



**Onyango t/a Emmanuel Computer Academy v Shiloah Investments Limited (Environment and Land Case Civil Suit 158 of 2012) [2025] KEELC 7907 (KLR) (11 November 2025) (Judgment)**

Neutral citation: [2025] KEELC 7907 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND CASE CIVIL SUIT 158 OF 2012  
SO OKONG'O, J  
NOVEMBER 11, 2025**

**BETWEEN**

**JOEL OMINO ONYANGO T/A EMMANUEL COMPUTER  
ACADEMY ..... PLAINTIFF**

**AND**

**SHILOAH INVESTMENTS LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed this suit against the Defendant through a plaint dated 28<sup>th</sup> September 2012, which was amended on 26<sup>th</sup> November 2021. The Plaintiff averred that he had leased from the Defendant premises situated on Mega Plaza, Kisumu, Mega City, Kisumu, and Mega Mall, Kakamega (hereinafter referred to as “the suit properties”). The Plaintiff averred that he had leased two different premises from the Defendant at the Mega Plaza, Kisumu, in respect of which the parties entered into a written lease agreement for 6 years for one of the premises, but did not execute the lease agreement for the other, despite the Plaintiff having taken possession thereof from 1<sup>st</sup> January 2012.
2. The Plaintiff averred that the parties did not enter into a written lease agreement, also in respect of the premises at Mega Mall, Kakamega, despite the Plaintiff having taken possession of the premises with effect from 1<sup>st</sup> March 2012. The Plaintiff averred that due to the multiplicity of tenancies, the Defendant had failed to account properly for the rent paid by the Plaintiff. The Plaintiff averred that on 25<sup>th</sup> September 2012, the Defendant unlawfully and without warning purported to levy distress on the Plaintiff’s stock in trade and furniture to recover an alleged unpaid rent.
3. The Plaintiff averred that since there was no signed lease in respect of two of the three premises, the tenancy between the parties was a controlled tenancy within the meaning of Section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 of the Laws of Kenya. The Plaintiff averred that on 1<sup>st</sup> October 2012, he obtained a court order restraining the Defendant from evicting him, levying distress, or in any manner interfering with the Plaintiff’s tenancies until further



orders of the court. The Plaintiff averred that the Defendant, in total disregard or breach of the said order, proceeded to levy distress on the Plaintiff's premises, carried off the Plaintiff's tools of trade, computers, chairs, desks, office tables, and locked up the premises.

4. The Plaintiff averred that the Defendant evicted him from the premises unlawfully, and he suffered loss and damage. The Plaintiff pleaded the particulars of loss as follows;
  1. Cost of 105 computers taken away at 25,000/= each -Kshs. 2,625,000/=
  2. Cost of 191 office/student chairs taken away at 3,500/=each, Kshs. 668,500/=
  3. Cost of 40 wooden dining tables at 8,000/= each, Kshs. 320,000/=
  4. Cost of 4 office tables at 9,200/= each, Kshs. 36,800/=
  5. Cost of 66 computer fitted desk/small computer tables at 7,200/= each, Kshs. 475,200/=
  6. Cost of 7 white boards at 9,000/= each, Kshs.63,000/=
  7. Cost of 210 power cables at 200/= each, Kshs. 42,000/=
  8. Cost of 1 printer at 36,000/= each, Kshs. 36,000/=
  9. Cost of 29 extensions at 1,200/= each, Kshs. 46,800/=
  10. Cost of 5 plastic chairs at 840/= each, Kshs. 4,200/=
  11. Cost of 2 (4-twin) computer tables at 16,000/= each, Kshs. 32,000/=
  12. Cost of 4 leather office tables at 17,500/= each, Kshs. 70,000/=
  13. Cost of 14 half dining wooden benches at 4,000/= each, Kshs. 56,000/=
  14. Cost of office partitioning and painting Kshs. 339,000/=
  15. Cost of branding at Kshs. 80,000/= TOTAL 4,894,500/=
5. The Plaintiff averred that he was harassed and subjected to humiliation by the Defendant, its agents, and/or employees. The Plaintiff prayed for judgment against the Defendant for;
  1. A declaration that the tenancies between the parties are controlled tenancies.
  2. A declaration that the distress levied upon the Plaintiff was illegal, null and void.
  3. Special damages of Kshs. 4,894,500/=.
  4. General damages.
  5. Costs.
6. The Defendant filed a statement of defence on 18<sup>th</sup> October 2012, which it later amended on 13<sup>th</sup> July 2022 and further amended on 30<sup>th</sup> May 2023 to plead a counterclaim against the Plaintiff. The Defendant admitted that the Plaintiff was its tenant on its premises at Mega Plaza, Kisumu, Mega City, Kisumu and Mega Mall, Kakamega, situated on Kisumu Municipality/Block 7/380, Kisumu Municipality/Block 9/134 and Kisumu Municipality/Block 9/135, and Kakamega Town Block III/97 ("the suit properties").
7. The Defendant averred that the non-signing/execution of some of the leases was occasioned by the Plaintiff's delay in signing the same, despite numerous copies thereof being sent to him to do so. The



Defendant averred that the fact that there were multiple tenancies and accounts was not an excuse for the Plaintiff not to pay rent. The Defendant averred that the distress for rent levied against the Plaintiff was lawful because the Plaintiff failed to pay rent despite making numerous commitments and undertakings to do so. The Defendant cited Section 12 of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 of the Laws of Kenya, and denied that the tenancies between the Plaintiff and the Defendant were controlled.

8. In its counterclaim, the Defendant averred that the Plaintiff agreed to pay deposit, rent and service charge while in possession of the suit properties. The Defendant averred that while the Plaintiff was in possession of the suit properties, the Plaintiff accumulated rent arrears and service charges, which the Plaintiff was liable to pay to the Defendant as special damages. The Defendant gave the particulars of special damages due from the Plaintiff as follows;

Mega City Rent and Service Charge

(Sept 2009 to Sept 2013) Kshs. 1,303,967/=

Remainder of the lease period

(Oct 2013 to Oct 2015) Kshs. 2,217,163/=

Mega Mall Rent and Service Charge

(March 2012 to Sept 2013 Kshs. 1,348,899/=

Remainder of the lease period

(Oct 2013 to Feb 2018) Kshs. 5,773,629/=

Mega Plaza Rent and Service charge

(Jan 2011 to Sept 2013) Kshs. 1,216,257/=

Remainder of the lease period

(October 2013 to Dec 2017) Kshs. 4,820,948/=

Total Outstanding Kshs. 16,680,863/=

Deductions:

a. Rent lump sum payment Kshs. 417,898/=

(b) Net recovery from auction Kshs. 12,000/=

Total Amount Payable Kshs. 16,250,965/=

9. The Defendant averred that by virtue of the lease agreements registered on 16<sup>th</sup> May 2011 and 24<sup>th</sup> May 2010, between the Defendant and the Plaintiff, and Letters of Offer dated 19<sup>th</sup> May 2012 and 10<sup>th</sup> January 2012, the parties expressly agreed particularly under clause 3 (a) of the lease agreement that the Plaintiff would pay rent and actual service charge for the entire lease period which determined on December 2017, February 2018 and October 2015.

