REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC NO. E170 OF 2023

LOFTY LES FONDS LIMITED - PLAINTIFF

Vs

TOTAL KENYA PLC - DEFENDANT

JUDGMENT

The pleadings

1. The suit herein was instituted vide the Plaint dated 15/11/2023. The Plaintiff seeks the following reliefs:
    a. A declaration that the open market rent for the Premises as on 1/7/2020 and which should apply for the 5-year period from 1/7/2020 to 30/6/2025 is Kshs. 7,752,364/= per month, Kshs. 93,028,368/= per annum and a total Kshs. 456,141,840/= for the 5-year period (all exclusive of VAT).
    b. The amount of Kshs. 236,866,510.69 being the open market rent for the period from 1/7/2020 to 30/6/2024 (Kshs. 372,113,472/=), less the amount of Kshs. 135,246,961.31/= paid as advance rent for the 4-year period for which rent is due and payable.
    c. A declaration that the open market rent for the one-year period from 1/7/2024 to 30/6/2025 is Kshs. 93, 028,368/= (exclusive of VAT) and will be due and payable by 1/7/2024.
    d. Interest on the underpaid advance rent from the date it was due to the date of judgment as follows:
        i. On Kshs. 45,293,976.35/= from 1/7/2021 until the date of judgment at the rate of 14.5%.
        ii. On Kshs. 51,777,451 .77 /= from 1/7/2022 until the date of judgment at the rate of 14.5%; and
        iii. On Kshs. 55,275,078.47/= from 1/7/2023 until the date of judgment at the rate of 14.5%
    e. Costs of this suit.

f. Interest on 2,4 and 5 above from the date of judgment until payment in full.

2. The Plaintiff asserts that it is the registered proprietor and Lessee of all that parcel of land known as LR No. 209/10502, Nairobi. Pursuant to the Lease dated 11/5/2005, the then owner, Charles Njogu Lofty, leased the premises to the Defendant for the purpose of erecting a petrol station. The Lease term was twenty years, commencing on 1 July 2005 and expiring on 30 June 2025, subject to termination by operation of law. It is contended that the rent for the final five (5) years of the term, beginning 1 July 2020, was to be assessed and payable at the open market rate. The specific term in question is the subject of these proceedings.
3. The Plaintiffs aver that the Lease was varied by a Deed of Variation dated 20/8/2015. In particular, the term commencing 1/7/2015 provided that rent would be based on sales volume passing through the Premises rather than assessed at the open-market rent stated in the Lease Agreement. Further, the Deed provided that where rent had not been determined under the Lease, the rent payable would equal that payable in the preceding year. Any dispute arising therefrom would be referred to arbitration by a single arbitrator.
4. It is averred that the parties have been unable to agree on the open market rent as at 1/7/2020 for the 5-year term ending 30/6/2025. The dispute is under the Lease but outside the Deed of Variation. The Plaintiff further alleges that the Defendant has breached the Lease by failing to pay advance rent equal to that paid in the previous year, pending assessment. It's the Plaintiff's case that it has suffered loss and damage, particularly in the form of loss of income from unpaid advance rent, unpaid rent at open-market rates, and interest thereon.
5. The Plaintiff contends that the Defendant engaged Tysons Limited to determine the open market rent; however, the two Valuation Reports present conflicting assessments. The report dated 6 November 2019 evaluated the market rent "as is" at Kshs. 2,700,000 per month and the

"post-acquisition" market rent at Kshs. 2,300,000 per month. Conversely, the report dated 17 November 2021 assessed the "market rent" as of 17 September 2021 at Kshs. 2,275,000 per month. The Plaintiff maintains that neither of the Reports and Valuations by Tysons evaluated the open market rent as of 1 July 2020, as stipulated in the Lease. Furthermore, it alleges that the Valuers neglected to consider the rent and income generated by the Defendant from other businesses conducted within the Premises, including those of its sub-tenants and licensees, making it infeasible to determine an accurate open-market rent.

