**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC NO 686 OF 2017**

**DORIC INDUSTRIES LIMITED .................................. PLAINTIFF**

**VERSUS**

**AKSHARAP REAL ESTATE LIMITED ..................... DEFENDANT**

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## JUDGMENT

**Background**

**1.** Vide an Amended Plaint dated 21st March, 2016, the Plaintiff seeks the following reliefs:

> a) ***Permanent injunction restraining the defendant, their servants, agents from distressing for rent, proclaiming, attaching, evicting or in any other way howsoever from interfering with the Plaintiff's quiet possession, enjoyment and peaceful occupation of Plot L.R No 209/12042, Godown No 17 & 18 Alpha Centre, Mombasa Road.***
>
> b) ***General damages for loss of business as a result of the defendant's unlawful eviction of the Plaintiff from plot no L.R No 209/12042,***

***Godown No 17 & 18 Alpha Center Mombasa Road.***

c) ***General Damages for the illegal distress, unlawful eviction, conversion and detention of goods, machines and chattels.***

d) ***Punitive, exemplary, and aggravated damages for unlawful eviction, and illegal distress.***

e) ***Kshs 106, 554, 875.30 being the market of the goods, machines and apparatus seized by the defendants as a result of the unlawful eviction.***

f) ***Damages for wrongful detention of the Plaintiff's goods.***

g) ***Loss of profits and revenue at the rate of Kshs 134, 441, 012.50 annually until it is restored to its position as at 19th August, 2015.***

h) ***Kshs 2,004, 910/= being the monthly loan the Plaintiff was servicing at Consolidated Bank & Tusho Capital.***

i) ***Kshs 34, 516, 951.82 being the debt owing to the Plaintiffs suppliers.***

j) ***Interests on a-f.***

k) ***Any other relief as this Honourable may deem fit and grant fit and just to grant in the interests of justice.***

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***l) Costs of the suit.***

**2.** The Plaintiff's case is that it is a limited liability company duly incorporated in Kenya and engaged in the manufacture and distribution of industrial products, while the Defendant is similarly a limited liability company and the landlord of business premises situate on Plot No. L.R. No. 209/12042, Godown Nos. 17 and 18, Alpha Centre, Mombasa Road.

**3.** The Plaintiff avers that it entered into a lawful tenancy with the Defendant and remained in occupation of the premises as a controlled tenant within the meaning of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and that the tenancy was initially governed by a lease which expired around 31st May 2013, after which the Defendant continued accepting rent, thereby creating and maintaining a periodic tenancy. The Plaintiff contends that it consistently paid rent, and that receipts were duly issued, demonstrating the continuation of the tenancy relationship.

**4.** According to the Plaintiff, discussions were undertaken between the parties concerning renewal of the lease for a further term of approximately five years and six months. In that regard, the Defendant, through its managing agent, issued it with a letter of offer which reinforced its belief that its tenancy would continue uninterrupted.

**5.** Despite the ongoing tenancy relationship, the Plaintiff alleges that on the 27th November, 2013, the Defendant caused its

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agents by the name Sterling Auctioneers, to levy distress in a purported recovery of rent covering the period up to 31st December, 2013. The Plaintiff avers that the Defendant's actions and or that of its agents were illegal and unwarranted as it had paid all its rent for which the Defendant failed to issue receipts.

**6.** It was averred that on 19th and 20th August, 2015, the Defendant instructed its agents, Muhatia Pala Auctioneers, to levy distress in a purported recovery of alleged rent arrears up to August 2015 in the sum of Kshs 10,786,015.34. The Plaintiff contends that the said distress was illegal and unwarranted, maintaining that all rent due had been paid.

**7.** The Plaintiff contented that the auctioneers aforesaid caused its heavy machinery, equipment, raw materials and finished goods to be removed from the premises and that by a letter dated 24th August, 2015, the Defendant's advocates confirmed that godown no. 17 had already been leased to another party, thereby effectively excluding the Plaintiff from the premises. With regard to godown no. 18, it was averred that the Plaintiff last occupied the same on 7th May 2015, prior to the distress complained of.

**8.** The Plaintiff asserted that an extensive inventory of the assets was removed from the premises including heavy machinery, substantial quantities of finished goods, raw materials, and packaging materials. The Plaintiff annexed a

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schedule which shows items such as shoe polish products, waxes, dyes, chemical compounds, solvents, bottles, lids, cartons, labels, and other packaging inputs essential to the Plaintiff's manufacturing process. The Plaintiff contends that these assets collectively represented the core operational infrastructure of its business.

**9.** The Plaintiff estimates the total value of seized machinery, goods, raw materials, packaging materials, and work in progress to be Kshs 106, 554, 875.30. According to the Plaintiff, it is a protected tenant and leave of the business premises rent tribunal was required before levying distress for unpaid rent and has indeed filed tribunal case number 761 of 2013.

