REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CIVIL SUIT NO. 23 OF 2018

NGUMBAU INVESTMENTS LIMITED
T/A COURTYARD HOTEL ……

PLAINTIFF

VERSUS

KITELE INVESTMENTS LIMITED……1ST DEFENDANT

ELIZABETH NGII MWANGI, ELIJAH MUSAU KITELE, MWOSE KITELE & DAPHNE KITELE (Sued as the Administrators of the Estate of Laban Maingi Kitele……2ND DEFENDANT

AND BY WAY OF COUNTERCLAIM

KITELE INVESTMENTS LIMITED……1ST DEFENDANT

ELIZABETH NGII MAINGI……2ND DEFENDANT

ELIJAH MUSAU KITELE……3RD DEFENDANT

MWOSE KITELE……..4TH DEFENDANT

DAPHINE MUENI MUSYOKI……5TH DEFENDANT

VERSUS

NGUMBAU INVESTMENTS LIMITED T/A COURTYARD HOTEL……1ST DEFENDANT

WILLIAM MUTISYA MBALUTO……2ND DEFENDANT

ANTHONY KINGOO NGUNGA……3RD DEFENDANT

AND

KINDEST AUCTIONEERS…… INTERESTED PARTY

JUDGMENT

Background of the case

1. At the heart of the dispute before this court is a lease agreement over structures on **L.R. No. Machakos Town/ Block 11/89 ("suit premises")** between the plaintiff and Laban Maingi Kitele **("deceased").** The first defendant is a company incorporated by the deceased's beneficiaries, while the second defendant is the administrator of his estate.

2. In a plaint dated 02/02/2018 and amended on 15/03/2023, the plaintiff contended that the lease was for a term of six years from 1st January 2014 to 31st December 2019. It was also claimed that, as part of the agreement, the deceased was to lease out a separate property to the plaintiff, where a hotel called Garden Hotel was to be established, which was to happen once the lease over the suit premises had expired.

3. The plaintiff contended that at the time of entering the lease, the suit premises were in poor condition and required extensive repairs and renovations. It claimed that an agreement was made with the deceased that the plaintiff would invest in the suit premises by renovating it, with the costs to be recovered from the intended lease over the Garden Hotel. Accordingly, the plaintiff spent Kshs. 5,400,000 on such renovations, financed through a bank loan.

4. It stated that upon occupation, it was discovered that the suit premises required further extensive repairs; additionally, there were six unusable rooms, resulting in annual losses of Kshs. 4, 106, 250/-, and the main sewer line also experienced persistent blockages. As a consequence of these issues, it averred that on 21st August 2014, a meeting was held where it was agreed that rent for the entire lease period would be frozen at Kshs. 300,000/-.

5. It asserted that following a Ministry of Health inspection, further renovations were required at the butchery area and the

back of the building to prevent closure of the premises. However, since the deceased lacked funds, it was agreed that the plaintiff would undertake the renovations, valued at Kshs 3,600,000/-, to be reimbursed gradually during the lease term, which it allegedly financed through a loan that continues to accrue interest. It maintains that at the behest of the deceased, it expended a further sum of Kshs 1,200,000/- as goodwill to secure the Masii Butchery, which was not initially part of the leased premises, with a promise that the amount would be refunded.

6. It stated that upon the deceased's demise on 22nd August 2015, it was informed to pay rent to the 1st defendant, and it complied. Furthermore, in 2015, an agreement was made with the 1st defendant that the mentioned Kshs 5,400,000 would be recovered by offsetting Kshs 150,000 monthly from the frozen rent of Kshs 300,000 over a period of 36 months. Nevertheless, in 2017, the 2nd defendant demanded full rent in accordance with the lease terms, including alleged arrears of 20 months from January 2015, essentially disregarding prior agreements.

