was paid for space that did not exist and was falsely included in the lease by the Respondent.
24. Counsel submitted that the Appellant was threatened with wrongful attachment and sale of its properties if it vacated the premises.
25. It was argued that the Appellant's decision to continue occupying the premises and paying rent was driven by threats of attachment made by the Respondent. Consequently, the Respondent should compensate the Appellant for any rent received due to its coercive and manipulative actions. To support this claim, reference was made to the case of **Madhupaper International Ltd & another v Kenya Commercial Bank Ltd & 2 others (2003) Eklr**, where the court stated as follows:

‘....the threat to sell constitutes duress because the plaintiff is typically compelled either to pay the money or allow his property to be sold. It is evident that duress of goods is closely related to economic duress or business coercion, among other factors.’

26. Counsel argued that the Respondent should not benefit from its coercive and deceptive conduct. To support this point, reliance was placed on the case of **L.U. International Ltd. versus Kenya National Trading Corporation & others (1995) eKLR.**

27. In conclusion, Counsel urged the court to allow the appeal as prayed.

THE RESPONDENTS' SUBMISSIONS

28. The Respondent filed its submissions dated 2nd April 2025.

29. On behalf of the Respondent, Counsel outlined the following issues for the court's determination:

a) *Whether the Tribunal erred in its finding that the Appellant is not entitled to a refund of the alleged overcharged rent?*

b) *Whether the Tribunal erred in its finding that the Appellant was not entitled to compensation for being forcefully detained in the rental premises from January 2019 to September 2023.*

30. Regarding the first issue, Counsel argued that the Appellant's claims of material non-disclosure and misrepresentation by the Respondent lack evidence, as it had previously requested the

godown layout plan to verify the leasable area. Additionally, Counsel maintained that the Appellant had an opportunity to inquire about the lettable space after receiving the layout plan, which was before signing the lease agreement.

31. Counsel further argued that there was clear mischief, as the issue of the lettable space was introduced four years into the lease term and coincided with the Respondent's demand for deferred rent of Kshs 1,150,448/=.
32. Counsel maintained that the issue of lettable space is an afterthought aimed at defeating the Respondent's claim for deferred rent. It was contended that the Appellant is bound by the terms of the lease agreement, because it did not object prior to signing the lease. To support this argument, reliance was placed on the case of **National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & Another Civil Appeal No. 95 of 1999 (2001) KLR**, where the court held that:

“A court of law cannot rewrite a contract between the parties once it is ascertained that the parties' intention was to establish a valid contract. The parties are bound by the contractual terms unless coercion, fraud, or undue influence are pleaded and proven.”

Further reference was made to the cases of **Fina Bank Ltd v Spares and Industrie Ltd (200) 1 EA 52** and **Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd (2017) eKLR**.

It was contended that the Tribunal lacked jurisdiction to vary the lease agreement between the parties since the Appellant did not allege any coercion, fraud, or undue influence.

33. Counsel also contended that the Tribunal correctly determined that the premises were leased as a whole, because Clause 1 of the lease agreement did not specify that rent was based on square footage.
34. Regarding the second issue, Counsel stated that, contrary to claims of forceful detention, the lease was valid for five years and three months. Counsel also pointed out that, given the challenges the Appellant faced during the COVID-19 pandemic, the Respondent offered to waive the 5% rent increase starting from March 2020, in accordance with the lease agreement.
35. In a letter dated 2nd June 2020, the Respondent proposed to permit the Appellant to vacate the demised premises upon settling the outstanding rent, without facing any legal consequences. This offer aimed to prevent additional rent from accruing and to counter the Appellant's claim that it was forcibly detained from January 2019 to September 2023.
36. It was submitted that the Appellant filed a notice of motion and a reference, both dated 3rd February 2023, seeking to restrain the landlord from interfering with its peaceful occupation of the leased premises.
37. That on 15th February 2023, the court issued an injunction pending inter partes hearing. On 2nd August 2023, the Appellant sought leave to vacate the premises, and the Tribunal ordered that it was at liberty to vacate on or before

30th August 2023 or upon payment of the said 2 months' rent, whichever comes first. Based on the foregoing, Counsel submitted that the Appellant allegations are misleading as it elected to remain on the suit premises.

38. It was submitted that the lease agreement between the parties was binding as it was neither nullified nor declared invalid.

39. Furthermore, it was contended that the Appellant failed to submit any evidence before the Tribunal to substantiate its allegation of forceful detention. In support of this assertion, reference was made to the case of **Mohammed Guyo v Richard Mwilaria & another.**

ANALYSIS AND DETERMINATION

40. The principles which guide a first Appellate Court were discussed in the case of **Selle & Another vs Associated Motor Boat Company and Others (1968) 1 EA 123**, where the Court of Appeal set out the duty of Appellate Courts as follows;

“An appeal to this court from a trial court by the High Court is by way of a retrial, and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate itself, and derive its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to

follow the trial judge's finding of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanour of a witness is inconsistent with the evidence in the case generally.

41. The ten grounds of appeal can be condensed into two grounds, namely:-

a. Whether the lease agreement was based on a monthly rent or a square foot.

b. Whether the learned chairperson analyzed the evidence on record in arriving at his decision.