6. The Plaintiff subsequently appointed Pinnacle Valuers Limited, who assessed the open market rent and submitted a report dated 30 June 2022. The open market rent was assessed at Kshs. 7,494,308 per month, amounting to Kshs. 449,658,480 for the five-year period from 1 July 2020 to 30 June 2025. However, the report did not include any rental component for the sale of Liquefied Petroleum Gas (LPG) and lubricants because the Defendant did not provide the necessary information for valuation. Upon receipt of the requisite information from the Defendant, the valuation was updated in 2023, resulting in an increased open market rent of Kshs. 7,752,364 per month, totalling Kshs. 465,141,840 for the same five-year period. The Defendant has contested the report and has refused to jointly appoint a valuer.
7. It is alleged that, contrary to the mutual agreement under the Lease and in the absence of consensus on the open market rent for the premises, the Defendant declined to pay an amount equivalent to the previous year's advance rent for each subsequent year, thereby causing deficits. The deficits are as follows: for the year 2019/2020, rent amounting to Kshs. 71,898,367/=; projected advance rent from 2020 to 2024, totalling Kshs. 284,593,468/=; advance rent paid from 2020 to 2024, amounting to Kshs. 135,246,961.31/=; and the shortfall in advance rent from 2020 to 2024 of Kshs. 152,346,506.69/=.

8. The Plaintiff claims interest on each shortfall, as the Lease provides for interest to be paid for at least 90 days at the bank rate prevailing at the time. The agreed rate was the base lending rate of Absa Bank, which was 14.5% on the date in question.
9. It is contended that despite the shortfall in the advance rent paid on account and the shortfall in rent overall, the Defendant continues to occupy the Premises and to enjoy the full commercial benefit of the Lease, including subletting and licensing various business premises within the Premises listed in the Lease. The Plaintiff reiterates that the suit relates to the Lease, not the Deed of Variation, and that the court therefore has jurisdiction over the dispute.
10. In its defence, as amended on 6/12/2023, the defendant denies the allegations made against it. It admits executing the Deed of Variation of Lease dated 20/8/2015 (hereinafter referred to as “the Deed of Variation”). The defendant asserts that the five-year lease term commencing on 1/7/2020 is governed by the Deed of Variation pursuant to Clause 7, which provides that if rent has not been determined by 10 July in any year of the term, the lessee shall pay to the lessor, as an advance, rent equal to that payable in the immediately preceding year. The defendant firmly denies the claim that it has failed or refused to pay advance rent based on the rent payable in the previous year. The plaintiff’s allegations concerning breach, loss, and damage are similarly denied.
11. In further response, the Defendant asserts that the valuation report prepared by Tyson Limited is professional, fair, and reasonable, and that it accurately reflects the commercial open-market value of the suit premises. The Defendant denies declining to select a joint valuer. The Defendant maintains that Pinnacle's assessment is overstated and does not accurately represent the true commercial open-market rent for the suit property. The Defendant further asserts that the report is intended to unjustly enrich the Plaintiff. The Defendant invites the Plaintiff to

substantiate the alleged shortfall in rent of Kshs. 152,346,509.69 and the claimed interest rate of 14.5%. The Defendant affirms that it is in lawful and continuous possession of the suit premises and has fulfilled its contractual obligations under the lease.

12. The Defendant further asserts that the Deed of Variation supplemented the Lease and its terms, thereby extending the arbitration clause's applicability to the Lease. It contends that the Lease and the Deed of Variation are inseparable and interconnected. Additionally, it affirms that, pursuant to Clause 7 of the Deed of Variation, the dispute herein is subject to arbitration. The Defendant further contends that the Plaintiff received and accepted rent payments in accordance with Clause 7 of the Deed of Variation and, consequently, is obliged to comply with Clause 8. It states that all rent has been paid in full and that no outstanding amount is due.
13. The Defendant states that there is a pending suit, HCCC No. E202 of 2021, between the parties herein concerning the same premises, and that the rent claims are the subject of that litigation. It is averred that the parties recorded a consent in the said suit, agreeing to maintain the status quo and to refer the dispute to arbitration. The agreed-upon status quo required the parties to continue fulfilling their obligations as landlord and tenant. The Defendant was to continue paying rent in accordance with clause 8 of the Deed of Variation until the conclusion of the arbitration proceedings. Consequently, the Defendant contends that this suit is premature and that rent based on an open-market assessment is inapplicable. In light of clause 12 of the Deed of Variation, which constitutes an arbitration agreement between the parties, and considering the pending suit before the High Court, this court lacks jurisdiction to hear and determine the dispute. The Defendant urges that the suit be dismissed with costs.