10. The Defendant prayed for judgment against the Plaintiff for;

1. Rent arrears (due and owing or outstanding) by the time the Defendant left the premises;

a. Mega City Sept. 2009- Sept. 2013 Kshs. 1,303,967/=

b. Mega Mall March 2012-Sept. 2013 Kshs. 1,348,899/=



- c. Mega Plaza Jan. 2011- Sept. 2013 Kshs. 1,216,257/=
 

Total arrears Kshs. 3,869,123/=
    2. Contractual damages for the remainder of the lease period
      - a. Mega City Oct. 2013-Oct. 2015 Kshs. 2,217,163/=
      - b. Mega Mall Oct. 2013- Feb. 2018 Kshs. 1,348,899/=
      - c. Mega Plaza Oct. 2013- Dec. 2017 Kshs. 4,820,948/=
 

Total arrears Kshs. 8,387,010/=
    3. Cost of suit and interest at commercial rates of 14 percent per annum.
    4. Any other relief.
11. At the trial, the Plaintiff, Joel Omino Onyango (PW1), stated as follows in his evidence in chief: He was a computer trainer. The Defendant was his landlord from 2009 to March 2013. He filed a witness statement on 8<sup>th</sup> November 2021, which he wished to adopt as his evidence in chief. He was evicted illegally from the suit properties. He did not owe the Defendant any rent at the time of his eviction. In 2012, the court gave an order restraining the Defendant from levying distress against him. He produced the said court order and an affidavit he swore as P.EXH. 1 and 2, respectively. The proclamations were in his list of documents filed on 8<sup>th</sup> November 2021. He produced the same as P.EXH.3 (a), P.EXH. 3 (b), P.EXH. 3 (c), P.EXH. 3(d). He produced a cheque he issued to the Plaintiff as P.EXH.4. The auctioneer took his goods and proceeded to lock the doors of his premises. The auctioneer sold everything. He had documents to prove that he was a qualified computer expert. He produced the certificate of accreditation as P.EXH.5, security inspection reports as P.EXH. 6(a) and P.EXH 6(b). He produced the lease agreements as P.EXH. 7 (a), (b), (c) and (d). He produced the receipts and invoices as PMFI 8 (a) and 8 (b), PMFI 9(a) and 9 (b), PMFI 10 (a) and 10 (b), PMFI 11, 12, 13, 14, 15 and 16.
12. PW1 stated further that he sued the Defendant because the Defendant instructed Nyaluoyo Auctioneers to attach his properties. He did not owe the Defendant any rent when the attachment was done, and the amount claimed by the Defendant was excessive and outrageous. By September 2012, he had overpaid rent to the tune of Kshs. 1,912,000/=. He produced the statements of account supplied to him by the Defendant as P.EXH. 17. He stated that he was entitled to the excess payment. He stated that he paid the rent through cheques and in cash.
13. On cross-examination by Mr. Qeu, the Plaintiff stated that he signed two lease agreements out of the four that he was to sign. He stated that rent was to be paid plus service charge. He stated that the rent was subject to VAT at 16 percent. He stated that, according to him, the rent he was paying was inclusive of VAT. He stated that he had no problem with the amounts shown in the statement of account as having been paid by him. He stated that his problem was with the amount that he was billed. He admitted that some of his cheques were returned unpaid. He stated that he came to court because of the proclamation upon his goods by the auctioneer on 27<sup>th</sup> September 2012. He stated that he was ordered to pay Kshs. 232,000/- by the court but paid Kshs 262,000/=. He stated that he was not in arrears at the time. He stated that he had overpaid the Defendant by Kshs. 1,912,000/=.
14. The Plaintiff stated further that he purchased 78 computers for Emerald Computer College. He admitted that he had no ETR receipts and the model or serial numbers of the computers were not shown. He stated that although he had no receipts for the purchase of the computers, he had his stock inventory, but did not have it in court.



15. The Plaintiff (PW1) gave further evidence in chief on 9<sup>th</sup> November 2023 following the filing by the Defendant of a counterclaim against him. PW1 stated that he had filed a further statement dated 18<sup>th</sup> July 2023 to respond to the claim raised against him by the Defendant in its counterclaim. He adopted the further witness statement as his further evidence in chief. He told the court that upon perusal of the Defendant's counterclaim, he noted that the claim included a sum of Kshs. 5,208,019/= for the remainder of the lease.
16. On further cross-examination by the Defendant's advocate, the Plaintiff stated that he occupied 4 spaces and there were lease agreements for each. He stated that he had one space at Mega City, which was the subject of a lease dated 1<sup>st</sup> October 2009. He stated that he had two spaces at Mega Plaza. He stated that the first lease for Mega Plaza was for 700sqf. which commenced on 1<sup>st</sup> February 2011. He stated that the second lease was for 100sqf. He stated that this lease commenced on 1<sup>st</sup> February 2012. He stated that the last lease was the space at Mega Mall Kakamega, which commenced on 1<sup>st</sup> March 2012. He admitted that he had claimed in his further statement that he was billed from January 2012 for the Mega Mall space. When referred to the ledger account from 1<sup>st</sup> March 2012 to 3<sup>rd</sup> April 2013 for Mega Mall Kakamega, he admitted that the rent was charged from March 2012 and not January as he had claimed. The Plaintiff admitted that he was to pay a security deposit of Kshs. 68,288/- for the Mega Mall space, the lessor's advocates' fees and disbursements. The Plaintiff admitted that clause 3 (m) of the lease provided for the payment of rent for the remainder of the lease. The Plaintiff admitted further that the lease provided for the payment of rent and service charge, and that VAT was payable on rent.
17. Concerning the Mega City lease, the Plaintiff admitted that it was to commence on 1<sup>st</sup> October 2009. He stated that the monthly rent from 1<sup>st</sup> October 2009 to 31<sup>st</sup> October 2010, inclusive of service charge and VAT was Kshs. 58,000/=. When shown the ledger account for Mega City, he stated that he could see that the rent for December 2009 was Kshs. 58,000/=: the same as January 2010. He stated he had evidence showing that there were some payments that he made that were not captured in the ledger account. He admitted that he had not provided the receipts for the payments, which he claimed had not to have been captured in the ledger account. The Plaintiff told the court that on 5<sup>th</sup> November 2009, he paid Kshs. 50,000/=: and on 17<sup>th</sup> November 2009, he paid Kshs. 14,000/-. He stated that he had the receipt numbers for all the payments that he made, and for the cheque payments, he had the cheque number. He admitted that he issued some cheques which were returned unpaid.
18. On re-examination, the Plaintiff stated that he was taken through the four leases between him and the Defendant. He stated that the terms of the leases were set out in the said leases. The Plaintiff stated that the ledger accounts he was taken through were different from the ones that had been supplied to him earlier and seemed to have been selectively extracted from the earlier statements of account. He stated that for the Mega City space, the original ledger account reflected Kshs. 50,000/= paid on 4<sup>th</sup> September 2009, Kshs. 51,264/= paid on 27<sup>th</sup> April 2012, and Kshs. 30,880/= paid on 28<sup>th</sup> February 2011. He stated that these payments were omitted in the ledger account for Mega City produced by the Defendant. He stated that for Mega Plaza, the ledger account omitted Kshs. 7,318/= paid on 2<sup>nd</sup> August 2011, Kshs. 106,318/= paid on 26<sup>th</sup> August 2011 and Kshs. 17,636/= paid on 1<sup>st</sup> September 2011. He stated that these payments were acknowledged initially.
19. The Plaintiff stated that he also had a problem with the service charge and VAT. The Plaintiff stated that when he took the tenancy in 2009, he was to pay rent and service charge. He stated that he was given some of the leases 3 months after occupation. He stated that the leases had some terms that they did not discuss and agree on with the Defendant, a fact which he communicated to the Defendant, and asked it to make the necessary amendment. He stated that the Defendant promised to make the suggested amendments, but never did. He stated that he never signed some of the leases.



