Arfa Arfa Limited & another v Casamia Investments Limited & 2 others (Environment and Land Case E019 of 2022 & E078 of 2024 (Consolidated)) [2025] KEELC 7921 (KLR) (14 November 2025) (Judgment)

Neutral citation: [2025] KEELC 7921 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE E019 OF 2022 & E078 OF 2024 (CONSOLIDATED)

CG MBOGO, J

NOVEMBER 14, 2025

BETWEEN

ARFA ARFA LIMITED ..... PLAINTIFF

AND

CASAMIA INVESTMENTS LIMITED ..... 1ST DEFENDANT

PAUL GATHIRWA T/A IDEAL AUCTIONEERS ..... 2ND DEFENDANT

AS CONSOLIDATED WITH

ENVIRONMENT AND LAND CASE E078 OF 2024

BETWEEN

CASAMIA INVESTMENTS LIMITED ..... PLAINTIFF

AND

MOHUTNIY AFRICA LIMITED ..... DEFENDANT

JUDGMENT

1. The plaintiff filed the plaint 8th June, 2020 seeking that judgment be entered jointly against the defendants for:-

    1. A declaration that the impugned lease agreement dated 6th March 2012 was terminated automatically when the Covid19 virus rendered the leased premises inaccessible to the plaintiff and the public pursuant to government guidance vide Legal Notice No. 36- The Public Order (State Curfew) Order, 2020 dated 26th March, 2020 to avert the Covid-19 crisis, effectively affecting performance of the contract.

2. A declaration that the impugned lease agreement dated 6th March, 2012 discharged both the plaintiff and the 1st defendant from further liability upon frustration of the contract.

3. A mandatory order do issue against the 1st defendant to issue a new written lease agreement to the plaintiff that reflects fresh tenancy terms agreed among both parties.

4. A declaration that the 2nd defendant's unreasonable issue of the proclamation notice dated 21st May, 2020 was unlawful, illegal and of no legal effect.

5. A declaration that the distress and attachment on 21st May 2020 and intended auction of the plaintiff's movable property 14 days thereafter is null and void.

6. A declaration awarding general damages for breach of contract.

7. A declaration that the 1st defendant accepts negotiation of new rent payment terms.

8. Costs of the suit.

9. Interest on (4) and (5) above.

10. Any other relief the court may deem fit.

2. The gist of the plaint is that vide the agreement dated 6th March, 2012, the plaintiff leased the premises on the 1st floor, 3rd floor and 4th floor of 20th Century Plaza on title I.R No. 16229 which is registered in the 1st defendant's name for a period of 11 years and 9 months with effect from 1st February, 2012. The said lease was to expire on 31st October 2023, and the rent agreed was monthly payable quarterly in advance on the 1st day of February, May, August and November and thereafter, it was revisable and increased annually.

3. The plaintiff further stated that the rent payable from 1st November, 2019 to 31st October 2020 was KShs.559,070, and that it paid the 1st defendant KShs.9,200,000 as security deposit for the performance of its obligation which is held by the 1st defendant to date. Further, that the Covid -19 was declared a formidable disease on 2nd March, 2020 which made the contract impossible to perform for both the plaintiff and the 1st defendant.

4. The plaintiff pleaded that as a result of the said declaration, on 25th March, 2020 it closed its business, and following the government's directives, the impugned contract was radically altered making it impossible to perform its obligations. Further, that the government published an order calling for a curfew on all persons not providing essential services which included its business and that the Kenya Film Classification Board ordered closure of cinema theatres countrywide as a measure to implement government's directives. Further, that as a result of the mandatory government directives, it was financially crippled and failed to generate the requisite revenue to meet its obligations under the lease agreement.

5. The plaintiff pleaded particulars of frustrations as result of the Covid-19 pandemic which included involuntary closure of business on 24th March, 2020 due to the nation-wide curfew imposed, and the government's express exclusion of the lease premises as one of the essential services providers.

6. The plaintiff stated that it communicated its predicament to the 1st defendant with an aim to negotiate a payment structure but the 1st defendant refused to indulge it, and as such the lease was frustrated. Further, that the proclamation notice was a nullity as the contract had been voided by the frustration after the Covid-19 became full blown.