Reply to Amended Statement of Defence

14. In response to the assertions in the Amended Statement of Defence, the Plaintiff has filed a Reply to Defence dated 24/1/2024. The Plaintiff reaffirms the allegations set out in the Plaint and asserts that the dispute concerns solely the five-year term of the Lease, commencing on 1 July 2020 and ending on 30 June 2025. The Plaintiff further maintains that the rent for the preceding five-year term of the Lease, covering the period from 1 July 2015 to 30 June 2020, was governed by the Deed of Variation dated 20 August 2025 and is not under consideration in this proceeding. The Plaintiff also contends that the subject matter of this litigation is not within the scope of the arbitration agreement in the Deed of Variation. Moreover, the Plaintiff asserts that the Defendant failed to remit the advance rent for the previous year, pending the assessment of the open market rent for the land and buildings comprising the premises for the five-year period beginning 1 July 2020.
15. Furthermore, the Plaintiff contends that the valuation reports prepared by Tysons Limited did not specify the open market rent of the subject premises as of 1 July 2020. Moreover, the Defendant made no advance rent payments based on any of Tysons' valuation reports. The Plaintiff maintains that the 2023 Pinnacle Assessment Report provides an accurate assessment of the open market rent of the subject premises as of 1 July 2020. Additionally, Clause 12 of the Deed of Variation, which contains an arbitration agreement, applies solely to the Deed of Variation itself. The Deed of Variation did not alter the method for determining the open market rent of the subject premises for the period from 1 July 2020 to 30 June 2025. Consequently, the determination of the open market rent remains outside the scope of arbitration.
16. The Plaintiff asserts that it is not a party to HCCC No. E202 of 2021 and, consequently, could not have been involved in any consent relating to that matter. Furthermore, the Plaintiff contends that referring the matter to arbitration does not constitute acceptance of the arbitral tribunal's jurisdiction. Additionally, the Plaintiff clarifies that the status quo

established in the consent recorded in the High Court was intended to prevent the Defendant's eviction and does not pertain to the issue of rent. The Plaintiff asserts that this Honourable Court possesses the jurisdiction to hear and determine this matter. Moreover, the Plaintiff asserts that, by filing a Statement of Defence, the Defendant has submitted to the jurisdiction of this Court. The Plaintiff urges the Court to dismiss the Defendant's Defence and enter Judgment in accordance with the prayer set out in the Plaint.

The evidence adduced at the trial

17. During the trial, Mr Charles Njogu Lofty, the sole Director of the Plaintiff, testified as PW 1. He adopted his witness statements dated 15 September 2023 and 26 March 2024 as part of his evidence-in-chief. He also produced the documents listed in the Plaintiff's List of Documents dated 15 November 2023, which were marked as P Ex Nos. 1 - 20. He further asserted that the dispute concerns rent payments and that the Defendant's arbitral award did not address the specific dispute.
18. In cross-examination, PW 1 confirmed that they had executed a Lease Agreement with the Defendant. He stated that the Deed of Variation was short-term. He averred that the dispute concerns the payment of open-market rent for the period from July 2020 to July 2025, which was to be assessed. He stated that Clause 7 of the Deed of Variation was to be adopted where the open market rate was not assessed. He further stated that the clause was to apply for the full 5-year term.
19. His testimony was that the open market rate was to be mutually agreed and that the assessment was to be carried out by valuers. However, they had not agreed on the market rate as of 1/7/2020. PW 1 accused the Defendant of frustrating the process. He argued that the figures sought in his prayers are based on his Valuers Report. He stated that the rent for 20/9/2020 was Kshs. 71.8 M, the same as the previous year. He stated that in July 2020 they adopted clause 7 until they agreed on the

market rent. The open market rate for 2019/2020: Kshs. 71.8 M, was to be applied until the open market rate is agreed.

20. He reiterated that he seeks an advance sum of Kshs. 71.8 M on account of rent, to be determined by the court, as the parties could not agree. He stated that the total advance rent is Kshs. 287.5 M, which does not cover 2024/2025. He averred that Clause 8 of the Deed of Variation was not adopted by the parties. He testified that the Defendant paid Kshs. 135.2 M for 2020-2024. He further stated that interest on unpaid amounts totals Kshs. 152.3 M. He also stated that fixed rent was agreed.
21. On re-examination, PW 1 confirmed that the dispute concerns rent for the 5-year period ending in July 2025, which has not been assessed. Clause 2(a)(iv) of the Lease refers to 1/7/2015 for payment of open-market rent. Rent for the period 2015 to 2020 was based on the Deed of Variation and was reconciled in arrears at the end of the year. It was fixed rent. The advance rent was based on sales made at the end of the previous year. Rent for 2020 to 2025 was to be dealt with in accordance with clause 2(a)(iv) of the Lease. However, rent for 1/7/2020 to 30/6/2025 has not been agreed.
22. He asserted that the Defendant paid the fixed rent for 2020/2021 but adopted variable rent under clause 8 of the Deed of Variation for 2021/2022. Clause 4 of the Lease provided that rent delayed would be paid with interest. He stated that he is entitled to interest on the shortfall arrears. Clause 9 of the Deed of Variation provides that bank rates are to be based on interest rates applicable at Barclays Bank. The market rate was Kshs. 7.7 M, whereas the difference between what was paid and the shortfall is Kshs. 135.2 M. The shortfall is Kshs. 236.2 M. He confirmed that he had been paid Kshs. 50.7 M for the current period.
23. Mr Paul E.N. Ngugi, a Valuer, testified as PW 2. He relied on his Witness Statement dated 15/11/2023 as his evidence in chief. He also produced the Valuation Reports dated 30/6/2024 and 6/3/2023 as exhibits and marked them as P Ex No. 16 and 17, respectively. In reference to the