**10.** Further, it was averred by the Plaintiff, the Defendant had previously been restrained from harassing the Plaintiff in the purported recovery of rent in HCCC No. 684 of 2011. In addition, the High Court in HCCC No. 507 of 2013 found that the Plaintiff was a protected tenant, and directed that if the Defendant intended to terminate the tenancy, it was required to issue a notice in the prescribed statutory form.

**11.** According to the Plaintiff, its average sales revenue for the past four years between 2011 and 2014 totals Kshs 537, 764, 050 and per year it totals Kshs 134, 441, 012.50; that the Defendant's actions caused its business to come to a standstill and it will require at least four years to return to

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the position it was before the illegal eviction and distress and that prior to the same, it was indebted to its suppliers to the tune of Kshs 34, 516, 951.82 which it is now unable to service.

**12.** Further, it was argued by the Plaintiff that it had outstanding loan facilities of Kshs 76,101,646.88 with Consolidated Bank and Kshs 6,439,010.04 with Tsusho Capital (K) Ltd, which it serviced through monthly repayments of Kshs 1,610,048.00 and Kshs 233,145.17 respectively from the proceeds of its business.

**13.** Following the distress complained of, the Plaintiff contends that it has been unable to service these facilities. The Plaintiff also claims the sum of Kshs 106,554,875.30, being the alleged value of goods, machinery, apparatus and equipment seized by the Defendant during the impugned distress.

**14.** The Defendant filed a Second Further Amended Defence and Counterclaim on 16th June, 2020. It denied the Plaintiff's assertions stating that whereas indeed it had a lease with the Plaintiff which expired on 31st May, 2013, it did not as alleged continue to accept rent and that to the contrary, the Plaintiff had rent arrears under the lease that expired on 31st May, 2013 and had refused to hand over vacant possession.

**15.** According to the Defendant, pursuant to **Section 60** of the **Land Act,** where a lessee remains on after termination of the



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lease without the consent of the lessor, the terms continue until after possession is ceded and that the Plaintiff ignored and/or refused to comply with the Lessor's statutory final one months' notice dated 25th April, 2014 demanding compliance with the express terms of the lease.

**16.** It was stated that the Plaintiff being an industry cannot claim controlled tenancy under the Landlords and Tenant (Shops, Hotels and catering Establishments) and that the Plaintiff failed to comply with the orders of this court adopted on the 19th June, 2012 in **HCC No 684 of 2011**.

**17.** The Defendant contends that the Plaintiff's occupation of the premises arose from a binding lease arrangement reduced into a Lease Deed dated 10th March 2009, under which the Plaintiff agreed to lease the two premises for a fixed term of five years and six months commencing on 1st December 2007 and expiring on 31st March 2013.

**18.** According to the Defendant, the lease provided clear obligations requiring the Plaintiff to pay rent quarterly in advance without deduction, and further stipulated that any default entitled the lessor to apply or retain the security deposit toward outstanding rent or other recoverable sums.

**19.** The Defendants assert that the lease also imposed obligations on the Plaintiff to maintain the premises in good condition, paint and repair the interior before expiry, and comply with all covenants relating to use of the premises. It

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is stated that the Plaintiff expressly agreed not to change the user of the premises without consent and to operate strictly within the permitted use contemplated under the lease.

**20.** The Defendant aver that upon expiry of the fixed term, the Plaintiff was duly informed through correspondence from its agents, Real Management Services dated 10th April, 2013 and a meeting held on the 15th April, 2013 that the tenancy would not be extended and that on 2nd May, 2013, a statutory final notice was issued to the Plaintiff reiterating the non-renewal of the lease and requiring vacant possession upon expiry of the lease. Reminders were issued on 24th May, 2013, 27th May, 2013 and 28th May, 2013.

**21.** According to the Defendant, on 26th March, 2014, the Plaintiff was ordered by the court to pay rent arrears due and owing together with the sum of Kshs 2, 192,000,000 all of which have not been paid; that the Plaintiff further continues to be in illegal occupation of the premises and that the Plaintiff is in breach of contract, the particulars of which include, failing to pay the full revised rent of Kshs 360,000 per month as required, exclusive of service charges, VAT and water and that it handed over the suit properties to the Defendant without reinstatement of the same to its prior state.

**22.** As a consequence, the Defendant asserts that it has suffered special damages, *to wit,* mesne profits from June 2013-

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March, 2019 Kshs 41,531,738.00, repair costs of Kshs 12, 396, 270.00 and Auctioneers charges of Kshs 30,500,00. The Defendant has sought in the counter claim for the following orders:

i. ***Kshs 7, 070,899.14, 15, 851, 085. 75, 41, 531, 789.00/= as at March, 2019 together with interest thereon at commercial rate of 24% per annum from the 1st June, 2013 until payment in full or such higher rate as shall be prevailing when judgment is delivered.***

ii. ***Repair costs at Kshs 12, 396, 270/= and auctioneers charges at Kshs 30,500.00/=***

iii. ***Aggravated damages as shall be granted by the Honourable Court due to unlawful breach of the contract occasioning the Plaintiff's illegal and unlawful occupation of the Defendants premises known as L.R 209/12042/17 and 18 Mombasa Road in contempt of the High Court Consent adopted by the court on 19th June, 2012 until handover of the same in good occupational standards.***

iv. ***Mesne profits at the monthly rent consideration contained in the letter of offer dated 3rd June, 2012 at present being Kshs 512, 256, 526, 785.00 until the Plaintiff vacates the Defendants***