7. The plaintiff pleaded particulars of breach of contract on the part of the defendants to the extent that they failed to recognize the difficulty in the performance of the same during this period, and suspend the plaintiff's rent obligations due to the government's directive. Further, that the intended sale of its movable property is unnecessary as it has not refused to pay rent save that it is unable to occupy the premises and utilize the same to enable payment of rent.

8. The defendants filed their defence and amended counterclaim dated 23rd June, 2021. In their defence, the defendants admitted to the deposit of KShs.9,200,000/- and the presence of the Covid-19 pandemic in the country. They denied the allegations of frustration and the inability to perform the contract. Further, they admitted that the business premises were closed down owing to the regulations that had been issued by the government in March, 2020. They stated that the averments in the plaint have since been overtaken by events as cinemas were allowed to re-open. Further, that it has attempted to discuss with the plaintiff the issue of payment of the arrears on numerous occasions without success.

9. The defendants denied that the lease agreement has been voided by frustration, and the particulars of breach as well. They stated that the plaintiff has ignored, neglected and refused to pay rent leading to distress for rent being levied.

10. In their counterclaim, the defendants pleaded that the plaintiff is still in the premises and continues to refuse to pay rent when it accrues, and as at 31st May, 2021 the same had accumulated to KShs.14,679,785.67. Further, that they had agreed that if the plaintiff delayed in making payment, interest would accrue at 25%.

11. The defendants pray for the following orders:-

    1. The defendants in the main suit (Casamia Investments Ltd and Paul Githirwa t/a Ideal Auctioneers) pray that the plaintiff's suit in the plaint dated 8th June, 2020 be dismissed with costs.

    2. The plaintiff in the counterclaim (Casamia) prays for a declaration that the 1st defendant in the counterclaim (Arfa Arfa Limited) has forfeited the lease dated 6th March, 2012 for failing to pay rent and other charges.

    3. The court does order that the 1st defendant in the counterclaim (Arfa Arfa Limited) vacates from the suit premises within 7 days of the order.

    4. In the event the 1st defendant does not vacate from the suit premises as per order (3) above, an order be and is hereby issued evicting Arfa Arfa Limited from the suit premises.

    5. The plaintiff in the Counterclaim (Casamia) prays that after the 1st defendant (Arfa Arfa Limited) vacates or is evicted from the suit premises, the defendants in the counterclaim (Arfa Arfa Limited, Ratnikova and Adam Jaysen Kahindi Francis) be and are hereby ordered to restore the suit premises to its original condition pursuant to the lease dated 6th March, 2012 or in the alternative, to pay the plaintiff in the counterclaim (Casamia) KShs.15,898,960 being the costs of restoration and repair to the premises.

    6. The plaintiff in the counterclaim (Casamia) prays for judgment against the defendants in the counterclaim (Arfa Arfa Limited, Ratnikova and Adam Jaysen Kahindi Francis), jointly and severally for: -

        i. Arrears of inter alia, rent and other charges in the amount of Kshs. 14, 679,785.67 due and owing as at 31st May, 2021.

ii. Rent and service charge at the rate of KShs.978,402.00 per month until the 1st defendant (Arfa Arfa Limited) gives vacant possession or is evicted from the premises.

7. An order be and is hereby issued, directed to the defendants in the counterclaim jointly and severally, to pay to the plaintiff in the counterclaim all outstanding rents, service charge, and/or any other payments including auctioneer's charges together with interest at 25% that will have accrued to the plaintiff at the date of eviction or the 1st defendant vacating the premises, whichever is earlier.

8. Interest on (6) and (7) above at 25% per annum from the date of eviction or when Arfa Arfa gives vacant possession whichever is earlier, until payment in full.

9. Costs of the suit and of the counterclaim.

12. The plaintiff filed its reply to defence and defence to the amended counterclaim dated 13th July, 2021. In its reply to the defence, the plaintiff reiterated the contents of its plaint and stated that efforts to try and discuss with the defendants the payment issues have proved futile. The plaintiff prayed that the defence be struck out with costs and judgment entered as prayed. In its defence to the amended counterclaim, the plaintiff denied the contents thereof and reiterated the contents of its plaint. Further, the plaintiff maintained that it has paid all the current rent and service charge until the business was frustrated by the Covid-19 pandemic.