Valuation Report dated 30/6/2024, PW 2 averred that the premises were assessed at Kshs. 7.4 M as open market rent, while the second report assessed them at Kshs. 7.7 M. This was due to unleaded LPG gas and the lubricants.

24. During cross-examination, PW 2 stated that the Plaintiff disclosed the purpose of the valuation, which was to determine the open market rate. He stated that he was instructed on 20/9/2021, after July 2020.
25. On re-examination, PW 2 averred that he was able to determine the open market value of rent in 2021. Counsel for the Plaintiff then closed the case.
26. Mr Arthur Ombima, the Defendant's Development Manager, testified as DW 1. He relied on the Witness Statement dated 11/3/2024 as his evidence in chief. He also produced the documents listed in the Defendant's List of Documents dated 11/3/2024 and the Supplementary List of Documents dated 13/2/2025, which were marked as exhibits D Ex 1-12.
27. During cross-examination, DW 1 confirmed that the lease agreement is valid for a period of 20 years, commencing in 2005 and concluding in 2025. He clarified that the rent was payable in advance and was fixed at a monthly rate from July 1, 2005, to July 1, 2011. He further stated that the rent for the period from July 1, 2015, to 2020, was not established at the time the lease was executed. Similarly, the rent for the period from July 1, 2020, to 2025, was also not agreed upon. DW 1 indicated that the rent as of July 1, 2025, was based on the open market rate, which would be applicable for a subsequent five-year term ending in 2025. He noted that the rent in question has neither been agreed upon nor assessed.
28. His testimony was that, pursuant to the Deed of Variation dated 11/5/2005, any dispute would be referred to arbitration. He, however, noted that there was no pending arbitration because the arbitrator had determined that the arbitrator lacked jurisdiction to hear the dispute. He further stated that only disputes arising from the Deed of Variation were

subject to arbitration. He confirmed that the open market rate had not been assessed or agreed.

29. DW 1 further stated that the lease referred to an assessment based on the open market rate and that it had not been revised. He stated that the assessment was not carried out because there was no agreement on market rates despite the Plaintiff's efforts. He stated that the Plaintiff issued a notice of forfeiture dated 27/5/2020. He stated that the Defendant invited the Plaintiff to a meeting, which the Plaintiff declined because the Defendant had first responded to the Notice of Forfeiture. He noted that it was necessary to assess the market rent, which is why the Defendant proffered its agent, Tysons Limited, to negotiate on its behalf. He stated that they then prepared an open-market Valuation Report dated 6/11/2019, which was issued before 1/7/2020, though the report had not been adduced in court. He stated that part of the premises was acquired for the expressway.
30. The witness affirmed that the fair market rent per month as at 1/7/2020 was 7.49 million, as detailed in the Plaintiff Report dated 30/6/2022. Conversely, the Valuation Report dated 6/3/2023 recorded a value of 7.752 M as at 1/7/2020. He referred to the Letter dated 9/3/2021, which constituted an offer to the Plaintiff regarding variable rent. The offer was not based on any valuation; consequently, the Plaintiff declined it. He maintained that the Defendant paid the correct rent, noting that it had not yet been officially assessed. Nevertheless, he observed that the appropriate rent for the period from 2020 to 2025 had not been determined. He averred that the Defendant paid Kshs. 71 million for the year 2019/2020. He acknowledged that no mutual agreement had been reached for the period from 2020 to 2025.
31. Referring to the Letter dated 9/3/2021 regarding the appointment of a Valuer, the Defendant's advocates did not propose any Valuer. DW 1 stated that they did not pay rent as per the report by Tysons Limited, nor did they accept the figure from Pinnacle Limited. He confirmed that he

was aware that the unpaid rent accrued interest at Barclays Bank Kenya rates.