42. The Appellant contended that the Learned Trial Magistrate erred by finding that the lease dated 29th July 2019 was based on monthly rent and not square feet. It was further contended that the leased area was Go Down No. 2, measuring 6,800 square feet, and that the rent payable was based on the square footage.

43. The Appellant asserted that a joint report on measuring the lettable area showed it was 575.5 (6194.52 square feet) and not 6800 as stated in the lease. Based on the foregoing, the Appellant argued that the Respondent had deliberately misrepresented the actual lettable area, resulting in a loss.

44. The Respondent, on the other hand, maintained that the Appellant had the opportunity to inquire about the lettable area before signing the lease since it had requested the go

down layout plan. According to the Respondent, the issue of the lettable space was mischievous because it was introduced after it demanded for deferred rent.

45. It is not in dispute that the parties herein entered into a lease agreement dated 29th July 2019. Clause 1 of the lease agreement dated 27th July 2019 states as follows:-

In consideration of the rent hereinafter reserved and of the covenants and agreements by the Lessee hereinafter contained, the LESSOR HEREBY LEASES unto the Lessee ALL THAT premises situate on the said building being Go Down No. 2, measuring 6800 square feet (which said premises are hereinafter called the demised premises”) TOGETHER with the Lessor’s fixtures as at present installed therein and together with right to the Lessee and all persons authorized by it in common with the Lessor and other Lessee and occupiers of the building and all persons duly authorized by it or them thereon on foot or with motor vehicles or lorries or other means of transport to pass on and across the remaining land for the purpose of ingress to and egress from the Building and for the purpose of transporting of goods thereto and there from AND TOGETHER ALSO in common with all other persons entitled thereto and as far as the Lessor has the power to grant the same with the free passage and running of water, soil and electricity from and to the said premises through the drain pipes wires cables and metres in or under the building and the adjoining or adjacent property BUT EXCEPTING AND RESERVING unto the Lessor and all other persons entitle thereto the free passage and running of water soil and electricity form the adjoining property at reasonable times for the

purpose of inspecting altering, adding to or repairing the same TO BE HELD by the LESSEE for a term of five(5) years and three(3) months from the first day of March Two Thousand Nineteen (hereinafter referred to as “the said term”) (subject nevertheless to determination as hereinafter provided)YIELDING AND PAYING thereof and thereout during the said term the monthly rents hereunder which rents shall increase by 5% every year set out payable without any deduction whatsoever monthly in advance before the fifth (5th) day of every due month directly to the Lessor in the manner hereinafter mentioned that is to say:-

**From 1st March 2019 to 30th April 2020-
Kshs.204,000/= per month plus VAT**

**From 1st March 2020 to 30th April 2021-
Kshs.214.200/=per month plus VAT**

**From 1st March 2021 to 30th April 2022-
Kshs.224,910/=per month plus VAT**

**From 1st March 2022 to 30th April 2023-
Kshs.236,156/=per month plus VAT**

**From 1st March 2023 to 30th April 2024-
kshs.247,964/= per month plus VAT**

**From 1st March 2024 to 31ST May 2024-
Kshs.260,362/= per month plus VAT**

And the first of such payments being rent for the first month shall be paid on or before execution hereon to the Lessor.

As agreed above the Lesser shall pay such rents without any deductions whatsoever during the term hereby granted SUBJECT to the following covenants condition stipulations and agreements.

The Appellant asserted that the Respondent deliberately misrepresented the actual lettable area and, as a result, he had made overpayments to the tune of Kshs. 1,166,452.24/= from the inception of the lease, which the learned Magistrate failed to consider. The Appellant faulted the learned Magistrate for failing to consider the report, which indicated the actual lettable area. It is not in dispute that the lettable area was 575.5 meters (6,194.52 square feet).

46. Although the lease agreement states that the area is 6800 square feet, it is clear that billing was based on the rent rather than the square footage. The agreed rent was not tied to the lettable area but was determined by the rent amount.
47. The judgment indicates that the learned Chairperson reviewed the joint inspection report but deemed it immaterial since the rent was not calculated based on square footage.
48. It is trite that a court cannot rewrite a contract between the parties. The lease agreement clearly states that the rent was payable for the entire premises, not per square foot.
49. Based on the foregoing, it is my considered view that the learned chairperson did not err in finding that the rent was not based on square footage.
50. The Appellant asserted that its decision to continue occupying the suit property was driven by threats of attachment and sale made by the Respondent. In this regard, the Appellant sought compensation for forceful detention from January 2021 to 31st May, 2024.

51. The record shows that by the ruling delivered on 2nd August 2023, the Appellant was allowed to vacate on or before the 30th August 2023 or upon payment of two months' rent, whichever came first. Pursuant to his motion and reference dated 3rd February 2023, the Appellant sought an injunction restraining the Respondent from interfering with its peaceful occupation of the leased premises. The order was granted vide the ruling delivered on 2nd August 2023. Based on the foregoing, I find that the Appellant has not demonstrated that he was forcibly detained in the suit premises.
52. In light of the foregoing, I find that the learned Chairperson analysed the evidence on record in arriving at his decision.
53. In the end, I find that the Appeal is not merited, and the same is hereby dismissed with costs.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 31ST DAY OF OCTOBER, 2025.

.....
HON. T. MURIGI
JUDGE

IN THE PRESENCE OF:
Mwenda for the Appellant
Ahmed – court assistant