20. Concerning the legal fees, the Plaintiff stated that the Defendant had not indicated in its ledger accounts the premises in respect of which the legal fees were raised. He stated that the Mega Plaza 'B' and the Mega Mall Kakamega leases were not signed. He stated that the Defendant threatened to throw him out of the premises if he did not sign the Mega City and Mega Plaza "A" leases. He stated that the earlier ledger account statements were supplied to him in October 2012. He stated that what the Defendant was claiming at that time was different from what it was claiming in the counterclaim. He told the court that he did not owe the Defendant any money. The Plaintiff stated that he had overpaid the Defendant at the time it attached and auctioned his goods.
21. The Defendant called one witness, SUKU ELISHA SHERWIN (DW1). DW1 told the court that he had worked with the Defendant for 15 years. He adopted his witness statement filed on 6<sup>th</sup> July 2021 as part of his evidence in chief. He stated that through a letter dated 19<sup>th</sup> May 2021, the Defendant forwarded a lease agreement to the Plaintiff in respect of the premises at Mega Mall Kakamega for the Plaintiff to sign and return for registration, which the Plaintiff never did. He stated that the Defendant forwarded to the Plaintiff the lease for Mega Plaza under the cover of a letter dated 17<sup>th</sup> February 2012, which again the Plaintiff failed to sign and return. He stated that their two letters were received by Christine Akinyi Odhiambo. He stated that the other two leases, one for the premises also at Mega Plaza and the other for the premises at Mega City, were signed and registered. He produced the letters and the leases as exhibits D.EXH. 1, 2, 3, 4, 5 and 6 respectively. DW1 stated that the Plaintiff occupied four (4) spaces. He stated that the lease agreements the Defendant entered into with the Plaintiff provided how rent was to be calculated. He stated that the rent payable included: the rent, service charge and VAT. He stated that VAT was charged at 16% on the rent and service charge. DW1 stated that the leases also provided for damages. He referred the court to clause "M" at page 273 of the Mega Plaza lease (at page 289 of the Defendant's bundle). He stated that the clause provided for rent and service charge for the entire period of the lease in case of premature termination. He stated that the clause was in all their leases.
22. DW1 stated that the rents were tabulated in the leases. He stated that the tabulation was done for invoicing and also to show the escalation of the rent. He stated that the Plaintiff wrote three letters to the Defendant. He stated that in the letter dated 11<sup>th</sup> April 2011, at page 209 of Defendant's bundle, the Plaintiff explained how he was going to clear the rent arrears. He stated that in the other letter at page 208 of the bundle, the Plaintiff again explained how he was going to clear rent arrears. He stated that in the letters, the Plaintiff admitted that he was in rent arrears for all the premises rented to him. He stated that in the Plaintiff's letter received by the Defendant on 8<sup>th</sup> December 2020 at page 206 of the Defendant's bundle, the Plaintiff asked for a rent reduction contrary to the terms of the lease. DW1 produced the letters as D.EXH. 7 (a), (b) and (c). He stated that he had ledger accounts/statements of account for the premises leased to the Plaintiff. DW1 referred the court to the ledger account for Mega Plaza at page 205 of the Defendant's bundle. He stated that the statement ran from 1<sup>st</sup> November 2012 to 23<sup>rd</sup> January 2014 (See pages 205 and 206 of the bundle). He stated that the last entry in this statement was made on 7<sup>th</sup> October 2013, which was a payment of Kshs. 12,000/=. He stated that the statement showed that the Plaintiff was in rent arrears of Kshs. 1,173,784/= for the premises at Mega Plaza. He stated that the sum of Kshs. 1,603,682/= was for all the invoices that the Defendant had raised, while the sum of Kshs. 429,898/= was the total payment received from the Plaintiff over the period. He stated that the statement was generated on 23<sup>rd</sup> January 2014.
23. He stated that at page 203 of the Defendant's bundle of documents was a ledger account for the premises at Mega City from 1<sup>st</sup> November 2012 to 23<sup>rd</sup> January 2014. DW1 stated that the last entry was made on 1<sup>st</sup> October 2013. He stated that the statement showed that the Plaintiff was in rent arrears of Kshs. 1,486,214/=.



24. DW1 stated that the next ledger account was at page 202 of the Defendant's bundle. He stated that the statement was for the premises at Mega Mall Kakamega from 1<sup>st</sup> November 2012 to 23<sup>rd</sup> January 2014. He stated that the last entry was an invoice for Kshs. 87,135/= raised on 1<sup>st</sup> October 2013. He stated that the statement showed that the Plaintiff was in rent arrears of Kshs, 1,517,401/=. He produced the ledger accounts/statements as D.EXH. 8 (a), (b) and (c).
25. DW1 stated that at page 94 of the Defendant's bundle was the Plaintiff's cheque that was dishonoured by his bankers for lack of funds. He stated that this was cheque no. 000222 for Kshs. 73,000/= dated 13<sup>th</sup> July 2013. He stated that the cheque was captured in the Defendant's statement contained in the Defendant's further list of documents dated 29<sup>th</sup> July 2023. He stated that the last item at page 7 of the further list of documents indicated the amount as having been received on 13<sup>th</sup> July 2012. He stated that the cheque was not paid, so the credit was reversed. He stated that page 193 of their bundle was another cheque for Kshs. 50,000/= dated 11<sup>th</sup> June 2013, which was dishonoured. He stated that this cheque was reflected in their statement of account in the further list of documents at page 10. He stated that the cheque was credited, but after it was dishonoured, the credit was reversed. He told the court that he had produced other cheques from the Plaintiff which were also dishonoured at pages 192, 191, 190, 189 and 188 of the Defendant's bundle of documents. He produced the cheques as D.EXH. 9 (a) to 9 (g) respectively. He also produced the demand notices/invoices that they sent to the Plaintiff as D.EXH. 10 (a) to (h) respectively. DW1 also produced a summary of the Plaintiff's ledger accounts as D.EXH. 11 to 13, respectively. He stated that in addition to the ledger accounts, he also had a summary of the accounts receivable for all the spaces that the Plaintiff occupied at Mega City, Mega Plaza and Mega Mall. He stated that the summary was for the duration of the Plaintiff's tenancy. DW1 stated that, in addition to the rent arrears, he had included the rent that was payable for the remainder of the lease period. He stated that the leases had expiry dates, and that the same were terminated before the said expiry dates. He produced the summary of the accounts receivable as D.EXH.14. He produced the letter from Nyaluoyo Auctioneers dated 30<sup>th</sup> September 2013 and the advertisement in the Star Newspaper of 17<sup>th</sup> September 2013 as D.EXH. 15(a) and (b) respectively. He stated that the Plaintiff's accounts were closed on 1<sup>st</sup> September 2013. He stated that the last entry was a rent invoice that was sent to the Plaintiff. He stated that this followed the removal of the Plaintiff's goods from the premises by Nyaluoyo Auctioneers. He told the court that as of September 2012, the Plaintiff was in rent arrears. He stated that the Plaintiff made no further payment after September 2012. He stated that the last payment they received from the Plaintiff was on 29<sup>th</sup> August 2012. He stated that for the premises at Mega Mall, Kakamega, the Plaintiff was in rent arrears as at September 2012. The last payment they received from him was on 10<sup>th</sup> September 2012 for these premises. He stated that they did not receive any further payment from the Plaintiff after that date. DW1 stated that the Defendant had set out the particulars of its claim in paragraph 16 of the further amended defence and counterclaim.
26. He stated that for the premises at Mega City, their claim was for Kshs. 1,303,967/=. DW1 stated that they had also claimed Kshs. 2,217,163/= for the rent for the remainder of the lease term, which was 25 months. He stated that for Mega Plaza, the rent arrears were Kshs. 1,216,257/=. He stated that they had also claimed the rent for the remainder of the lease period. He stated that at Mega Plaza, the Plaintiff was occupying 2 spaces. He stated that for Mega Mall, they first invoiced the Plaintiff on 1<sup>st</sup> March 2012, through invoice No. 7643 for Kshs. 79,214/=. He stated that what the Plaintiff was invoiced for in January and February 2012 were security deposits and legal charges. He stated that the Plaintiff was liable to pay the security deposit and legal charges. He stated that they forwarded the leases to the Plaintiff and the same were received. He stated that the particulars of the amounts due on account of the premises at Mega Mall are set out in their further amended defence and counterclaim. He prayed that the Plaintiff's suit be dismissed and judgment be entered for the Defendant for the rent arrears and



service charge. He stated that the Defendant wished to abandon its claim for rent for the remainder of the lease period, as it had rented out the premises to other tenants. He stated that the Plaintiff did not comply with the court order. He stated that the Plaintiff remained in the Defendant's premises after October 2012, and he was not paying rent. He stated that that was why they levied distress against him.