32. On re-examination, DW 1 averred that the open market rent had not been agreed. That the fallback position, as stated in the Lease, was to pay rent based on throughput, as set out in clause 8 of the Deed of Variation. That the Kshs. 71 M paid for 2020/2021 related to the immediately preceding year. That the rent was to be agreed mutually.
33. That marked the close of the Defendant's case.

The Parties Submissions

34. As directed by the court, both parties filed written submissions. The Plaintiff's counsel on record filed written submissions dated 4/7/2025 and supplementary submissions dated 18/8/2025. By contrast, the Defendant's submissions are dated 1/8/2025.
35. Upon identifying and considering the issues for determination, this court will, in its analysis and determination, consider the parties' respective arguments, the provisions of law and authorities they relied upon to advance their arguments, as set out in their submissions.

Analysis and determination

36. I have considered the pleadings, the evidence adduced by the parties, and the rival submissions and the issues that fall for determination are;
    a. Whether this court jurisdiction to hear and determine the instant dispute;
    b. Whether the Deed of Variation is applicable to the dispute herein;
    c. What was the open market rent of the suit property as of 1/7/2020?
    d. Whether the Plaintiff is entitled to the orders sought.
    e. Costs of the suit

Whether this court has jurisdiction to hear and determine the instant dispute;

37. The first two issues are intertwined, hence I will address them concurrently.

38. There is a long line of judicial decisions on the importance of a court's jurisdiction in litigation. In any litigation, jurisdiction is central. A court of law cannot validly take any step without jurisdiction. The Supreme Court stated in the Matter of Interim Independent Electoral Commission [2011] eKLR as follows:

> [29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):
>
> > "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step."
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> [30] The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.

39. In the case of Samuel Macharia Kamau –vs- KCB & Others (2012) eKLR the court held that;

> "a court's jurisdiction flows from either the Constitution or legislation or both. Thus a court can only exercise jurisdiction as conferred by the constitution or other written laws. it cannot

arrogate to itself jurisdiction exceeding that which is confirmed upon it by law. The court must operate within the constitutional limits. it cannot expand jurisdiction through judicial craft or innovation."

40. The ELC Court traces its jurisdictional roots to Article 162 Constitution which states;

> 162. System of courts
>
> (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
>
> (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-
>
> (a) employment and labour relations; and
>
> (b) the environment and the use and occupation of, and title to, land.

41. The ELC Court, which is a court of equivalent status to the High Court, has been invested with authority under Article 165(3)(b) of the Constitution to resolve questions concerning whether a right or a fundamental freedom in the Bill of Rights has been infringed.

42. The mandate of the court, as set out in the constitution, has been operationalised under Section 13 of the ELC Act, which elaborately provides for the jurisdiction of the Court that;

> 13. Jurisdiction of the Court
>
> (1) The Court shall have original and appellate jurisdiction to hear and
>
> determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
>
> (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues,

land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses

in action or other instruments granting any enforceable interests in

land; and

(e) any other dispute relating to environment and land.;

43. From the foregoing, it is not in dispute that the ELC Court has both original and appellate jurisdiction to hear matters of environmental and land law, including those of a constitutional nature.

44. In the instant suit, the parties entered into a Lease Agreement dated 11/5/2005 for a period of 20 years, terminable by effluxion of time. Rent for the last 5-year term of the Lease, from 1/7/2020 to 30/6/2025, was to be assessed and payable at the open-market rent. Clause 2 (a) (iv) of the Lease states as follows.

> 'For the following five (5) year period of the term, commencing on the first day of July two thousand and fifteen the lessee shall pay open market rent for the land and buildings as on that day.
>
> Rent for land and buildings for the last five (5) years period of the term commencing on first July two thousand and twenty shall be similarly assessed.'

45. It is evident that the parties have been unable to agree on the open market rent for the suit premises for the period from 1/7/2020 to 30/6/2025. As stated in the Lease, to assess the rent payable for this period, the parties were required to assess the open market rent for the

land and buildings as at that day, just as they had assessed it for the preceding term from 1/7/2015 to 30/6/2020.

46. On the face of it, and pursuant to the Lease executed between the parties, the cause of action is for rent payable for the period from 1/7/2020 to 30/6/2025. This falls within the jurisdiction of this court pursuant to Section 13 (2) (a) of the ELC Act.