13. The plaintiff further stated that its efforts to negotiate a payment structure have been ignored, and further denied the allegation that the deposit amount held is insufficient to restore the premises to its original state. The plaintiff prayed that the amended counterclaim be dismissed and struck out with costs.

14. This matter proceeded for hearing on 17th July, 2025. Bett Kenneth (PW1) adopted his witness statement dated 14th May, 2024 as his evidence in chief, and produced the list of documents dated 21st July, 2021 and 14th May, 2024 as P. Exhibits 1 to 6 respectively.

15. On cross-examination, PW1 confirmed that he was testifying on behalf of the defendant in E078 of 2024. He admitted that the plaintiff is in rent arrears as per the letter dated 5th May, 2020. He stated that the Covid-19 pandemic affected payment of rent. PW1 could not comment on the other arrears, and he could not remember if the plaintiff went back to the premises after taking the landlord to court. Based on the documents showed to him, PW1 stated that as at 1st May, 2021, the outstanding amounts were KShs.14, 679,785.67, and he did not know whether these amounts were ever paid to the defendants. Further, he stated that he did not know if the plaintiff restored the premises to their original condition once they left.

16. PW1 testified that the lease between the defendant and Mohutniy commenced on 1st November, 2022 when it took over the premises, and that he is aware that the 1st defendant filed a suit against Mohutniy in 2024. While he is an employee of Mohutniy, PW1 testified that they stopped running the business in the year 2023 as they have not been showing films since then. He stated that the premises were locked by the defendant, and they were not evicted. Further, that since 2023, they have had a dispute over rent, and since then, the premises remain locked, and that they are not paying rent. He stated that the arrears outstanding is KShs.20,672, 50.59/- which continues to accrue. With regard to the deposit of rent of KShs.9,200,000/, PW1 testified that the same was not paid to the plaintiff, and the same is held by the defendant. With the testimony of PW1, the plaintiff's closed its case.

17. Gaetano Ruffo (DW1) adopted his witness statement dated 14th July, 2021 as his evidence in chief. He produced the documents as evidence marked as D. Exhibits 1 to 9 respectively. Paul Mwangi (DW2) adopted his witness statement dated 12th March, 2025 as his evidence in chief.

18. The plaintiff filed its written submissions dated 11th August, 2025 where it raised three issues for determination as follows:-

    1. Whether the plaintiff's suit is premature and an abuse of the court process.

    2. Whether eviction is available as a remedy under the lease agreement.

    3. Whether the defendant continued occupation causes prejudice to the plaintiff.

19. On the first issue, the plaintiff submitted that the lease agreement granted it quiet possession of the suit premises for ten years with expiry on 31st October, 2032, and that the defendant rushed to court despite the subsistence of the tenancy without exhausting contractual remedies such as applying the security deposit. Reliance was placed in the case of National Bank of Kenya Ltd v Pipelastic Samkolit (K) Ltd [2001] eKLR.

20. On the second issue, the plaintiff submitted that the lease does not provide for eviction as a consequence of non-payment of rent, and instead it contemplates recovery of arrears with contractual interest of 18% per annum. While relying on the case of Kenya Breweries Ltd v Kiambu General Transport Agency Limited [2000] eKLR, the plaintiff submitted that the defendant enjoys security by way of the deposit transferred to it. Further, that the drastic step of eviction is unjustified.

21. On the third issue, it was submitted that the assertion that its occupation exposes the defendant to harm is unfounded. The plaintiff submitted that it is amenable to settling arrears in good faith and has demonstrated willingness to negotiate. The plaintiff urged the court to exercise equity which looks to the intent rather than the form and allow for quiet possession while protecting the defendant through rent and security deposit provisions.

22. The defendant filed its written submissions dated 13th August, 2025. The defendant submitted that no evidence supporting the plaintiff's allegation regarding frustration was presented before the court, and that even before the Covid-19 pandemic, the plaintiff had defaulted on its rental obligations. Further, that the issue of frustration is a red herring as no justifiable reason has been placed before the court to justify the plaintiff's failure to pay rent. The defendant relied on the case of Five Forty Aviation Limited v Erwan Lanoe [2019] eKLR.