27. On cross-examination by the Plaintiff in person, DW1 stated as follows: He was not aware of any disputed rent. He confirmed that he swore an affidavit, which was filed in court on 18<sup>th</sup> October 2012, in which he annexed, among others, a ledger account. He stated that there was no difference between the ledger accounts he annexed to the affidavit and those he produced in evidence, save that the earlier statements were up to 2012, while the ones he produced were up to 2013. DW1 stated that the court had ordered that the parties reconcile the accounts. He stated that the difference in the figures was a result of the reconciliation of the accounts. He stated that the distress was levied after the reconciliation of the accounts. He denied that he changed the figures so as to charge VAT. He stated that the Plaintiff was liable to pay VAT under the lease. He stated that the process of preparing the lease for the premises at Mega City took time, but the Plaintiff had already signed a letter of offer which had similar terms as the lease. He stated that the lease was prepared by an advocate who took time to process it. He stated that when the Defendant levied distress for rent, there was rent outstanding, and there was no overpayment as claimed by the Plaintiff. He denied that the Plaintiff had overpaid the Defendant in respect of the two Mega Plaza leases. He stated that the rent due from the Plaintiff was set out in the reconciled accounts.
28. DW1 stated that when they levied distress against the Plaintiff, the Plaintiff was in rent arrears. He stated that since the Plaintiff had rent arrears, the payments he was making were on account. He told the court that in the letter dated 30<sup>th</sup> September 2013, the auctioneer had only mentioned what he was able to sell. He stated that some of the items proclaimed were broken could not be sold. He was shown the advertisement dated 17<sup>th</sup> September 2013 (D.EXH. 15(b)). He stated that he could see the adverts for goods distrained from the Plaintiff. He stated that the auctioneer gave an account only for what he sold. DW1 stated that they had claimed rent arrears of Kshs. 3,869,123/=. He stated that that was the rent arrears due to the Defendant. He stated that the monthly service charge paid with the rent was the minimum estimated service charge. He stated that an audit was being done every six months, and if the landlord had spent more than the service charge already paid, the landlord would recover the same from the tenant. He stated that that was provided for in the lease as the actual service charge. He stated that the audit report was served upon the Plaintiff together with the demand. He stated that they had not filed the audit reports on the basis of which they were demanding the actual service charge. He stated that the Defendant did not charge the actual service charge before 14<sup>th</sup> March 2013 because what it had spent was not more than the payments received for the service charge from the Plaintiff. He stated that there was no need to demand further payment. When shown the receipts dated 12<sup>th</sup> February 2019, 1<sup>st</sup> December 2011 and 4<sup>th</sup> May 2012, he stated that the payments were received on account. He stated that the receipts did not indicate the month or the premises because the Plaintiff was in arrears for several months. He stated that they had given the particulars of these payments in the statements of account. He stated that the VAT was provided for in the lease.
28. DW1 was shown the lease for Kisumu/Municipality Block 9/134 and 135. He stated that he could see that the service charge was indicated as 10%. He stated that that was what was agreed. He was shown the demand notes (D.EXH. 10 (a) to (h)). He told the court that they were all dated 29<sup>th</sup> October 2012, but had indicated the demand note period. He stated that they had not raised an invoice for the period covered. He denied that he was trying to make up figures. He stated that they had their own statements of account, which showed arrears. He stated that the Plaintiff also had his own statements of account,



which showed no arrears. He stated that that was the reason why the court called for the reconciliation of accounts, which they did, and the Plaintiff was found to be in arrears.

29. On re-examination, DW1 stated that in the reconciled accounts at pages 2 to 11 of the Defendant's further list of documents, the Plaintiff had not shown any payment or cheque that had been omitted. He stated that the last proclamation that led to the Plaintiff's items being taken away was at pages 337 and 338. He stated that the proclamations were made on 16<sup>th</sup> July 2013 and 14<sup>th</sup> August 2013, respectively. He stated that as at 29<sup>th</sup> August 2012, the Plaintiff was in arrears of Kshs. 293,511/= in respect of the Mega City premises.
30. After the close of evidence, the parties made written closing submissions.

### **The Plaintiff's submissions**

31. The Plaintiff filed submissions dated 27<sup>th</sup> February 2025. The Plaintiff submitted that for the premises leased to him by the Defendant at Mega City, Kisumu, the total rent and service charge that was payable by the Plaintiff to the Defendant from 1<sup>st</sup> October 2009 to 30<sup>th</sup> September 2012 was Kshs. 1,950,534/= . The Plaintiff submitted that, according to the Defendant's Exhibit 14, the Defendant billed a total of Kshs. 3,690,993/= for these premises for the same period, and received from the Defendant a sum of Kshs. 2,387,026/=. The Plaintiff submitted that, based on the amount payable and the amount paid, there was an overpayment by him of Kshs. 436,492/= for Mega City premises.
32. The Plaintiff submitted further that for the two premises at Mega Plaza, for Mega Plaza A, the rent and service charge payable from 1<sup>st</sup> February 2011 to 31<sup>st</sup> September 2012 was Kshs. 629,200/=. For Mega Plaza B, the Plaintiff submitted that the rent and service charge payable from 1<sup>st</sup> January 2012 to September 2012 was Kshs. 306,900/-. The Plaintiff submitted that the total rent and service charge, which was payable by the Plaintiff for the premises leased to him by the Defendant at Mega Plaza A and Mega Plaza B was Kshs. 936,100/=. The Plaintiff submitted that according to Defendant's Exhibit 14, the Defendant billed a total of Kshs. 2,569,003/= and was paid Kshs. 1,352,743/= by the Defendant. The Plaintiff submitted that the Defendant received an overpayment of Kshs. 416,464/= for the Mega Plaza premises.
33. For the Mega Mall at Kakamega, the Plaintiff submitted that the rent payable to Defendant from 1<sup>st</sup> March 2012 to 31<sup>st</sup> September 2012 was Kshs. 478,016/=. The Plaintiff submitted that according to the Defendant's Exhibit 14, the Defendant billed a total of Kshs. 1,985,123/- during the period and received a total of Kshs. 636,226/- from the Plaintiff. The Plaintiff submitted that there was an overpayment of Kshs. 58,210/= for the Mega Mall premises as at September 2012.
34. The Plaintiff submitted that for the four premises that were let to him by the Defendant, he had overpaid the Defendant to the tune of Kshs. 1,011,166/- as at 28<sup>th</sup> September 2012. The Plaintiff submitted that it followed from the foregoing that, as at 28<sup>th</sup> September 2012, when a distress for rent proclamation was served upon him by the auctioneers instructed by the Defendant, there was no rent due from him to the Defendant. The Plaintiff submitted that the rent overpayment of Kshs. 1,011,166/= was sufficient to cover the Plaintiff's rent and service charge for the premises that were let to him for the next 6 months from 1<sup>st</sup> October 2012 to 30<sup>th</sup> March 2013, amounting to Kshs. 1,200,692/=. The Plaintiff averred that since the overpayment was with the Defendant, the Defendant should have used it as rent, which would have left only a sum of Kshs. 189,526/= as outstanding rent as at March 2013. The Plaintiff submitted that even for this sum of Kshs. 189,526/=:, the same could be covered by some of the payments made by the Plaintiff in respect of which he was not given credit by the Defendant, such as: Kshs. 30,000/- paid on 26<sup>th</sup> October 2009 for Mega City premises, lump sum of Kshs. 90,064/- paid on 17<sup>th</sup> May 2012 for which no receipt was issued, but admitted at page 13