7. Furthermore, on or about 19th December 2017, the 2nd defendant instructed it to pay all rental sums into a bank account, and in January 2017, the 1st defendant's advocates demanded the outstanding rent of Kshs 1,590,000/-. Shortly thereafter, it instructed Kindest Auctioneers to levy distress for rent of Kshs 2,129,734.90/-. It regarded such distress as

irregular and illegal. To it, the actions of the defendants caused losses, which it particularised as follows: -

i. A percentage of the interest on the suit premises owing to the renovations undertaken over the years to be assessed by a qualified surveyor;
ii. Loss of goodwill owing to the dilapidated state of the sewerage line assessed at Kshs. 7,008,000/-;
iii. Kshs. 1,200,000 paid by the plaintiff to Masii Butchery in the form of goodwill;
iv. Damages due to lack of water in the suit premises assessed at Kshs. 900,000/;
v. Total water bill paid for the suit premises valued at Kshs. 79,800/-;
vi. Sewer line repairs at Kshs. 1,620,000/-;
vii. Recovery of Kshs. 9,000,000/- spent towards renovating the suit premises; and
viii. Goodwill over the suit premises assessed at Kshs. 1,709, 211.78/-

8. In the end, it sought the following reliefs from this court: -

a. A permanent injunction does issue restraining the defendants and their agents, employees, servants and/or otherwise assigns/ and or whosoever from attaching, advertising or offering for sale, taking possession, auctioning, transferring, leasing, charging, interfering with the suit premises or

plaintiff's equipment as contained in Courtyard Hotel.

b. A percentage of the interest in the suit premises.

c. Special damages as pleaded.

d. Costs and interests at commercial rates.

9. Upon being served, the defendants filed a defence and an "amended" counterclaim dated 9th November 2022, which mainly consisted of denials and required the plaintiff to prove its claims. They asserted that they were not involved in any agreements concerning the Garden Hotel. According to them, between August 2009 and 9th December 2013, the deceased carried out extensive repairs, followed all proper procedures before an occupancy certificate was issued to him; therefore, the suit premises were habitable.

10. They contended that prior to executing the lease, the deceased and the second and third defendants to the counterclaim, who are directors of the plaintiff, entered into a pre-lease agreement on 26th July 2013. As concerns Masii Butchery, they contended that if such an agreement existed, it concerned a different property. They maintained that the lease contained all the terms and conditions that defined the relationship between the parties and excluded any other agreements. They argued that it was a term of the lease that the rent would increase by 10% each year, with the first year's rent being Kshs. 300,000/-, the second year's Kshs 350,000/-,

the third and fourth years Kshs 385,000/-, and the fifth and sixth years' Kshs 423,500/-.

11. They claimed that, despite clear terms regarding rental payments, the plaintiff, from January 2015 onwards, defaulted on paying Kshs. 13,404,000/= in rent. Concerning renovations, they argued that the lease explicitly stated that no renovations or alterations could be carried out without the written consent of the deceased. They averred that the lease expired during the pendency of the suit and that they issued a non-renewal notice on 20th August 2019, and the plaintiff vacated on 13th August 2020 without paying rent for this extended period of eight months, hence seeking mesne profits of Kshs. 423, 500/- per month.

12. They averred that during the plaintiff's vacation, they engaged the services of Maguna-Andu Building Contractors and Civil Engineers **("Maguna"),** who estimated the cost of repair and renovation works on the suit premises at Kshs. 6, 579, 679/-. They also stated that the plaintiff had not paid the outstanding water and electricity bills of Kshs. 711, 971.25/- and Kshs. 356, 142.23/- respectively. As a result, they sought the following reliefs from this court: -

    a. ***The plaintiff's suit be dismissed with costs to the defendants.***

b. An order be made that the outstanding rent arrears of Kshs. 13, 404,000/- together with interest thereof be paid to the defendants.

c. An order for special damages of Kshs. 7, 647, 792.48/-

d. An order of mesne profits of Kshs. 3, 388,000/-

13. In response, the plaintiff filed a defence to the "amended" counterclaim dated 15th March 2023, stating that some assertions were unfamiliar, others were denied, and specifically admitting that the lease detailed the mode and amounts of payment, and that the plaintiff could not make any alterations or additions to the suit premises without the written consent of the deceased. It also acknowledged that the lease was due to expire on 1st January 2020, that a non-renewal notice was issued on 20th August 2019, and that its lawyers responded on 4th September 2019, contesting the notice.