23. With regard to Mohutniy, the defendant submitted that it took over the premises on 1st November, 2022 vide the heads of terms dated 17th July, 2022. Further, that as at 26th February, 2024, Mohutniy had defaulted in rent payment in the sum of KShs.20,672,350.49, and to date it has locked the suit premises and that it is no longer conducting any business.

24. In conclusion, the defendant submitted that the plaintiff failed to pay rent when it was due, and that they failed to restore the premises when Mohutniy took possession of the same. Further, that Mohutniy took over the premises and had arrears which is indebted.

25. I have considered the pleadings, the evidence tendered and the testimonies of the witnesses as well as the written submissions filed. The issue for determination is whether the suit is merit.

26. It is not in dispute that on 6th March, 2012, the plaintiff leased the premises on the 1st floor, 3rd floor and 4th floor of 20th Century Plaza on title I.R No. 16229 which is registered in the 1st defendant's name for a period of 11 years and 9 months with effect from 1st February, 2012. As pleaded in the plaint, the

said lease was to expire on 31st October 2023, and the rent agreed was monthly payable quarterly in advance on the 1st day of February, May, August and November and thereafter, it was revisable and increased annually. However, during the Covid-19 pandemic in the year 2020, the plaintiff was forced to close down due to the government's directives in mitigation to the risks associated with this disease. The plaintiff argued that as a result of the Covid-19 pandemic, the lease agreement between the parties was voided and thus it could not meet its obligations to pay rent.

27. On the other hand, the defendants argued that prior to the Covid-19 pandemic, the plaintiff had defaulted in rent payment. They denied the allegations of frustration and the inability to perform the contract. However, they admitted that the business premises were closed down owing to the regulations that had been issued by the government in March, 2020. PW1 an employee of Mohutniy admitted that there are indeed arrears that had accumulated and speaking on behalf of his employer, he could not say much about the plaintiff and the outstanding rent arrears owed to the defendant. Interestingly, he informed the court that the deposit of Kshs.9,200,000/- paid by the plaintiff is still held by the defendant. DW1 and DW2 confirmed that the plaintiff was in arrears of rent, and this evidence was not challenged.

28. Having said the above, this court takes judicial notice of the Covid-19 pandemic which affected the provisions of services including businesses countrywide. Having reviewed the documents relied on by the parties, it is not in doubt that the plaintiff has rent outstanding which is owing to the defendant. However, I am not in agreement that the Covid-19 pandemic frustrated the entire lease agreement owing to the fact that at the time of the declaration of the Covid-19 pandemic, there was rent outstanding.

29. More importantly, this court is unable to tell when the plaintiff resumed business having closed down on 24th March, 2020 or when it was evicted from the premises. On the lease agreement dated 6th March, 2012, there was no term or clause providing for the frustration incase of unforeseen events. In that case, I am guided by the Supreme Court decision in Kwanza Estates Limited v Jomo Kenyatta University of Agriculture and Technology [2024] KESC 74 (KLR) which pronounced itself as follows:-

> " 70. The applicability of the doctrine of frustration is not new to our jurisdiction. As noted by the Court of Appeal in the present matter, the principles of the doctrine of frustration have been restated repeatedly and are now old hat. The doctrine of frustration has been applied severally by the Court of Appeal for instance in the cases of Kenya Airways Limited v Satwant Singh Flora [2013] eKLR, Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & another [2014] eKLR and Five Fourty Aviation Limited v Richard Oloka [2015] eKLR. The Kenyan Courts acknowledge that the doctrine of frustration, first established in Taylor v Caldwell 122 Eng Rep 309 (1863), discharges parties from a contract when unforeseen events destroy the subject matter or render performance impossible without fault from either party. Further, modern interpretation, as articulated by Lord Radcliffe in Davis Contractors Ltd v Fareham UDC (1956) AC 696, recognizes frustration where a contractual obligation becomes radically different due to external circumstances, beyond what was originally agreed. The doctrine aims to ensure fairness and mitigate the rigidity of strict contractual obligations but must be invoked cautiously.
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> 71. In summary, the doctrine of frustration releases parties from their contractual obligations when an unforeseen event fundamentally alters the nature of the contract, rendering further performance impossible or significantly different

