REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. E109 OF 2023

THAARA LIMITED ..... PLAINTIFF

VERSUS

VIBE NAIROBI LIMITED ..... DEFENDANT

JUDGEMENT

1. By Plaint dated 10 March 2023, the Plaintiff instituted these proceedings seeking the following reliefs:
   (i) Judgement against the Defendant for Kshs 69,589,059.79;
   (ii) Interest on (i) above at the rate of 25% per annum from February 2021 until payment in full;
   (iii) Costs of this suit.

2. The dispute relates to outstanding rental arrears, utilities and service charge arising from a commercial tenancy agreement. The undisputed facts are that parties entered into a commercial lease agreement which commenced on 1 July 2016. The term was intended to be six years. The tenancy was determined in February 2021.

3. The Defendant filed a Statement of Defence dated 25 April 2023, denying the claim in its entirety. The gravamen of the defence is that the written Lease Agreement between the parties was by mutual agreement and conduct, varied or novated. The Defendant contends that the fixed rent obligation was substituted with an arrangement where the rent would be payable as a

percentage of the Defendant's business turnover. In the alternative, the Defendant pleads that the Plaintiff, by its conduct, waived its right to claim the contractual rent or is otherwise estopped from enforcing strict terms of the original Lease Agreement.

Brief History

4. By a Lease Agreement executed on 31 January 2017, the Plaintiff demised unto the Defendant the premises known as Units L126 and L127 on the lower ground floor of the Rosslyn Riviera Mall ("demised premises"). The lease was for a fixed term of six years. Part B of the First Schedule to the Lease stipulated a graduated monthly rent, commending at Kshs 861,222.80 plus VAT in the first year and escalating annually to Kshs 1,207,909.52 plus VAT in the sixth year. The rent commencement date was specified as 1 October 2016. The lease also provided for the payment of service charge and promotion charge. Clause 3.2 and Clause 1.1.29 provided for interest on any arrears at a rate of 25%.

5. It is not in dispute that from 2018 or thereabouts, the Defendant began to experience financial difficulties. PW1 testified that the Defendant was non-performing even before the COVID-19 pandemic. DW1 attributed these difficulties to a considerable reduction in human traffic at the Rosslyn Riviera Mall, which adversely affected the revenue of its restaurant business. This commercial distress precipitated a series of discussions between the parties, primarily conducted through the Plaintiff's appointed property agent, Knight Frank, regarding a potential restructuring of the rent obligations.

6. The tenancy ultimately came to an end in February 2021 when the Defendant vacated the demised premises. PW1 testified that the Defendant had already closed its business and requested to terminate the tenancy, and the Plaintiff had no choice. Following the Defendant's vacation, the Plaintiff, through its Advocates, issued a demand letter dated 16 October 2021 for the sum now claimed.

7. The Plaintiff's claim is supported by a bundle of documents containing the Lease Agreement, numerous invoices, debit notes, and a detailed statement of accounts running from July 2017 to February 2021, which culminated in the claimed sum.

Plaintiff's Case

8. PW1, Peter Nderitu Gethi, the Managing Director relied on his witness statements and documents. His evidence was anchored on the express terms of the Lease. He confirmed that a deposit of Kshs 3.2 million, made pursuant to Clause 4.6 of the Lease, is still held and credit will be given for this amount. He maintained that tax invoices and debit notes were conveyed to the Defendant by email and physical copies, dispatched by Knight Frank, and that no complaint of non-receipt was made by the Defendant.

9. PW1 maintained that despite discussions about a turnover-based rent, these negotiations never materialised into an agreement to vary the terms of the lease. He produced email correspondence from July and September 2018 which, in his view, demonstrated that the parties never reached a consensus, particularly on the treatment of historical arrears.

10. In cross examination, PW1 made several notable concessions. He confirmed that the Defendant requested to terminate the tenancy because it was unable to pay rent and that the Plaintiff allowed the Defendant to leave because the business was no longer running. He could not recall whether any notice of forfeiture under Clause 6 was ever issued to the Defendant. He also confirmed that the Plaintiff did not at any point levy distress for rent, a remedy available under the law.

11. The Plaintiff submitted that the principle of sanctity of contract must be upheld. It argued that the email of 26 April 2018, relied upon by the Defendant, was merely a proposal that was never accepted in writing. The

Plaintiff contended that in the absence of a formal, written variation, the original terms of the Lease remained in full force and effect. It submitted that there was no novation of the contract and that the Defendant had failed to discharge its burden of proving otherwise. The Plaintiff urged the Court to enter judgement as prayed, subject to giving credit for the security deposit paid by the Defendant.