- of the further list of documents at the bottom right, and a deposit of Kshs. 262,000/- evidenced by a deposit slip at page 114 of the further list of documents. The Plaintiff submitted that the Defendant had been paid rent and service charge up to the end of March 2013.
35. The Plaintiff submitted that the only rent that the Defendant could claim was rent from April 2013 to August 2013 when the Defendant levied distress for rent. The Plaintiff submitted that according to the statement of outstanding rent for the 4 premises let to the Plaintiff dated 15<sup>th</sup> July 2013 filed in court on 24<sup>th</sup> May 2023, the total rent that was due to the Defendant as of July 2013 was Kshs. 598,026/=. The Plaintiff submitted that in the circumstances, the rent amount of Kshs. 3,862,123/= claimed by the Defendant in the counterclaim had no basis. The Defendant submitted that of the said outstanding rent of Kshs. 598,026/- he paid Kshs. 417,898/= on 1<sup>st</sup> August 2013, leaving a balance of Kshs. 180,128/- which was not payable as it consisted of 16% VAT, which was disputed, and a monthly rent at the rate of Kshs. 80,875/= for April to July 2013, which was inflated and the Defendant tried to rectify it in D.EXH.11, which was an admission of an overcharge of Kshs. 3,676/- per month.
36. The Plaintiff submitted that his operations were disrupted by the proclamation of distress for rent that was affixed to the doors of the Plaintiff's premises on 16<sup>th</sup> July 2013, and for that reason, the Defendant was not entitled to the rent for July 2013. The Plaintiff submitted that he paid Kshs. 417,898/- on 28<sup>th</sup> June 2013, for which he never received a receipt, nor was it included in the ledger accounts produced by the Defendant. The Plaintiff submitted that the payment was, however, acknowledged by the Defendant on page 13 of its further list of documents at the bottom. The Plaintiff submitted that he also presented to the Defendant a further cheque on 1<sup>st</sup> August 2013. The Plaintiff submitted that despite these payments, the Defendant still proceeded with distress for rent against him in July and August 2013. The Plaintiff submitted that the distress was unlawful as he had no rent arrears. The Plaintiff submitted that following the illegal distress, he ceased to occupy the suit properties on 14<sup>th</sup> August 2013. The Plaintiff submitted that he had agreed with the Defendant on a service charge of 5% which was charged for the Mega City premises, but the Defendant applied a 10% service charge for the Mega Plaza and Mega Mall premises, and that is what caused the non-signing of the leases for the two premises. The Plaintiff submitted that even for the Mega City premises for which the service charge was agreed at 5%, the Defendant had claimed a service charge at the rate of 10%. The Plaintiff submitted that he was not liable to pay rent for August, September, and October 2013 as the Defendant had already levied distress and the tenancy had come to an end. The Plaintiff submitted that it was also not liable to pay a total deposit of Kshs. 340,000/- claimed by the Defendant on account of security deposit and legal charges. The Plaintiff submitted that the deposits were not properly accounted for, the leases for Mega Plaza A and Mega Mall were neither signed nor registered, the Defendant did not provide proof of the payment of the legal charges for the signed and registered leases, the deposits paid were not refunded, and the letters of offer on which the Defendant based the deposit demands were not produced in court.
37. The Plaintiff submitted that the Defendant's counterclaim was not proved. The Plaintiff accused the Defendant of concealment of material facts and tampering with the court record. The Plaintiff submitted that the letters which he allegedly wrote admitting being in arrears of rent and undertaking to clear the same were written under duress to avoid being evicted from the leased premises. Concerning the cheques that were returned unpaid, the Plaintiff submitted that the payments made through the said cheques were unnecessary as he had already overpaid the rent due from him, and in any event, the cheques were replaced by cash. The Plaintiff submitted further that the demand notes produced by the Defendant were not genuine for several reasons. The Plaintiff submitted that although they were for October and November 2012, the same were issued on a single day, 29<sup>th</sup> October 2012, and a number had ETR receipts printed at the same time. The Plaintiff submitted that the demand notes were issued



in response to the Plaintiff's affidavit, in which he had raised the issue of overpayment of rent. The Plaintiff submitted further that the receipts which were issued by the Defendant did not have the particulars of what was paid for, the invoice number, or the cheque number. The Plaintiff submitted that the Defendant was not entitled to claim VAT. The Plaintiff submitted that the Defendant did not prove that he paid VAT and that it did not raise the issue of VAT between September 2009 and October 2012. The Plaintiff submitted further that the leases on which the Defendant based his VAT claim were not signed by the Plaintiff. The Plaintiff submitted that since the Defendant had been distrained for rent due from April 2013, that meant that the rent before that date had been cleared. The Plaintiff submitted that since VAT was not charged before April 2013, that was an admission that VAT was not part of the agreement between the parties and was only raised to counter the Plaintiff's rent overpayment claim. The Plaintiff submitted that the Defendant was not entitled to VAT for rents that were payable from April 2013 to July 2013.

38. The Plaintiff submitted that the Defendant did not provide the necessary particulars of the proceeds of the auction sale and the expenses incurred to justify the alleged costs of the distress. The Plaintiff submitted that due process was not followed in the sale of his goods that were distrained for rent. The Plaintiff submitted further that what was collected by the auctioneer from his premises was more than what the auctioneer indicated in the inventory to have collected. The Plaintiff submitted that this could be confirmed from the advertisements for sale of the distrained goods, which contained some items that were not in the inventory supplied by the auctioneers. The Plaintiff submitted that it was the Defendant who breached the lease agreements it entered into with the Plaintiff by levying an illegal distress for rent.

### **The Defendant's submissions**

39. The Defendant filed submissions dated 25<sup>th</sup> March 2025. The Defendant framed the following issues for determination;
1. Whether there were valid lease agreements between the two parties.
  2. Whether the Plaintiff was in rent arrears by the time distress for rent was levied against him on the 27<sup>th</sup> September, 2012.
  3. Whether the Plaintiff had proved his claim for special damages.
  4. Whether the Plaintiff had proved his claim for general damages.
  5. Whether the Defendant had proved its counterclaim for rent arrears.
40. On the first issue, the Defendant submitted that the parties entered into lease agreements which were registered as indicated on the cover page of the lease at page 18 of the Plaintiff's bundle of documents. The Defendant submitted that the leases were for a period of 6 years and, as such, were not controlled.
41. On the second and fifth issues, the Defendant submitted that it produced statements of accounts as defence exhibits 11, 12 and 13, which demonstrated that the Plaintiff was in rent arrears as at the time distress for rent was levied against him. The Defendant submitted that the Plaintiff owed Kshs 227,992/= for the Mega City premises as at 29<sup>th</sup> August 2012, Kshs. 79,765/- for Mega Plaza premises, as at 29<sup>th</sup> August 2012, and Kshs. 277,470/= for the Mega Mall, Kakamega premises, as at 10<sup>th</sup> September 2012. The Defendant submitted that these statements of accounts were prepared following an order by the court for the parties to reconcile their accounts.
42. The Defendant submitted that it produced as defence exhibit 14 a summary of the amounts outstanding as at the time the Plaintiff vacated the suit properties, when the auctioneer removed the



distrained goods from his premises on 14<sup>th</sup> August 2013. The Defendant submitted that the Plaintiff was liable to pay rent up to that date. The Defendant submitted that it produced as exhibit 15A a list of the items that were removed from the Plaintiff's premises by the auctioneers and sold by public auction. The Defendant submitted that the Defendant did not receive any payment following the auction sale, as there was an outstanding amount of Kshs. 35,860/= to be paid to the auctioneer. The Defendant submitted that it had proved that the Plaintiff was in rent arrears at the time distress was levied against him. The Defendant submitted that it had also proved its counterclaim against the Plaintiff since the rent that was in arrears was never settled by the Plaintiff.

43. On the third issue, the Defendant submitted that the law on special damages was settled, that special damages must be specifically pleaded with as much particularity as possible, and proved. The Defendant submitted that the Plaintiff did not prove his claim for special damages. The Defendant submitted that the Plaintiff had told the court that he would call a witness who would give evidence in proof of the special damages claimed by the Plaintiff, but the Plaintiff closed his case without calling the witness. The Defendant submitted that the Plaintiff's claim for special damages was unsupported and must fail. In support of this submission, the Defendant relied on Provincial Insurance Co. E.A Ltd. v. Mordekai Mwangi Nandwa, KSM CACA No. 179 of 1995 (unreported), and Capital Fish K Ltd. v. Kenya Power & Lighting Co. Ltd [2012] KEHC 5275 (KLR).
44. On the fourth issue, the Defendant submitted that general damages are such damages that the law will presume to be the direct natural or probable consequences of the action complained of. The Defendant submitted that the general rule reiterated in Dharamshi v. Karsan [1974] E.A 41, is that general damages are not awardable for a breach of a contract in addition to the quantified damages, as it would amount to a duplication. The Defendant submitted that from the evidence tendered in this case, it was the Plaintiff who caused the breach of the contracts between the parties by deliberately failing to pay the rent due to the Defendant. The Defendant submitted that this is what led to the termination of the said contracts and the consequent recovery process. The Defendant submitted that the Plaintiff, having contributed to the breach of contracts, was not entitled to an award of general damages. The Defendant relied on National Industrial Credit Bank Limited v. Aquinas Francis Wasike & Another [2015] eKLR in support of this submission.
45. With regard to the claim for rent for the unexpired term of the lease, the Defendant submitted that it had opted to abandon the same.