14. Regarding the delayed payments after the expiry, particularly for January and February 2020, it was stated that the frustration of the defendants caused this, as they froze their bank accounts and their lawyer refused to accept the cheques. As for the delayed handover, it stated it was ready to vacate as of March 2020 and amongst others, the delay was occasioned by COVID-19 restrictions. It noted that it vacated the suit premises when it was in good condition, and settled all outstanding bills, and it was not involved in the assessment post-handover.

Issues for determination

15. Having considered the pleadings and the evidence presented by the parties during the hearing on the merits and issues as outlined in the filed submissions, the following issues for determination arise: -

    a) ***Whether the terms of the lease were breached?***

    b) ***Whether parties are entitled to the reliefs sought.***

16. Having outlined the issues to be decided, this court will now summarise the parties' evidence related to these issues as identified. However, it is worth noting that although the plaintiff raised the preliminary issue of Daphine Mueni Musyoki's authority to plead, this is a non-issue, as the authorities to act for the defendants were filed on 15th February 2018.

Hearing and evidence

17. Hearing in this matter commenced on 26th July 2023, with Anthony Ngunga **(PW1**) testifying for the plaintiff and Daphine Mueni Musyoki **(DW1)** testifying for the defendants. They relied on their respective witness statements, oral testimonies, and produced documents, with those of the plaintiff marked as **PExh 1-13** and those of the defendants as **DExh 1-25.** Their testimonies largely reiterated their pleadings, and this court will not dwell on reaffirming them.

18. In his testimony, PW1 did not dispute the lease agreement or the terms of payment therein, as alluded to in the defence and counterclaim. He also did not dispute that the plaintiff fully complied with the lease terms during the first year of the lease, which was 2014. As for the subsequent years, he stated that in 2016, the plaintiff was paying either Kshs 150,000/- or 300,000/- instead of Kshs. 385,000/-, and that in the subsequent years, it was only paying Kshs 150,000/-, which was contrary to the lease terms.

19. He also did not dispute that the plaintiff vacated either three or eight months after the lease expired, but stated that it duly paid the rental sums. He also did not dispute that the plaintiff had not settled the outstanding utility bills.

20. As concerns the question of a handover inventory at the time of vacation and repairs, he testified that the plaintiff did not send a representative during the process and that he was unaware that the plaintiff was to carry out renovations prior to vacation. However, he stated the plaintiff painted the premises in April 2020. In respect of the renovations costing Kshs. 5,400,000/-, he mentioned that he obtained oral consent to carry them out. He also stated that the plaintiff left the suit premises in good condition and that the post-vacation assessment of the suit premises by the defendants was conducted arbitrarily.

21. As for the freezing of the rental sums to Kshs. 300,000/-, he stated that the plaintiff's request to the deceased's advocates was responsive. He also noted that some of the plaintiff's cheques were rejected due to issues with depository accounts.

22. Turning to DW1's evidence, it was her testimony that she was not privy to any agreements between the deceased, Elijah, and the plaintiff regarding renovations, and that they only became aware of the Kshs. 5,400,000/- much later. She also stated she did not have proof that this money was ever refunded to the plaintiff. Regarding the Ksh. 1,200,000/- paid to Masii Butchery, she said she was not aware of such arrangements.

23. She argued that only after reviewing the lease following the deceased's death and obtaining letters of administration did they discover that the plaintiff had not been adhering to the lease terms. She also noted that there was no evidence that the deceased had ever accepted the reduced rent of Kshs. 150,000/-, and furthermore, the plaintiff continued to make such payments even after the deceased's death. Regarding non-payment after the lease expiry, she was shown a letter by her advocates dated 25th February 2020, which indicated that the defendants' advocates wrote to the plaintiff's advocates, asserting they had no instructions to receive the cheques.