The Defendant's Case

12. DW1, Joash Okombo Ochieng, Head of Finance, adopted his statements and maintained that the Defendant disputed the amount claimed. While DW1 conceded that the Lease contained a Clause (1.1.29) setting the interest rate at 25% per annum, and Clause 3.2 regarding arrears, he disputed the sum of Kshs 65 million claimed by the Plaintiff. He testified that following meeting with Knight Frank, it was agreed that rent would be paid based on 12% of the Defendant's net turnover, in lieu of the contractual rent, from April 2018. He stated that this arrangement was to be in force until December 2018, after which the parties would discuss the way forward.

13. DW1 asserted that Knight Frank had access to the Defendant's sales system to verify the turnover figures. He further testified that from April 2018 until the filing of this suit, neither the Plaintiff nor its agent issued any invoices based on the original Lease, which he argued was evidence of the mutual agreement to vary the terms.

14. In cross examination, DW1 revealed significant inconsistencies. When asked to point to the document evidencing the agreement to vary the rent, DW1 stated, "*To the extent of my knowledge, the agreement is the email*." However, when pressed, he conceded that the email was a proposal from the landlord and that the Defendant did not expressly agree to it. He confirmed that there was no email to show that the Defendant disagreed with it, thus suggesting that acceptance was to be inferred from silence. He further admitted that there was no express agreement to vary the rent, but that

meetings had been held to discuss the issue. DW1 claimed that the Defendant never received invoices for rent, a position that is difficult to reconcile with the voluminous bundle of invoices produced by the Plaintiff. DW1 stated that based on the turnover model, the Defendant owed approximately Kshs 4.4 million in rent arrears.

15. The Defendant submitted that the parties had, by their conduct, novated the original Lease Agreement. It was argued that the email from Knight Frank referring to a 'new agreement' was corroborative evidence of this variation. The Defendant placed significant weight on the Plaintiff's conduct, namely, its failure to distrain for rent or issue any default notices, and its act of allowing the Defendant to surrender the lease before its expiry. The Defendant argued that this conduct pointed to the indisputable fact that the parties had a mutual agreement that revised the written terms of the lease. Reliance was placed on the case of ***James G.K. Njoroge t/a Baraka Tools & Hardware v Kenya Cement Marketing Co. Ltd & two others*** **eKLR** in submitting that novation can be implied from the conduct of the parties and that the Plaintiff is now estopped from reneging on the varied agreement.

Analysis & Determination

16. Having considered the pleadings, the evidence and the submissions of the parties, the following issues lend themselves for determination:
    (i) Whether the Lease Agreement dated 31 January 2017 was varied by a subsequent agreement or novated;
    (ii) Whether the Plaintiff successfully proved the claimed arrears of KES 69,589,059.7;
    (iii) Whether the Plaintiff is entitled to interest at the contractual rate of 25% per annum;
    (iv) Who is liable to pay costs?

Rent Variation

17. It is trite law that a variation of an existing contract must satisfy the requirement of a valid agreement, requiring offer, acceptance and consideration, unless the contract specifically dictates otherwise. The starting point of any contractual dispute is the contract itself. The principle of sanctity of contract, encapsulated in *maxim pacta sunt servanda,* is a cornerstone of contract law in Kenya. Courts do no exist to rewrite contracts for parties. Their role is to enforce the bargain struck by the parties. As the Court of Appeal held in ***NBK Ltd -vs- Pipeplastic Samkolit (K) Ltd & Another eKLR***, a court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved.

18. The burden of proving that a written contract was subsequently varied lies squarely on the party alleging such variation. In this instance, the burden lay on the Defendant who alleges that the fixed rent obligation under the Lease was varied to a turnover-based rent. The Defendant relies on an email proposal from the Plaintiff's agent in April 2018 and the subsequent conduct of the parties. However, the evidence falls short of establishing a concluded agreement to vary. The email correspondence produced by the Plaintiff are particularly telling. In an email dated 10 July 2018, the Plaintiff's agent, Ashmi Shah, wrote to the Defendant's director, Perrie Viljoen, stating that the outstanding debt of Kshs 18,163,069.06 needs to be paid over and over the new agreement in place from 1 February 2018. Mr. Vijloen's response on 11 July 2018 was unequivocal: "*That was not our understanding at all. Ours is that we are not paying rent, but were paying service charge and services. We would then start paying rent on 1 February on a % of turnover.*" This exchange reveals a fundamental disagreement on a cardinal term: the treatment of accrued arrears. It is clear that there was no meeting of minds.