from the original agreement. Key principles include limitation to narrow circumstances, and reliance on events beyond the control or fault of the invoking party, the effect of bringing the contract to an end forthwith, without more and automatically. The final principle is the effect of fully discharging the parties from further liability under the contract from the moment the frustrating event occurs. Though accepted in civil law jurisdictions, the concept of partial discharge has been rejected in common law jurisdictions. This finds footing in the treatise Treitel on the Law of Contract, 11th edition para 50-07 it stated that:"...the contract is either frustrated or remains in force. There is no such concept as partial or temporary discharge frustration on account of partial or temporary impossibility...the concept of partial discharge in English law is restricted to obligations which are severable, whether in point of time or otherwise"As a matter of logic, the doctrine of frustration operates to discharge a contract, bringing it to an immediate and definitive end. Once the doctrine is applied, the contract cannot be deemed suspended or temporarily inoperative; it is terminated entirely unless the parties expressly agree to revive it through a subsequent agreement.

72. These are the principles that the courts have applied time and again when asked to consider the plea of applying the doctrine of frustration. However, the doctrine of frustration is not absolute. The alleging party must prove that the frustrating event occurred without their fault or contribution. Self-induced frustration, where the event results from the party's own actions or breach, cannot be relied upon to terminate a contract.

73. Turning back to the dispute at hand, the Covid-19 virus was first identified in December, 2019 and declared a global pandemic in March 2020. This court in the case of Haki Na Sheria Initiative v Inspector General of Police & 2 others; Kenya National Human Rights and Equality Commission (Interested Party) (Petition 5 (E007) of 2021) [2021] KESC 22 (KLR), as a matter of general public notoriety, took judicial notice of the fact that the Covid-19 pandemic was a public health emergency that affected not just Kenya, but the whole world.

74. We acknowledge that the Covid-19 pandemic was an extraordinary and unprecedented global event that disrupted every facet of life, affecting economies, healthcare systems, and daily activities across the world. Never in modern history had governments been forced to implement such widespread lockdowns, travel restrictions, and social distancing measures to contain a virus. The scale and impact of the pandemic are often compared to the Spanish Flu of 1918, which similarly caused widespread devastation, killing millions globally. Covid-19 stood out as unique in its reach and the overwhelming strain it placed on societies, economies, and public health infrastructure, with the world grappling for solutions in real time amidst uncertainty.

75. We equally acknowledge that the pandemic had an effect on landlords and commercial properties causing income losses due to missed rental income, increased vacancies, and depreciated property values as businesses closed or moved online. Landlords also faced legal challenges over the terms of leases as well increased costs for adopting safety measures. It is the effects of the Covid-

19 pandemic on the landlords and the tenants that we are called to balance in this appeal...

78. We see no reason to depart from the principles of the doctrine of frustration as expressed in common law and applied by the courts in Kenya. As the various courts have cautioned time and again, it is a doctrine that must not be lightly invoked by parties or lightly applied by the courts. Where parties have provided for it in their agreement, then it is for the court to look at the agreement before applying the doctrine of frustration. However, where the parties have not made provision for this doctrine, then the courts fall back on common law and the parameters we have set out in the preceding paragraphs.

79. Applying these parameters to the current matter, we note that the Covid-19 pandemic caused an exceptional disruption to educational institutions around the world. In response, governments were grappling for solutions in real-time amidst uncertainty and Kenya was no different. The most effective solution which was replicated the world over was government-mandated lockdowns and health measures forcing the temporary closure of all learning facilities.

80. The virus was confirmed to have reached Kenya on March 12, 2020 with the initial cases reported in the capital, Nairobi and in the coastal area of Mombasa. On March 15, 2020 the government directed all schools and higher learning institutions be closed from March 20, 2020 until further notice. On June 6, 2020, the Government announced that schools would begin to reopen gradually from September 1, 2020.

83. The principle of pacta sunt servanda is one of the oldest most fundamental principles of international law that requires parties to honour their agreements and obligations. This is why the doctrine of frustration is interpreted narrowly to maintain the certainty of contracts. It is only when the frustration is substantial and the contract's purpose becomes meaningless, that the courts should step in to apply the doctrine of frustration and discharge the parties. This intervention is intended to provide reprieve to a party where it would be unjust and unreasonable to hold them to their contract. Further, as is evident from the cases we have cited and expounded on hereinabove, a party is not absolved from performing their obligations under a contract simply because it has become more expensive or more difficult.