### **Analysis and Determination**

46. I have considered the pleadings, the evidence, and the submissions filed by the parties. I am of the view that the issues arising for determination in this suit and the counter-claim are the following;
  - a. Whether there were valid lease agreements between the parties.
  - b. What were the principal terms of the said leases, if any?
  - c. Whether the tenancies between the parties were controlled tenancies, and if so, what are the effects of such status?
  - d. Whether the Plaintiff was in rent arrears at the time the distress for rent was levied against him.
  - e. Whether the Plaintiff was unlawfully evicted from the suit properties.
  - f. Whether the Plaintiff is entitled to the orders sought.
  - g. Whether the Defendant is entitled to the orders sought in the counterclaim.



**Whether there were valid lease agreements between the parties, and if so, what were the principal terms of the said leases?**

47. In *Eldo City Limited v. Corn Products Kenya Ltd & another* [2013] eKLR, the court cited *Stores v. Manchester City Council* [1974] 1 WLR 1403 where Lord Denning MR stated as follows:

“In contracts, you do not look into the actual intent in a man’s mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying “I did not intend to contract”, if by his words, he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract, that is enough”.

48. The Plaintiff produced the leases he is said to have entered into with the Defendant. The first lease was for the premises situated at Mega City, Mezzanine floor space Nos. M-11 and M-13. The lease was for a term of 6 years with effect from 1<sup>st</sup> October 2009. The lease is undated but signed and registered on 24<sup>th</sup> May 2010. The lease provided for the payment of a deposit of Kshs. 50,000/-and monthly rent of various amounts from 1<sup>st</sup> October 2009 until the end of the lease. The lease provided for payment of a minimum service charge of 10% of the monthly rent with a proviso that if after an annual audit, it is found that the service charge paid by the Plaintiff was less than the actual service charge incurred for maintaining the premises, the Plaintiff would pay the difference between the service charge paid and the actual service charge found due after audit. The lease also provided for the payment of VAT on the rent and service charge, and the payment of the legal fees for the preparation of the lease.

49. The second lease produced by the Plaintiff was a lease in respect of the premises at Mega Plaza, Shop No. B4. The lease was for a term of 6 years with effect from 1<sup>st</sup> February 2011. The lease is undated but signed and registered on 16<sup>th</sup> May 2011. The lease provided for the payment of a deposit of Kshs. 30,250/-and monthly rent of various amounts from 1<sup>st</sup> February 2011 until the end of the lease. The lease provided for payment of a minimum service charge of 10% of the monthly rent with a proviso that if after an annual audit, it is found that the service charge paid by the Plaintiff was less than the actual service charge incurred for maintaining the premises, the Plaintiff would pay the difference between the service charge paid and the actual service charge found due after audit. The lease also provided for the payment of VAT on the rent and service charge, and the payment of the legal fees for the preparation of the lease.

50. The third lease was for the premises situated at Mega Plaza, Fourth Floor, Block B-3. The lease was for a term of 6 years with effect from 1<sup>st</sup> January 2012. The lease was undated, unsigned and unregistered. The draft lease provided for the payment of a deposit of Kshs. 34,100/-and monthly rent of various amounts from 1<sup>st</sup> January 2012 until the end of the lease. The draft lease provided for payment of a minimum service charge of 10% of the monthly rent with a proviso that if after an annual audit, it is found that the service charge paid by the Plaintiff was less than the actual service charge incurred for maintaining the premises, the Plaintiff would pay the difference between the service charge paid and the actual service charge found due after audit. The draft lease also provided for the payment of VAT on the rent and service charge, and the payment of the legal fees for the preparation of the lease.

51. The fourth lease produced by the Plaintiff was the lease for the premises at Mega Mall 1<sup>st</sup> Floor, Kakamega. The lease was for a term of 6 years with effect from 1<sup>st</sup> March 2012. The lease was undated, unsigned and unregistered. The draft lease provided for the payment of a deposit of Kshs. 68,288/- and monthly rent of various amounts from 1<sup>st</sup> March 2012 until the end of the lease. The draft lease provided for payment of a minimum service charge of 10% of the monthly rent with a proviso that if



after an annual audit, it is found that the service charge paid by the Plaintiff was less than the actual service charge incurred for maintaining the premises, the Plaintiff would pay the difference between the service charge paid and the actual service charge found due after audit. The draft lease also provided for the payment of VAT on the rent and service charge, and the payment of the legal fees for the preparation of the lease.

52. It is common ground that the Plaintiff took possession of the suit properties and made payment of rent for some time before a dispute arose between the parties in 2012 over alleged rent arrears. Both the Plaintiff and the Defendant referred to letters of offer by the Defendant, which were accepted by the Plaintiff as the basis of the said leases. However, none of the parties produced the said letters of offer in evidence in support of their respective cases. What were produced by both parties were the two dated, signed and registered leases and the two undated, unsigned and unregistered leases.
53. From the foregoing, it is my finding that the Plaintiff and the Defendant entered into two leases for 6-year terms, and two leases from month to month. The relationship between the Plaintiff and the Defendant in relation to the premises, which were let to the Plaintiff by the Defendant, but whose leases were never signed by the parties, is that of a periodic tenancy. Section 57 of the [Land Act 2012](#) provides as follows:

“ 57. Periodic leases

(1) If in any lease—

- (a) the term of the lease is not specified and no provision is made for the giving of notice to terminate the tenancy, the lease shall be deemed to be a periodic lease;
- (b) the term is from week to week, month to month, year to year or any other periodic basis to which the rent is payable in relation to agricultural land the periodic lease shall be for six months;
- (c) the lessee remains in possession of land with the consent of the lessor after the term of the lease has expired, then—
  - (i) unless the lessor and lessee have agreed, expressly or by implication, that the continuing possession shall be for some other period, the lease shall be deemed to be a periodic one;
  - and
  - (ii) all the terms and conditions of the lease that are consistent with the provisions of sub-paragraph (i) shall continue in force until the lease is terminated in accordance with this section.

(2) If the owner of land permits the exclusive occupation of the land or any part of it by any person at a rent but without any agreement in writing, that occupation shall be deemed to constitute a periodic tenancy.

(3) The periodic tenancy contemplated in subsection (1)(a) shall be the period by reference to which the rent is payable.

(4) A periodic tenancy may be terminated by either party giving notice to the other, the length of which shall be not less than the period of the tenancy and shall expire on one of the days on which rent is payable.”