19. This lack of consensus is further confirmed by PW1, who upon being forwarded the exchange, responded on the same day stating, "*I'm not sure what he's referring to. Rent has always been payable up to the point we*

agree on the turnover rent application for 2018... We simply cannot continue operating in limbo." This is a clear statement from the Plaintiff that as of July 2018, no new agreement had been concluded. The Defendant's subsequent email of 5 September 2018 which sets out a new set of proposals including a "write off all historical rent from 1 October 2017" further confirms that the parties were still in the realm of negotiation, not performance of a concluded variation. One does not make fresh proposals if a binding agreement is already in place. The testimony of DW1 in this regard was evasive and ultimately self-defeating when he conceded that there was no express agreement.

20. Furthermore, the Lease itself contains Clause 7.15, which states:

> *This Lease constitutes the entire agreement between the parties in respect of the matter dealt with herein and supersedes cancels and nullifies any previous agreement or arrangement between the parties in relation to such matters*.

21. Such clauses are intended to promote certainty and prevent a party from threshing the undergrowth for some chance remark during negotiations to found a claim, as aptly put in the English case of ***Inntrepreneur Pub Co. vs East Crown Ltd., [2000] 2 Lloyds Rep 611*.** While such clauses do not preclude a subsequent variation, they reinforce the principle that any alleged variation must be clearly and unequivocally proven. The evidence herein indicates inconclusive negotiations.

22. The Defendant's alternative plea of novation also fails. Novation is the rescission of one contract and its replacement by another. It requires the consent of all parties to extinguish the old contract and create a new one. As established, there was no consensus to extinguish the original Lease and substitute it with a new turnover-rent agreement.

23. It is, therefore, the finding of this Court that there was no variation or novation. The original Lease dated 31 January 2017 remained the operative instrument governing the relationship between the parties.

Claim for Arrears

24. The Defendant's second line of defence is founded in equity. It is argued that the Plaintiff, by its conduct, is estopped from claiming full contractual rent. Promissory estoppel is an equitable doctrine that may be invoked to prevent a party from resiling from a promise or representation that they would not enforce their strict legal rights, where the other party has relied on that representation to their detriment or has altered their position. It is a shield, not a sword, and its purpose is to avoid injustice.

25. The doctrine's modern formulation stems for the celebrated English case of ***Central London Property Trust Ltd vs High Trees House Ltd*** **KB 130**, where Denning J (as he then was) held that a promise intended to be binding, intended to be acted on, and in fact acted on, is binding so far as its terms properly apply. This principle has been received and applied by Kenyan courts. In ***Serah Njeri Mwobi vs John Kimani Njoroge [2013] KECA 501 (KLR)***, the Court of Appeal affirmed that for estoppel to apply, the representation must be clear and reliable. In ***Mjengo Limited v Menengai Oil Refineries Limited [2025] KECA 85 (KLR),*** the Court of Appeal reiterated the elements: (i) a clear and unequivocal promise of representation; (ii) reliance by the other party, and (iii) that it would be inequitable to allow the promisor to go back on the promise. The Court stated thus:

> *"Therefore, where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by*

the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective of whether there is any preexisting relationship between the parties or not."

26. In this instance, there was no express promise by the Plaintiff to forego the contractual rent permanently. However, a representation can be made by conduct. The Plaintiff was party to ongoing negotiations from at least April 2018. During this period, which stretched for nearly three years until the Defendant vacated in February 2021, the Plaintiff did not demand the contractual rent, did not issue any statutory notices for breach, and did not exercise its right to levy distress for rent or to forfeit the lease under Clause 6. A landlord to whom a debt of millions of shillings is owed, and who possesses potent legal remedies to secure its position, does not remain silent and inactive for such a prolonged period out of mere inadvertence. The only reasonable inference to be drawn from this sustained inaction, in the context of active negotiations for an alternative rent structure, is that the Plaintiff was representing to the Defendant that it was suspending its strict legal rights under the Lease pending the outcome of these negotiations.

27. The Defendant clearly acted on this representation. It remained in occupation of the Demised Premises and continued to trade, albeit with difficulty, and continued to engage in negotiations. Had the Plaintiff, in mid-2018, issued a demand for the then-outstanding arrears and a notice of forfeiture, the Defendant would have been forced to either pay up or vacate. By relying on the Plaintiff's forbearance, the Defendant altered its position. It would be now inequitable and unconscionable to permit the Plaintiff to go back on that representation and claim the full contractual rent for the entire period of its silence.