84. We acknowledge that the respondent entered into the contested lease agreement to teach and train self-sponsored students. Additionally, the respondent's Nakuru CBD campus was heavily dependent on income from self- sponsored students. During the lockdown, the respondent, like many other higher learning institutions, was forced to close its doors albeit temporarily.

85. The temporary closure of institutions of higher learning by the Government caused the respondent some financial hardship. However, we are of the considered view that this did not amount to an absolute impossibility of performance in the legal sense, especially once restrictions eased and the respondent, along with all learning institutions reopened and resumed normal learning. This is well demonstrated by the fact that once it vacated the

petitioner's premises, the respondent moved to another location within Nakuru City. It is a pertinent demonstration of the fact that the pandemic and lockdown measures by the government did not amount to the impossibility of performance. Further, the government restrictions did not bar the respondent entirely from teaching and training self-sponsored students, but only from using the traditional method of in-person teaching. One of the positives from the pandemic was the significant shift towards moving services online, and education was no different.

86. As a result, we are of the considered view that financial hardship alone, even one stemming from an extraordinary event like the Covid-19 pandemic, does not automatically discharge a tenant's rental obligations. Consequently, this Court arrives at a conclusion that in the circumstances of the present appeal, the Covid-19 pandemic did not constitute a frustrating event, that would allow the respondent to be discharged from further performance under the lease."

30. Taking into consideration that it is unknown when the plaintiff resumed its operations and business, and while the defendant contends that as at May, 2021 it was still in the premises, this court is mindful to consider the fact that the plaintiff's business closed down its business as per the various letters and emails exchanged between the parties dated 7th March, 2020, 13th March, 2020, 18th March, 2020, 31st March, 2020 and 5th May, 2020. However, and as it can be discerned from these letters, most of the rent outstanding was for the period before the Covid-19 pandemic which the plaintiff ought to settle. In my view, and owing to closure of the business premises on 24th March, 2020, the plaintiff ought to settle the outstanding rent arrears including and until the February, 2020 quarter. Also, while the defendant seeks the costs of restoration and repair to the premises in its counterclaim, the same was not specifically pleaded in the amended counterclaim and thus cannot issue.

31. Turning into the suit between the defendant and Mohutniy in Civil Suit No. E078 of 2024, it is not in dispute that the parties signed a Head of Terms which was to commence on 1st November, 2022. PW1 in his evidence admitted to have been in rent arrears and having closed the premises as a result of lack of business. These facts were not denied and in fact DW1 and DW2 were not cross-examined on any issues which meant that the evidence produced was not rebutted. In my view, I have not seen the correlation between the two suits to enable consolidation for the reason that while the issue in the lead file was on frustration of contract based on the Covid-19 pandemic, the same is not in the instant case. Mohutniy took over the premises on 1st November, 2022 after business had resumed normalcy and its failure to pay rent has not been explained or substantiated with evidence.

32. For the reasons stated above, I find no merit in the plaint dated 8th June 2020, and it is hereby dismissed. The counterclaim dated 23rd June, 2021 is hereby allowed in the following terms

    i. The 1st defendant in the counterclaim to pay all the outstanding rent arrears, service charge and VAT as at 1st May, 2020.

    ii. Prayer (i) is to be calculated against the deposit costs of KShs.9,200,000/-.

    iii. Costs of the suit and of the counterclaim.

33. With regard to the plaint dated 27th February, 2024 between Casamia Investments Limited and Mohutniy Africa Limited, the same is hereby allowed as prayed.

    Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY THIS 14TH DAY OF NOVEMBER, 2025.

HON. MBOGO C.G.

JUDGE

14/11/2025.

In the presence of:

Mr. Benson Agunga - Court assistant

Mr. Chepkwony holding brief for Mr. Muihori for the Plaintiffs

Ms. Maureen Mutai holding brief for Mr. Odeny for the Plaintiff in E019 of 2022 and the Defendant in E078 of 2024