Submissions

24. After the hearing concluded, and at the request of the parties, the parties argued their respective cases through written submissions. The court sincerely appreciates the well-argued submissions received from the law firms of **Ms. Kithuka & Nafula Advocates** representing the plaintiffs, dated 25/06/2025, and from **Ms. A.M.Mbindyo & Co. Advocates** for the defendants, dated 10/07/2025. Therefore, in its analysis and determination, the judgment will carefully consider the arguments presented in the rival submissions, along with the relevant law and judicial precedents cited.

Analysis and determination

25. The issues previously identified will be addressed collectively. In this case, it is undisputed that there is a pre-lease agreement between the plaintiff's directors (the 2nd and 3rd defendants to the counterclaim) and the deceased, dated 26th July 2013.

26. It is undisputed that the parties later entered into a six-year fixed-term lease agreement, subject to renewal, commencing on 1st January 2014 and ending on 1st January 2019, for the ground floor facing the cathedral church. The lease includes 24 rooms in the front part on the 1st and 3rd floors, 16 rooms on the 1st floor, and one conference room, along with fixtures and fittings, all within the suit premises. Therefore, in addressing

the issues for determination, it is necessary to highlight the relevant jurisprudence on the significance of such contracts as executed by the parties.

As concerns parole evidence and as the defendants' counsel submitted, the rule forbids introducing extrinsic evidence to modify the terms of a written contract between parties, and this court aligns itself with the decision of **Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited [2017] eKLRCivil Appeal 61 of 2013** that was relied upon by the defence, which stated: -

> ***"So that where the intention of parties has in fact been reduced to writing, under the so called parol evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms. Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's document meaning should be derived from the document itself, without reference to anything outside of the***

party (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it."

Respecting the conduct of parties to an agreement, this court adopts the dicta in **Eldo City Limited v Corn Products Kenya Ltd & another [2013] KEHC 5916 (KLR)** where the court stated:-

"It is trite law that in deciding disputes, it is the court's duty to give effect to the intention of the parties. The parties' intention is discernible from the documents and conduct of the parties. However, onerous a document or contract may be, the court's duty is to give effect to it. In the case of Smith –vs- Cook (1891) AC 297 at 303 the court held: -

> ***"The duty of the court is to give the natural meaning to the language of the deed unless it involves some manifest absurdity or would be inconsistent with some other provision of the deed and would therefore be contrary to the intention of the parties as appearing upon the face of the deed."***

In the case of Rose and Frank Co. –vs- J.R Crompton and Brothers Ltd (1923) 2 KB 261, the

court held that there was nothing wrong in having clauses in an agreement where parties agree not to be bound in law but subject to a contract being drawn up."

Regarding special damages, the Supreme Court of Kenya's decision of **Kwanza Estates Limited v Jomo Kenyatta University of Agriculture and Technology [2024] KESC 74 (KLR)** illuminated the settled principles by stating as follows:

However, it is equally established that general damages for breach of contract are not awardable in addition to quantified or special damages. The legal position on this issue was first stated in Dharamshi v Karsan [1974] EA 41 by the Court of Appeal for East Africa and restated several times by the Court of Appeal in subsequent cases including Postal Corporation of Kenya v Gerald Kamondo Njuki t/a Geka General Supplies NRB CA Civil Appeal No. 625 of 2019 [2021] eKLR. The measure of damages follows the rule established in Hadley v Baxendale (1854) 9 Exch.341, which holds that damages should encompass losses arising naturally from the breach itself or those reasonably foreseeable by both parties at the time the contract was formed. This principle has been adopted in Kenyan

jurisprudence, as demonstrated in Standard Chartered Bank Limited v Intercom Services Ltd & others, NRB CA Civil Appeal No 37 of 2003 [2004] eKLR. Such damages are special damages, which must be specifically pleaded and proven, a requirement reiterated in Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others (NRB CA Civil Appeal No. 192 of 92 (UR)) and Charles C. Sande v Kenya Co-operative Creameries Ltd (NRB CA Civil Appeal No. 154 of 1992 (UR)). Emphasis added."