54. The terms of the 6-year leases are set out in the said leases, while the terms of the periodic leases are what was agreed on by the parties as rent and other charges, and paid by the Plaintiff, and what the law would imply in that contractual arrangement. As mentioned earlier, the 6-year leases provided for the payment of rent, service charge and VAT, and the payment of legal costs for the preparation of the leases. The parties are bound by these terms.
55. For the periodic lease for the premises at Mega Plaza, Shop No. B3, from the invoices raised by the Defendant and the payments made by the Plaintiff from the commencement of the tenancy, it is clear that the parties agreed that the Plaintiff would pay a monthly rent of Kshs. 39,556/= inclusive of service charge and 16% VAT from 1<sup>st</sup> January 2012 to 31<sup>st</sup> December 2012, and Kshs. 43,512/= inclusive of service charge and 16% VAT from 1<sup>st</sup> January 2013 to 31<sup>st</sup> December 2013. There is no evidence that the parties agreed on the payment of the actual service charge after the yearly audit. An invoice for the said service charge was raised on 14<sup>th</sup> March 2013 in the sum of Kshs. 132,148/-, but the same was not paid by the Plaintiff. In the absence of an agreement binding the Plaintiff to make the payment, this court cannot hold him liable for the same. From the evidence on record, I am also satisfied that the parties agreed that a lease would be prepared and signed by the parties and that the Plaintiff would meet the cost. Since there is evidence that a lease was prepared and forwarded to the Plaintiff for execution, the Plaintiff cannot avoid paying the costs for the preparation of the lease merely because he refused to sign the same.
56. For the periodic lease for the premises at Mega Mall, Kakamega, from the invoices raised by the Defendant and the payments made by the Plaintiff at the commencement of the tenancy, I find that the parties agreed on a monthly rent of Kshs. 79,214/= inclusive of service charge and 16% VAT from 1<sup>st</sup> March 2012 to 28<sup>th</sup> February 2013, and Kshs. 87,136/= inclusive of service charge and 16% VAT from 1<sup>st</sup> March 2013 to 28<sup>th</sup> February 2014. Again, I have not found evidence that the parties had agreed on the payment of an actual service charge after the annual audit. I have seen from the evidence on record that the Defendant raised an invoice for Kshs. 152,997/= on 14<sup>th</sup> March 2013 on account of the said service charge. In the absence of an agreement between the parties for the payment of the same, the Plaintiff is not liable to pay the same. From the evidence on record, I am also satisfied that the parties agreed that a lease would be prepared and signed by the parties and that the Plaintiff would meet the cost. Since there is evidence that a lease was prepared and forwarded to the Plaintiff for execution, the Plaintiff cannot avoid paying the costs for the preparation of the lease merely because he refused to sign the same.

**Whether the tenancies between the parties were controlled tenancies, and if so, what are the effects of such status?**

57. The Landlord and Tenant (Shops, Hotels and Catering Establishment) Act Chapter 301, Laws of Kenya defines a controlled tenancy as follows:

“controlled tenancy” means a tenancy of a shop, hotel or catering establishment –

- a. which has not been reduced into writing; or
- b. which has been reduced into writing and which –
  - i. is for a period not exceeding five years; or
  - ii. contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or



- iii. relates to premises of a class specified under subsection (2) of this section:

Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy.”

58. In *Bachelor’s Bakery Ltd. v. Westlands Securities Ltd.* [1982] eKLR, the court stated as follows regarding the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act Chapter 301, Laws of Kenya :

“ The Act is legislation of a special nature enacted solely for the protection of tenants. It allows the parties a choice of occupation of premises under a controlled or uncontrolled tenancy, in the first case, within the ambit, and in the second case, outside the ambit of the Act. In the instances to which the provisions of the Act are declared to apply, it overrides any other written law which is in conflict with its provisions.

Notwithstanding the provisions of Section 107 aforesaid, which is contained in an earlier Act, therefore secondary to the provisions of the later legislation of the Act, the Act sets up a new mode, which did not exist before, of creating a valid tenancy of immovable property for any term exceeding one year by a specifically enforceable agreement in writing without registering the instrument; and if the agreement confers a right to obtain a lease thereunder for a period exceeding five years, it is a uncontrolled tenancy and outside the ambit of the Act which then loses jurisdiction over it. The Act is a cleverly conceived piece of legislation.

The uncontrolled tenancy thus created for a period exceeding five years is not altered into a controlled tenancy for it does not become a tenancy for a period less than five years, nor can it be deemed to be, as stated in Section 106 aforesaid, a lease from month to month, because an instrument under the agreement is not registered.”

59. In the case before me, I am not only dealing with an unregistered 6-year lease. There is no lease or agreement for lease. None was signed and if it was, it was not produced in evidence. It is my finding that the periodic tenancies for the premises that were let to the Plaintiff by the Defendant at Mega Plaza, Shop No. B3, and Mega Mall, Kakamega are controlled tenancies. The effect of that for the purposes of this case is found in Section 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya, which provides as follows:

- “ 4. Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with the following provisions of this Act.
- (1) A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.
  - (2) A tenant who wishes to obtain a reassessment of the rent of a controlled tenancy or the alteration of any term or condition in, or of any right or service enjoyed by him under, such a tenancy, shall give notice in that behalf to the landlord in the prescribed form.
  - (3) No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, as shall be specified therein:



Provided that -

Termination of, and alteration of terms and conditions in, controlled tenancy.

- i) where notice is given of the termination of a controlled tenancy, the date of termination shall not be earlier than the earliest date on which, but for the provisions of this Act, the tenancy would have, or could have been, terminated;
- (ii) where the terms and conditions of a controlled tenancy provide for a period of notice exceeding two months, that period shall be substituted for the said period of two months after the receipt of the tenancy notice;

SUBPARA (iii)

the parties to the tenancy may agree in writing to any lesser period of notice.

- (5) A tenancy notice shall not be effective for any of the purposes of this Act unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and requires the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice, whether or not he agrees to comply with the notice.
  - (6) A tenancy notice may be given to the receiving party by delivering it to him personally, or to an adult member of his family, or to any servant residing with him or employed in the premises concerned, or to his employer, or by sending it by prepaid registered post to his last known address, and any such notice shall be deemed to have been given on the date on which it was so delivered, or on the date of the postal receipt given by a person receiving the letter from the postal authorities, as the case may be.”
60. Under Section 12(1)(h) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya, the Business Premises Tribunal established under Section 11(1) of the Act has, among its powers, the power to permit the levying of distress. I, however, disagree with the Plaintiff that any landlord in respect of a controlled tenancy wishing to levy distress must obtain leave of the Business Premises Tribunal. There is no such requirement under the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act Chapter 301 Laws of Kenya. It follows, therefore, that if there was rent lawfully due and payable by the Plaintiff to the Defendant, in respect of the controlled tenancies, the Defendant could levy distress without leave of the Business Premises Tribunal.

#### **Whether the Plaintiff was in rent arrears at the time the distress for rent was levied against him.**

61. I do not have the benefit of the earlier proceedings in this matter. The original court file got lost and was never traced. The reconstitution of the court file became contentious as the parties could not agree on what was and what was not in the original court file, with each accusing the other of being responsible for the loss of the file. From what I can gather from the record, the Defendant first levied distress against the Plaintiff on 27<sup>th</sup> September 2012 when the Plaintiff was served with a proclamation of distress on his goods. In the proclamation dated 27<sup>th</sup> September 2012, the outstanding rent was given as Kshs. 236,713/=. It is not clear in respect of which premises this rent was due. It is also not clear from the record as to the premises on which the distress for rent was levied. According to the affidavit sworn by the Plaintiff on 28<sup>th</sup> September 2012 in support of his application for injunction to stop the distress which he claimed was illegal, the Plaintiff stated that the distress was levied on all his premises leased from the Defendant. The Plaintiff obtained a temporary injunction on 1<sup>st</sup> October 2012 restraining



the Defendant from levying distress against the Plaintiff. It is not clear from the record as to what became of that injunction application. From the material on record, it appears that on 23<sup>rd</sup> October 2012, when the application came up for inter partes hearing, the order of injunction was extended on condition that the Plaintiff deposit in court Kshs. 262,000/- as security, which the Plaintiff claims that he deposited on 1<sup>st</sup> November 2012.