47. However, the parties executed a Deed of Variation dated 20/8/2015. Clause 12 of the Deed provided for arbitration in the event of a dispute arising therefrom. On that basis, the Defendant argues that this court lacks jurisdiction to hear the matter. The said clause reads in part as follows.

> "Any dispute arising out of or in connection with this Deed of Variation of Lease shall be referred to arbitration by a single arbitrator being a practicing advocate of not less than 15 years standing to be appointed by agreement within Thirty (30) days of the notification of a dispute, upon the application of either party, by the Chairman for the time being of the Kenya Branch of the Chartered Institute of Arbitration of the United Kingdom…."

48. The Plaintiff, on the other hand, contends that the Deed of Variation is inapplicable. It further contends that the Deed of Variation only sets out the formula for rent for that period, subject to these proceedings.

49. I have reviewed the impugned Deed. The recitals in Clause A state that this Deed is supplemental to the Lease Agreement. What is a supplemental agreement? It is entered into to modify or add to the provisions of an existing agreement. It is a legally binding contract that adds, alters, or clarifies the terms and conditions of that agreement.

50. The Court of Appeal, while addressing the issue of the Supplemental Agreement and its binding nature in the case of Otundo & 5 Others –vs- Creek Marketing and Development Limited [2024] KECA 353 (KLR), stated that;

"It is not lost to us that, in principle, all contracts are liable to mutual variation of terms as may be subsequently agreed between the parties. In effect, duly executed supplementary agreements (as was the case here) are legally binding and enforceable in their express terms. They serve as a record of any changes or additions made to the original agreement."

51. Consequently, the parties herein were bound by the terms of the Agreement, as amended or altered by the express or implied terms of the supplementary agreement. In fact, the parties expressly stated in Clause 15 that the Lease continued in force and effect, save for the specific amendments set out in the Deed of Variation. Clause 15 states;

"The Lease as specifically amended by this Deed of Variation of Lease is and shall still continue to be in full force and effect and is hereby in all respects ratified and confirmed."

52. The Plaintiff contends that, pursuant to Recital C of the Deed of Variation, the Lease was varied only to the extent of determining rent for the suit premises for the period between 1/7/2015 and 30/6/2025. Recital C provided that;

"In accordance with the terms of Clause 2 (a) (iv) of the Lease the Lessor and the Lessee have discussed and mutually determined the rent for the land and buildings for the five (5) year period of the term commencing on 1/7/2015."

53. The Deed further set the formula for the rent for that period at Clause 2 of the Deed of Variation which provided as follows:

"The Lessor and the Lessee hereby agree and confirm that the rent for the five (5) year period of the term commencing on the first day of July Two Thousand and Fifteen shall be payable during the term as follows:

a. Kenya Shillings Five and Cents Sixty (Kshs. 5.60) per litre per month for Non- BV Sales Volume passing through the Premises, which sum is inclusive of VAT;

b. Kenya Shillings Four and Cents Thirty-Five (Kshs. 4.35) per litre per month in respect of the Minimum BV Sales Volume passing through the Premises, which sum is inclusive of VAT; and

c. Kenya Shillings Five and Cents Sixty (Kshs. 5.60) per litre per month for any and all sales above the Minimum BV Sales in any month, which sum is inclusive of VAT."

54. It is evident that the above clause applied only to the lease term from 1/7/2015 to 30/6/2020. The Deed is not applicable to determine rent for the period between 1/7/2020 and 30/6/2025, which is the subject of these proceedings.

55. It is therefore my finding that the dispute herein could not be the subject of arbitration proceedings. In any case, the Arbitrator has already found that he lacks jurisdiction to determine a dispute regarding rent payable for the period from 1/7/2020 to 30/6/2025. He confirmed that only disputes arising from the Deed of Variation were subject to arbitration. He also confirmed that the open market rate had not been assessed or agreed upon, a fact DW 1 also confirmed during his cross-examination.

56. Even if the arbitration clause were applicable to these proceedings, could the court refer the matter to arbitration? Section 6 of the Arbitration Act states as follows:

> 6. (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds-
>
> (a) That the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

57. The law requires that a party seeking to invoke the arbitration clause shall not take any step other than entering an appearance and filing the application. In the case of Adrec Ltd –vs- Nation Media Group Ltd (2017) eKLR, the Court of Appeal restated and reaffirmed the position that, in a suit founded on a contract containing an arbitration clause, a Defendant ought, contemporaneously with his notice of appointment or appearance, file an application for a stay of proceedings and to refer the matter to arbitration.
58. In the instant suit, the Defendant filed its Defence and the accompanying documents. It is clear that the Defendant has actively defended the suit and even participated in the hearing. Although the Defendant raised a jurisdictional objection in its Statement of Defence, such an objection can be addressed only at the trial of the matter. The Defendant ought to have separately raised the objection alongside the notice of appointment before filing a Defence. See the case of Mt Kenya University vs Step Up Holding (K) Limited [2010) eKLR, where the Court of Appeal considered Section 6(1) of the Arbitration Act and held that even if the conditions set out in paragraphs (a) and (b) are satisfied, the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application is not made prior to or at the time

of entering appearance, or if the application is made after the filing of the defence.