This decision went further and stated as follows on the duty of a party to mitigate against loss, thus: -

"The duty to mitigate arises as soon as the injured party realizes an interest has been injured. They must act in the interest of both parties, provided this does not require them to suffer additional injury or engage in unreasonable expenditure or speculative litigation. Whether the actions in mitigation are reasonable depends on the specific facts of each case, with the burden of proving failure to mitigate resting on the defendant (See African Highland Produce Limited v John Kisorio [2001] eKLR, citing Halsbury's Laws of England, Vol 11, Page 289, 3rd Edn 1955)."

On *mesne* profits, the court concurs with the Court of Appeal decision of **Attorney General v Halal Meat Products Limited [2016] KECA 306 (KLR)** that has been relied upon by the plaintiff, which stated:-

> ***"It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18th Ed. para 34-42."***

Accordingly, this court will address the issues under the following heads. Still, before doing so, it finds the plaintiff's claim for a permanent injunction moot, as it has already vacated the suit premises.

a) <u>Repairs</u>

27. Regarding repairs of the suit premises, the lease outlined the responsibilities of the plaintiff and the deceased. Under *clause 2 (d)* of the lease agreement, read in conjunction with clauses *4(d)* and *24*, it is clear that the deceased was responsible for repairing cracks, defects, leaks, water overflow, main walls, roofs, common parts, and keeping these in good condition. With reference to repairs at the time of vacation, *clause 4 (g),* which erroneously references *(g)* as *(a),* stipulates that the

deceased was to give written notice to the lessee of any repairs for which the lessee is liable, and in the event of default, to carry out the necessary repairs, with the lessee liable to pay the costs to the lessor on demand.

28. A reading of clauses *4 (j)* and *(k)* and *18* together demonstrates that the plaintiff had a duty to keep the interior and exterior of the suit premises in good and tenantable repair, with normal wear and tear expected. It could not carry out any structural changes or renovations without the written consent of the deceased or a permit. Under these conditions, the only structures it could erect without the deceased's consent were those related to shelves, counters, showcases, and tenant fixtures, which it was required to remove at the end of the lease at its own expense, while repairing all damage caused by the installation or removal of its fixtures.

29. Having delineated the rights and obligations of each party as specified in the lease, we will now consider three claims from the parties. The first claim by the plaintiff is for Kshs. 5,400,000/-, which amount is derived from a valuation report that allegedly inspected the suit premises on 30/06/2015. The various correspondences, especially from the defendants, indicate that they do not dispute this amount, only suggesting it should be recovered from the outstanding rent arrears, which the plaintiff agreed to as per its correspondence. The plaintiff also pleaded in *paragraphs 16*

and *17* of the amended plaint that these sums were to be offset from the rent.

30. Having made such concessions through their conduct to the plaintiff and asserting that it had already been deducted from the rent arrears, they cannot now disown this amount at this stage. This court therefore finds that the plaintiff was entitled to this amount. It also finds that this amount was offset from the rent. It also finds that the defendants fully settled these sums. It also finds that the plaintiff is not entitled to any losses incurred as bank loans, as the lease explicitly excludes such losses.
31. The second claim by the plaintiff is for Kshs. 3,600,000/-, and to support this, it has presented a valuation report from Rubyland Limited. The report reveals that an inspection was conducted on 9th December 2017 by Charles P.M. Gichira. It states that the scope of work involved the plaintiff informing him that, at the time of takeover, the butchery and bar were in a dilapidated condition and in need of repairs. His role was to determine the fair value of the improvements, which he valued at Kshs. 3,600,000/-.