62. The Plaintiff averred that on 14<sup>th</sup> August 2013, the Defendant, in breach of the said injunction order, removed the Plaintiff's goods from Mega Mall, Kakamega, in furtherance of the distress it had levied on 27<sup>th</sup> September 2012. The Plaintiff averred that on 26<sup>th</sup> August 2013, still in breach of the said injunction order, the Defendant removed his goods from Mega City Kisumu. The Plaintiff claimed that in both cases, the auctioneers instructed by the Defendant locked the premises and denied the Plaintiff access to the same.
63. From the copies of the proclamation produced in evidence by the Plaintiff, the Defendant levied a fresh distress for rent against the Plaintiff on 16<sup>th</sup> July 2013 for the recovery of rent arrears amounting to Kshs. 598,026/=, and it was following this distress for rent that the Defendant's auctioneers removed the distrained goods from the Plaintiff's premises on 14<sup>th</sup> August 2013. The Plaintiff filed an application dated 27<sup>th</sup> August 2013 to restrain the Defendant from selling the goods removed by the auctioneers from the suit properties and evicting him from the properties in breach of a court order. It is not clear from the record as to what became of that application. The question arising for determination is whether the Plaintiff was in rent arrears as at 27<sup>th</sup> September 2012 and 16<sup>th</sup> July 2013 when distress for rent was levied against him.
64. From the Defendant's statements of account produced as D.EXH.11, D.EXH.12 and D.EXH.13, the Plaintiff was in rent arrears to the tune of Kshs. 227,992/= as at 29<sup>th</sup> August 2012 for the premises at Mega City, Kshs. 79,765/= for the premises at Mega Plaza, and Kshs. 277,470/= for the premises at Mega mall as at the same date. It follows from the foregoing that the Plaintiff was in rent arrears as at 27<sup>th</sup> September 2012 when the first distress for rent was levied. From the Defendant's exhibits D.EXH. 11, D.EXH. 12 and D.EXH. 13, which I find to have correctly captured the rent, service charge and VAT that were payable by the Plaintiff, save as stated otherwise below, the Plaintiff was in rent and service charge arrears to the tune of a total of Kshs. 3,324,999/- for all four premises as at 1<sup>st</sup> July 2013. From this amount I would deduct Kshs. 152,997/= charged as actual service charge for Mega Mall, Kshs. 66,074/- being half of the Kshs.132,148/- charged as the actual service charge for Mega Plaza and Kshs. 156,605/- charged as the actual service charge for Mega City. The deductions leave an outstanding rent, service charge and VAT amounting to Kshs. 2,949,323/= as at 1<sup>st</sup> July 2013. The Plaintiff was therefore in rent arrears as at 16<sup>th</sup> July 2013 when the second distress for rent was levied against him. It follows from the foregoing that the distress that was levied against the Plaintiff was lawful, provided that it was not carried out in breach of a court order. I have found no evidence that the Plaintiff had overpaid rent to the Defendant. This claim did not find support in the agreements between the parties. The Plaintiff cannot say that he was not liable to pay VAT when he had signed a lease providing for such payment, and even in cases where there was no written lease, rent invoices had been raised which included 16% VAT, and the Plaintiff made payment of the same without any objection. I agree with the Plaintiff that there were inconsistencies in the invoices raised by the Defendant and the various statements of account. I, however, agree with the Defendant that there was a reconciliation of accounts and over-invoicing and under-invoicing were flagged out and appropriate credits and debits were made in the final statements of account, which were produced in court by the Defendant.



### **Whether the Plaintiff was unlawfully evicted from the suit properties.**

65. It is common ground that the Plaintiff ceased to be the Defendant's tenant in August 2013 after his goods were distrained, removed from his leased premises, and sold at a public auction at which nothing was recovered. A distress for rent is not provided in law as one of the means of terminating a lease or a tenancy. For the two premises under 6-year term leases, the leases provided for the circumstances under which the same could be terminated. For the other premises occupied by the Plaintiff under periodic tenancies, the Defendant could only terminate the same as provided under the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Chapter 301 Laws of Kenya. Unless the Plaintiff voluntarily handed possession of the premises to the Defendant, the Defendant had to obtain a court order or an order of the Business Premises Rent Tribunal to repossess the premises from the Plaintiff. What was done here was against the law. The auctioneers acting on behalf of the Defendant had no right to lock the suit properties and deny the Plaintiff access after levying distress. This amounted to unlawful eviction of the Plaintiff from the suit properties.

### **Whether the Plaintiff is entitled to the orders sought**

66. I have set out earlier in the judgment the orders sought by the Plaintiff in his amended plaint. The Plaintiff sought a declaration that the tenancies between the parties were controlled tenancies. I have found that only two tenancies were controlled. The Plaintiff is entitled to a declaration to that effect. The Plaintiff also sought a declaration that the distress for rent levied upon him was illegal, null, and void. I have found that the Plaintiff was in rent arrears as at the time the distress for rent was levied against him. To that extent, the distress was lawful. There is, however, the issue of distress being levied in breach of a court order. The Plaintiff failed to prove this claim. The Plaintiff is therefore not entitled to the declaration sought. The Plaintiff sought special damages of Kshs. 4,894,500/=. The Plaintiff failed to lay a basis for the claim. The Plaintiff also did not specifically prove the special damages as pleaded. All the documents that the Plaintiff sought to rely on in proof of his special damages claim were not produced in evidence. They were all marked for identification and were never produced as exhibits. The Plaintiff also claimed general damages for unlawful eviction. I have held that the eviction of the Plaintiff from the suit properties was unlawful. The Plaintiff is therefore entitled to general damages for unlawful eviction. Given his inability to meet his rent payment obligations, the Plaintiff's business may have been facing hard times. However, the Plaintiff had a right to due process before his leases could be terminated and the suit properties repossessed by the Defendant. The illegal termination of the Plaintiff's leases and eviction of the Plaintiff from the suit properties in effect destroyed the Plaintiff's business. Taking all factors into account, I will award the Plaintiff general damages in the sum of Kshs. 3,000,000/- for illegal eviction.

### **Whether the Defendant is entitled to the orders sought in its counterclaim**

67. The Defendant took over possession of the suit property in August 2013 after the auctioneer removed the Plaintiff's goods from the Defendant's premises and locked the premises. The Defendant is therefore not entitled to the rent for September 2013. I have found that the Plaintiff was in rent arrears at the time distress was levied against him and his leases terminated. I had earlier computed the outstanding rent, service charge and VAT as at the date of the levying of the distress for rent. This will now be adjusted up to August 2013, when the Plaintiff's tenancies were terminated. From the Defendant's statements of account produced as D.EXH.11, D.EXH.12 and D.EXH.13, the Plaintiff was in rent arrears to the tune of Kshs. 1,226,768/= as at 1<sup>st</sup> August 2013 for the premises at Mega City, Kshs. 1,130,286/= for the premises at Mega Plaza, and Kshs. 1,261,763/= for the premises at Mega mall as at the same date. It follows from the foregoing that the Plaintiff was in rent, service charge and



VAT arrears to the tune of a total of Kshs. 3,618,817/- for all four premises as at 1<sup>st</sup> August 2013. To this amount I would deduct Kshs. 152,997/= charged as actual service charge for Mega Mall, Kshs. 66,074/- being half of the 132,148/- charged as the actual service charge for Mega Plaza and Kshs. 156,605/- charged as the actual service charge for Mega City. The deductions leave an outstanding rent, service charge and VAT amounting to Kshs. 3,243,141/= as at 1<sup>st</sup> August 2013. This is what the Defendant is entitled to as rent arrears. The Defendant had abandoned its claim for the remainder of the lease period. I will therefore not consider the same.

### **Conclusion**

68. In conclusion, I hereby make the following orders in the matter;

1. Judgment is entered for the Plaintiff in the sum of Kshs. 3,000,000/- as general damages for unlawful eviction.
2. Judgment is entered for the Defendant in its counterclaim in the sum of Kshs. 3,243,141/-.
3. The sum of Kshs. 3,000,000/- awarded to the Plaintiff shall be set off against the award of Kshs. 3,243,141/- made in favour of the Defendant against the Plaintiff, and the Plaintiff shall pay to the Defendant the difference in the sum of Kshs. 243,141/=.
4. Each party shall bear its costs of the suit.

**DATED AND SIGNED AT KISUMU THIS 11<sup>TH</sup> DAY OF NOVEMBER 2025**

**S. OKONG'O**

**JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing platform in the presence of;

The Plaintiff present in person

Mr. Saro h/b for Mr. Qeu for the Defendant

Ms. Anne-Court Assistant