28. This brings me to the interplay between Clause 7.15 and the doctrine of estoppel. An entire agreement clause operates to define the scope of the contractual agreement, precluding claims for collateral warranties or terms based on pre-contractual representations. However, promissory estoppel is not a rule of contractual interpretation; it is a rule of equity that operates outside the contract. it does not create a new cause of action or a new contract. Rather, it prevents a party from unconscionably enforcing a right they already have under the existing contract. therefore, while Clause 7.15 is fatal to the Defendant's argument on variation, it does not oust the court's equitable jurisdiction to apply the doctrine of promissory estoppel to the parties' post-contractual conduct. Even in jurisdictions that have strongly affirmed "no oral modification" clauses, such as the UK Supreme Court in ***Rock Advertising Limited vs MWB Business Exchange Centres Limited*** **UKSC 24**, the possibility of an estoppel arising from subsequent conduct was left open, albeit with a high threshold.

29. I find that the Plaintiff, by its conduct in engaging in protracted negotiations while refraining from enforcing its legal rights for a period of almost 3 years, made a clear representation that it would not insist on the strict contractual rent. The Defendant relied on this representation by remaining in occupation. It would be inequitable to allow the Plaintiff to now claim the full arrears for that period. The estoppel, however, operates to suspend, not extinguish, the Plaintiff's rights. Since the underlying negotiations were for a turnover-based rent, it is equitable that the Defendant should pay a sum representing a fair rent for that period.

30. In view of the foregoing, this Court must now determine the quantum of the Defendant's liability, which I will categorise into two: Pre-estoppel period and estoppel period.

31. The pre-estoppel period runs from October 2016 to March 2018 since the negotiations commenced around April 2018. Therefore, all rent, service

charge, promotion charges that accrued up to 31 March 2018 under the terms of the Lease are due and payable. The Plaintiff's statement of accounts shall form the basis of this calculation.

32. The estoppel period, April 2018 to February 2021, is the period during which the contractual rent was suspended. Pursuant to DW1's testimony, the rent was based on 12% turnover proposal, and the approximate rent owed for that period was Kshs 4.4 million. This constitutes an admission against interest and present the only alternative valuation of rent presented to the Court. In the circumstances, I find it equitable to hold the Defendant to this figure as rent payable for this period.

33. The discussions did not primarily concern service charge and utilities, which are payments for services rendered. The Defendant's email of 11 July 2018 stated that their understanding was that they were paying service charge and services. Therefore, the contractual service charge, promotion charge and utilities as invoiced for this period remain due and payable.

34. Therefore, the total sum due to the Plaintiff shall be calculated as follows:

    (i) The total outstanding balance as per the Plaintiff's Statement of Account as at 31 March 2018;

    (ii) PLUS all invoiced service charges, promotion charges and utilities from 1 April 2018 to 28 February 2021;

    (iii) PLUS the sum of Kshs 4,400,000/- as rent for the period 1 April 2018 to 28 February 2021;

    (iv) LESS any and all payments made by the Defendant from 1 April 2018;

    (v) LESS the security deposit of Kshs 3,267,264.20 held by the Plaintiff.

35. The parties shall, within 30 days of the date of this judgement, agree on the final figure based on the above formula, drawing from the Statement of Account and records of payments. In default of agreement, the matter shall be referred to the Deputy Registrar to appoint a certified accountant at the expense of the parties.

Interest Chargeable

36. With respect to the interest, the Plaintiff claims interest at the rate of 25% per annum on the outstanding sum from February 2021. While parties are generally bound by the terms of their agreement, this Court, as a court of law and equity, retains a residual discretion to intervene where a contractual term is unconscionable or amounts to a penalty. This was affirmed in the case of ***Pipeplastic Samkolit Ltd (supra).***

37. In this case, the Plaintiff's own conduct of delaying enforcement for nearly 3 years significantly contributed to the accumulation of the principal sum. To permit the Plaintiff to benefit from a high contractual interest rate on a debt that it allowed to escalate through its own forbearance would be inequitable. It would be tantamount to rewarding the Plaintiff for laches. For this reason, I find that the enforcement of the 25% interest rate would be unconscionable. In the circumstances, interest shall be payable at court rates.

38. Consequently, I make the following orders:

(a) Judgement is hereby entered for the Plaintiff against the Defendant for the sum to be calculated in accordance with the formula set out in paragraph 34 of this Judgement. The parties are granted 30 days from the date hereof to agree on the final quantum, failing which the Deputy Registrar shall appoint a Certified Accountant to make the assessment.

(b) The sum found due shall attract interest at court rates from the date of filing suit until payment in full;

(c) Costs of the suit are awarded to the Plaintiff.

Dated and Delivered at Nairobi this 31 day of October 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For the Plaintiff: Mr. Oyare h/b Mr. Mwihuri

For the Defendant: Mr. Ndegwa h/b Mr. Echessa

Court Assistant: Lucy Mwangi