32. Considering the terms of the lease, the construction of a butchery was clearly in breach of the agreement, as the plaintiff was permitted to use the leased premises solely as a hotel, bar, and restaurant, not as a butchery. This court is uncertain whether this butchery is what is referred to as “Masii Butchery” and, if so, it then does not form part of the

lease agreement. Furthermore, it was expected that the plaintiff would provide written consent from the deceased or his legal representatives, as outlined in the lease, authorising such construction of the bar and butchery, if applicable.

33. The plaintiff failed to do so, and this court finds that if such a construction did occur, it obviously violated the unambiguous terms of the lease. Hence, the plaintiff must therefore bear the consequences of this breach. Moreover, pointedly, some of the alleged renovations appear to be those that the plaintiff was solely to bear, such as internal partitions and display, yet the report has not factored this in its tabulation. Additionally, the renovations were allegedly spent, and it was expected that the plaintiff would provide receipts to support its claim, but none were submitted. Therefore, this court finds the report unreliable and also concludes that the plaintiff has failed to prove its claim under this head.

34. The last claim under this head is that of the defendants, whereby they claim Kshs. 6,579,679/- as repair estimates, and in substantiating this claim, have relied on a report from Maguna. Their counsel in making their submissions urged this court to infer the terms of the lease as binding the parties and relied on **Weru v Nderitu [2023] KEHC 20678 (KLR),** and this court agrees with him in light of the parole evidence rule. From the evidence, it is undeniable that the plaintiff left the premises unceremoniously.

35. According to the lease agreement, in the event of neglecting to perform repairs, including painting, the defendants were responsible for undertaking repairs for which the lessee was liable and were to seek reimbursement for the incurred costs. Upon review of the evidence, the letter dated 14/08/2020 is insufficient as it does not specify the amounts spent on repairs as envisaged by the lease. Additionally, Maguna's report constitutes a quotation, implying it is an estimation of future expenses and not exact costs as provided for in the lease.

36. Furthermore, a review of this report indicates that it does not differentiate between the repair expenses to be borne by the plaintiff, the deceased, or his legal representatives. Additionally, it fails to consider the reasonable depreciation of the building due to everyday use. The report also omits the identification of the author and his credentials. Therefore, this court finds the report to be unreliable. It also finds that it was not made in accordance with the standards expected under the lease agreement. Consequently, the defendants' claim under this head fails.

b) Rent arrears

37. It is also undisputed that it was a term of the lease that the rent would increase by 10% each year, with the first year's rent being Kshs. 300,000/, the second year's Kshs 350,000/-, the third and fourth years' Kshs 385,000/-, and the fifth and

sixth years' Kshs 423,500/-. However, the plaintiff contends that the parties later agreed that the rent would be retained over the years at the flat rate of Kshs. 300,000/=. Since it is the trite law that he who alleges must prove, the burden was upon the plaintiff to prove these allegations that an agreement subsists on freezing the rent.

38. Having considered the adduced evidence, the court finds that the plaintiff did not substantiate the allegations, as the letter from it to the deceased, dated 28/08/2014-allegedly issued after a meeting with the deceased on 21 August, which this court assumes refers to 2014, only states: *"we hereby formally request a freeze to the initial Kshs. 300,000/= rental per month without any changes till the life of the current lease."*

39. Although it remains uncertain whether the deceased received it, as the postal code is absent from the letter, this court's understanding is that the plaintiff was making a proposal that had yet to be accepted by the deceased.

40. There is no evidence that the deceased accepted. It is undisputed that the contested lease agreement was negotiated and executed by the plaintiff and the deceased. Evidence demonstrates that both parties participated in its execution, that it addressed all their concerns and terms of engagement, which were subsequently documented in writing, and that they are bound by it. Therefore, an

exception to the parole evidence rule is not applicable in this case.