59. Further, Rule 2 of the Arbitration Rules, 1997, sets out the procedure to be followed by a party seeking to apply for a stay of proceedings under section 6 of the Act. Rule 2 provides thus:

> "2. Application under sections 6 and 7 of the Act shall be made by summons in the suit."

60. Rule 2 of the Arbitration Rules is mandatory in relation to the procedure to be adopted if a party applies for a stay under section 6(1) of the Act. In my view, the Defendant would have lost the option to have the suit stayed and the matter referred to arbitration under the arbitration agreement because it failed to comply with the procedure set out in the Arbitration Act for the stay of proceedings. Having in fact subjected itself to the Court's jurisdiction, the Defendant would be deemed to have waived its right to have the dispute referred to arbitration in accordance with the arbitration agreement.

61. It is my finding that this court has jurisdiction to hear and determine the dispute herein.

What was the open market rent of the suit property as of 1/7/2020?

62. It is trite law that a court of law cannot rewrite a contract between the parties. In the Court of Appeal case of National Bank of Kenya –vs- Pipe Plastic Samkolit (K) Ltd. & Another (2001) eKLR, it was held that;

> "A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved."

63. Further, the same Court of Appeal in the case of Housing Company of East Africa Limited –vs- Board of Trustees National Social Security Fund & 2 others [2018] eKLR held that:

> "…. It is settled law that contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does

not have the right or ability to substitute its judgment for that of the parties. Indeed, when a contract is clear and unambiguous, a court's role is to interpret the contract as written and not rewrite it because, just as with any other contract, a contract for the sale of land can only be changed with the agreement of both parties and not unilaterally, and the learned judge's ultimate findings cannot by any stretch of imagination be faulted…"

64. Having found that the applicable contract in these proceedings is the Lease Agreement dated 11/5/2005, the terms of which were well known to them, there was therefore no evidence of coercion or inducement. The terms were unambiguous. The parties are bound by the terms of the Lease Agreement.
65. To determine the rent payable for the period from 1/7/2020 to 30/6/2025, the court must determine the open market rent as at 1/7/2020. As earlier noted, Clause 2 (a) (iv) of the Lease states as follows:

> 'For the following five (5) year period of the term, commencing on the first day of July two thousand and fifteen the lessee shall pay open market rent for the land and buildings as on that day.
> Rent for land and buildings for the last five (5) years period of the term commencing on first July two thousand and twenty shall be similarly assessed.'

66. The effect of the clause cited above is that the rent for the last term would be assessed in the same way as the rent for the term commencing on 1/7/2015. That is, by assessing the open market rent for the land and buildings as at 1/7/2020.
67. It is evident that the parties have been unable to agree on the open market rent for the land and buildings. The Plaintiff averred that the determination of the open market rent should take into account the sale of Petrol, Diesel, Lubricants, Tyre Centre, Chemist Shop, Convenience Shop and an Automated Teller Machine cubicle. The Plaintiff has

adduced two valuation reports from Pinnacle Valuers Limited, dated 30/6/2022 and 6/3/2023.

68. The first report assessed the open market rent of the suit premises as of 1/7/2020 at Kshs. 7,494,308/= per month. The Plaintiff argues that the report did not take into account the sale of Liquefied Petroleum Gas because the Defendant had not provided the necessary information to facilitate the valuation. When the Defendant eventually provided the information, the Plaintiff instructed its valuer to update the assessment. It was then that the report dated 6/3/2023 was produced. The updated report assessed the rent as of 1/7/2020 at Kshs. 7,752,354/= per month.
69. The Defendant, on the other hand, contends that the assessment by Pinnacle Valuers Limited was 'overly exaggerated and unreasonable.' The Defendant averred that it proposed that its agent, Tysons Limited, negotiate on its behalf. It is then that they prepared an open-market Valuation Report dated 6/11/2019, which was prepared before 1/7/2020, though the report was not adduced in court.
70. The Plaintiff contested the valuation reports prepared by Tysons Limited, noting that none of the reports assessed the open market rent of the suit premises. Furthermore, the reports failed to assess the income generated by the Defendant from other businesses conducted at the suit premises.
71. It was observed that the Defendant did not produce any Report to challenge the Plaintiff's reports from Pinnacle Limited. Although Tyson Limited is the purported agent, it did not call any witnesses from Pinnacle Limited to testify in support of its defence. Consequently, the Plaintiff's Valuation Reports remained unchallenged. The Reports stood uncontroverted and unopposed by any other report.
72. In the case of Samson Nzaro -vs- Boniface Ngari (2020) eKLR, the court, when faced with an exactly similar situation and where only one valuation report was filed, held thus;