41. In their pleadings, namely *paragraphs 16* and *17* of the amended plaint and *paragraph 57* of the amended defence and counterclaim, both parties agree that the plaintiff began paying rent of Kshs. 150,000/- from 1st October 2015. It has also been established that throughout the lease period, the plaintiff paid Kshs. 300,000/- per month (subject to Ksh. 5,400,000/-). Additionally, it was agreed that the plaintiff would recover Kshs. 5,400,000/- by paying reduced rent of Kshs. 150,000/-. It has also been confirmed that this sum of Kshs. 5,400,000/- was fully recovered and settled from the rental sum. Hence, this court finds that it was wrong for the defendants to claim rent arrears of Kshs. 13,404,000 without taking into account this Kshs. 5,400,000/-.
42. Consequently, guided by **Fidelity Commercial Bank Limited *(Supra)*** and considering that the plaintiff's repair costs were to be recovered from rent arrears, this court deducts Kshs. 5,400,000/- from the Kshs 13,404,000/- that has been claimed. Therefore, the court finds that the plaintiff was in rental arrears for the years during which it failed to pay the increased rents and/or the full rent (less Kshs. 5,400,000/-), amounting to Kshs 8,004,000/-. It also concludes that the defendants correctly exercised their rights under *clause 25 (b)* of the lease by issuing demands to settle the rent arrears through their letters dated 1st September 2017 and 14th

September 2017. The court further finds that the interested party properly issued a distress of goods notice.

c) ***Goodwill, Masii Butchery, sewer line repairs, plaintiff's utility bills and loss of business***

43. The plaintiff and defendant claimed substantial sums under this head. The burden was on them to provide clear and solid evidence to justify their entitlement to these special damages and prove them.

44. Regarding goodwill, the plaintiff argued that the loss of goodwill was caused by the dilapidated condition of the main sewer line and the defendant's failure to maintain the infrastructure, violating both the lease terms and the implied covenant of quiet enjoyment. However, the lease does not provide for goodwill, including that of the purported Masii Butchery. Furthermore, the plaintiff failed to produce any evidence, such as receipts, bank statements, or deposit slips, to substantiate the claim to these sums. Additionally, *clause 25 (f)* categorically states that the lease shall not be interpreted as requiring the deceased to enforce any other lease against any other tenant or to be liable to the lessee for violations by such tenants. Therefore, any claim for goodwill, in whatever form, must fail.

45. As for sewer repairs, it was a term of the lease that the deceased, under *clause 24(c),* would maintain the common

parts of the building in good repair, provided this was not beyond his control. However, the report presented to support this claim is undated, unsigned, and its source is unknown, with no disclosures indicating whether the sewer lines were within public areas outside the deceased's control. The plaintiff's evidence was also inconsistent, as it testified to spending 200,000/- on such repairs, yet in the amended plaint, it claimed Kshs. 7,008,000 and/or 1,620,000/-. Furthermore, no receipts were provided to substantiate this claim. This claim fails.

46. Regarding water bills, *clause 4(g)* explicitly states that it is to be borne by the plaintiff. In the event of a shortage, *clause 25 (ii)* clearly indicates that the deceased would not bear this responsibility in any case; the plaintiff did not specifically prove through receipts that it spent Kshs. 979,800/- under this head. The plaintiff's claim under this head fails.

47. Respecting the defendants' claim under this head, these bills were to be settled by the plaintiff. The defendants presented an electricity account statement for Kshs 469, 091.77/-, and a receipt of payment from KPLC Ltd acknowledging payment of 361, 000/- for account no. 43****90. As for water, Machakos Water & Sewerage Company Limited issued an invoice for Kshs. 727, 158/- on account no 0701***0.

48. Nonetheless, this court agrees with the plaintiff that the defendants failed to prove that these accounts belonged to

utilities within the suit premises. Significantly, the account holders are all strangers to these proceedings. The defendants have also failed to establish a connection between these accounts and themselves. Accordingly, the defendants' claim under this head fails.

49. As concerns loss of business, this was not specifically pleaded. Suppose it refers to the “loss of goodwill owing to the dilapidated state of the sewerage line assessed at Kshs. 7,008,000," as pleaded and submitted by the plaintiff. Then, in such a scenario, such a claim cannot succeed since *clause 25(g)(i)* plainly exonerated the deceased, stating that the deceased was not liable for loss, damage, or injury to the lessee caused by any structural defect in the building or its equipment.