> "…. In his testimony before the court, the Plaintiff produced a Valuation Report (Exhibit 2) of the buildings he constructed on the suit property. The Report by Next Level Valuers and Property Consultants dated November 7, 2016 places the value of the building as at September 28, 2016 when they conducted the valuation at Kshs 220,000/-. In the absence of any other valuation report with a contrary value, this court is persuaded that the building is worth the said Kshs 220,000/- and that the Defendant ought to pay the said amount to the Plaintiff as compensation now that he no longer desires to have the Plaintiff operating the Posho Mill on his property."

73. Having reviewed the revised assessment report of Pinnacle Valuers Limited, which remains uncontested due to the absence of an alternative figure, and having considered both the documentary evidence and the oral testimonies presented herein, I determine that the open market rent as of 1/7/2020 was Kshs. 7,752,364 per month and Kshs. 93,028,368 annually.

Whether the Plaintiff is entitled to the orders sought.

74. It is well established that a contract is the primary source of legal obligations for each party, with each party ensuring the fulfilment of their commitments. The parties have entered into a Lease Agreement that is binding upon them. It is uncontested that the Defendant has failed to fulfil its contractual obligations, notwithstanding its occupancy of the premises.
75. Having determined the open market rent as of 1/7/2020, the rent payable for the term from 1/7/2020 to 30/6/2025 is calculated arithmetically. Under the lease terms, the parties have agreed on the applicable interest rate.
76. It is trite law that he who alleges must prove. Section 107(1) of the Evidence Act, Cap 80, Laws of Kenya, provides that:

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist".

77. In Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that: -

> "As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

Costs of the Suit

78. Although the costs of an action or proceeding are at the court's discretion, the general principle is that costs shall follow the event, in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap. 21). Accordingly, the successful litigant should ordinarily be awarded costs unless, for good reason, the court directs otherwise. In this case, the Plaintiff has succeeded in its suit, and I see no reason to deny it costs. I shall make the final orders in due course.

79. **Final orders for disposal**

It is my considered view that the Plaintiff has discharged the burden of proof. It is my further finding that the Plaintiff's suit is meritorious and is allowed as prayed. The upshot of this Court's findings is that the Plaintiff's suit succeeds. Judgment is hereby entered in the following terms:

a. A declaration that the open market rent for the Premises as on 1/7/2020 and which should apply for the 5-year period from 1/7/2020 to 30/6/2025 is Kshs. 7,752,364/= per month, Kshs. 93,028,368/= per annum and a total Kshs. 456,141,840/= for the 5-year period (all exclusive of VAT).

b. The amount of Kshs. 236,866,510.69 being the open market rent for the period from 1/7/2020 to 30/6/2024 (Kshs. 372,113,472/=), less the amount of Kshs. 135,246,961.31/= paid as advance rent for the 4-year period for which rent is due and payable.

c. A declaration that the open market rent for the one-year period from 1/7/2024 to 30/6/2025 is Kshs. 93, 028,368/= (exclusive of VAT) and will be due and payable by 1/7/2024.

d. Interest on the underpaid advance rent from the date it was due to the date of judgment as follows:

   i. On Kshs. 45,293,976.35/= from 1/7/2021 until the date of judgment at the rate of 14.5%.

   ii. On Kshs. 51,777,451 .77 /= from 1/7/2022 until the date of judgment at the rate of 14.5%; and

   iii. On Kshs. 55,275,078.47/= from 1/7/2023 until the date of judgment at the rate of 14.5%

e. Costs of this suit shall be in favour of the Plaintiff

80. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF FEBRUARY 2026 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of

1. Ms Ivy Makena for the Plaintiff

1.Mr Muriithi HB Thangei

3. CA – Ms Yvette