50. Concerning a percentage of ownership of the suit premises as pleaded, the court, in agreeing with the defence, finds this unusual because the lease agreement does not specify that the plaintiff would hold a stake in the premises upon expiry of the lease. To this court, it appears the plaintiff, in filing and arguing their case, completely misunderstood the significance and substance of the lease agreement. In this court’s humble opinion, a claim for damages would have sufficed.

d) Mesne profits

51. It is undisputed that the plaintiff was required to vacate the premises on 1st January 2020, as stipulated in the lease

agreement. From the undisputed evidence, notice was issued correctly by the defendants through their letter dated 20th September 2019. Upon receipt, and contrary to expectations of preparing to vacate the premises, the plaintiff, in a letter dated 4th September 2019, provided reasons for its inability to vacate, citing the existence of this suit.

52. In response, the defendants, in a communication dated 10th September 2019, informed the plaintiff that there were no legal orders preventing re-entry after the lease was terminated. Instead of complying, the plaintiff threatened to initiate legal proceedings, as stated in their letter dated 16th September 2019.

53. With this clear adamancy by the plaintiff, it emerged from the evidence that the defendants changed their banking accounts effective January 2019. There was nothing wrong with this, as relations between the parties had been determined, and the plaintiffs cannot now contend that they were frustrated in making payments post-determination of the lease.

54. From the evidence, the plaintiff initially agreed to vacate the premises on 31st March 2020, subject to confirmation from the defendants. Correspondence indicates that COVID-19 caused delays, with the handover taking place on 13th August 2020. However, the plaintiff's claim that the COVID-19 pandemic was responsible for the delay cannot stand in light of **Kwanza Estates Limited *(Supra).*** It follows that the plaintiff was

responsible for the delay, as they continued occupying the premises after its expiry.

55. By their actions, they denied the defendants occupancy for eight months, resulting in loss to them. The defendants have explicitly pleaded the claim for *mesne* profits. The defendants proved that the plaintiff was in illegal occupation from 1st January 2020. They tabulated the amount due at 423,000/- per month, representing the monthly rent for the final month of the lease, multiplied by the eight months of denied occupancy. This court concurs with the defendants that they are entitled to these sums.

56. For these reasons, the court finds that the defendants have proved their claim. The court also associates itself with a similar finding in **Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah [2016] KEHC 1880 (KLR),** which held: -

> ***"Mesne profits are awarded in place of rents, where the tenant remains in possession after the tenancy agreement has run out or been duly determined. A landlord claiming for mesne profits is claiming for the profits intermediate from the date the tenant ought to have given up possession and the date he actually gives up possession.***

After the service of a written notice or at the end of the term granted and the tenant holds over without the permission of the landlord, the tenant is liable to pay mesne profits for the use and occupation of the premises till he delivers up possession."

57. In conclusion, based on the reasons and findings articulated hereinabove, this court determines that both parties were respectively partly successful in their respective claims, and for these reasons, they shall bear their respective costs associated with the suit and counterclaim. Consequently, the following final disposal orders are hereby issued: -

    a) ***Judgment is hereby entered in favour of the defendants against the plaintiff for the sum of Kshs. 8,004,000/- for rent arrears.***

    b) ***Judgment is hereby entered in favour of the defendants against the plaintiff for the sum of Kshs. 3, 388,000/- for mesne profits.***

    c) ***The said sums will attract interest at court rates from 1st January 2020 until payment in full.***

    d) ***Each party shall bear their respective costs of this suit and the counterclaim.***

Judgment accordingly.

Delivered and Dated at Machakos this 8th day of December, 2025.

HON. A. Y. KOROSS
JUDGE
8.12.2025

Judgment delivered virtually through Microsoft Teams

Video Conferencing Platform

In the presence of;

Ms Kanja Court Assistant.

Miss Kabura holding brief for Mr. Kimathi for plaintiff.

Mr. Noor for defendants.