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***premises in perfect occupational condition as condensed in the leased deed or the Defendant undertakes repair works to reinstate both premises in good occupational condition monthly rent arrears costs refundable summarily at the monthly interest rate of 24% per annum or such higher interest rate as shall be prevailing at the time of judgment until payment in full.***

*v.* ***Costs of this suit and the counterclaim together with interest thereon.***

*vi.* ***Such other like relief as this Honourable Court may deem fit to grant.***

**Hearing and Evidence**

**23.** The Plaintiff's first witness, PW1, a director of the Plaintiff company, adopted his witness statements dated 3rd December, 2013, 22nd March, 2016, and 10th September 2020 as his evidence in chief, and produced in evidence documents filed on 3rd December, 2013, 22nd March, 2016, and 27th November, 2020 as Plaintiff's Exhibits 1–3.

**24.** It was PW1's evidence that the Plaintiff is engaged in the manufacture of shoe-care products, including shoe polish, cream, suede cleaners and leather dyes, marketed under the name RIC; that the Defendant had been the Plaintiff's landlord from 2002 until 2015; that the parties initially had a

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lease which expired on 30th November, 2007, after which it was renewed for a further five years and six months, expiring on 30th May 2013 and that upon expiry of the second lease, it was not formally renewed, although the Plaintiff continued paying rent annually.

**25.** He further testified that on 27th November, 2013, the Defendant instructed Sterling Auctioneers, who issued a proclamation notice; that this action prompted the filing of the present suit and that on 28th March, 2014, the court granted injunctive orders restraining the Defendant from interfering with the suit property and directed that a sum of Kshs 2,192,000 be deposited in court, which the Plaintiff complied with.

**26.** PW1 testified that the Plaintiff occupied go-down number 18 until 7th May 2015, when the premises were razed down by fire; that the godown housed the Plaintiff's finished products and raw materials and that the Plaintiff thereafter continued its operations from go-down number 17, where its machinery and equipment were located, as the fire had not spread to that unit, thereby enabling the Plaintiff to maintain minimal production.

**27.** However, on 19th August 2015, PW1 was informed by his employees that auctioneers had entered the premises and were dismantling and removing machinery, equipment and finished products from go-down number 17; that following

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this development, the Plaintiff's advocates promptly moved the court and obtained injunctive orders on 20th August 2015 directing that the removed goods be returned and that the said goods were, however, never returned.

**28.** PW1 stated that the goods were later said to have been taken to Industrial Area and stored with Leakey Auctioneers, although they have never been returned. He also stated that he did not know how the Defendant arrived at the alleged accumulated rent figure of Kshs 10,786,015.34.

**29.** PW1 stated that the equipment removed from the premises had an estimated value of Kshs 95,369,889, while packaging materials were valued at Kshs 2,693,126, bringing the total claim relating to removed items to Kshs 106,554,873. For quotations expressed in USD, it was his evidence that the exchange rate applied was Kshs 100 to 1 USD. He noted that there were no quotations for certain items such as drums, which had been purchased from Gikomba and that the water tanks were valued at Kshs 96,450 and Kshs 32,600 respectively.

**30.** PW1 explained that the raw materials consisted of various chemicals used in manufacturing the products, including substances such as glycerin, paraffin and acetone, which had been stored in the production area; that these had not been destroyed by fire but were instead removed by the auctioneers, although documentation for some of them was

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unavailable; that some of the goods had been imported, while others had already been issued for production and that the work-in-progress, comprising finished but unpackaged products, was valued at Kshs 1,641,098.20.

**31.** PW1 further testified that the dispute between the parties had largely arisen from the Defendant's attempt to review the rent, which would have increased it by approximately 70%, from Kshs 274,000/= to Kshs 466,310/= per month, together with higher premiums.

**32.** PW1 informed the court that following destruction of the factory and their eviction therefrom, the Plaintiff relocated operations to Mlolongo, although the business had never fully recovered; that the company had borrowed funds from financial institutions, including Kshs 76,101,646 from consolidated Bank, which remained unpaid, and another loan of Kshs 6,439,010 from Tshusho Capital, which was still outstanding at the time of the eviction and that the Plaintiff owed suppliers Kshs 34,516,951.82, many of whom subsequently demanded cash payments, worsening the company's financial position.

**33.** In addition, PW1 claimed loss of profits and revenue amounting to Kshs 134,441,000, as well as Kshs 2,004,910, being his monthly loan repayment obligations. He further stated that the Plaintiff does not admit any of the claims raised in the Defendant's counterclaim.

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**34.** On cross-examination, PW1 testified that he did not have the Plaintiff's Memorandum of Association. He stated that rent had been paid up to 31st May 2013, and that the cheques exhibited by the Plaintiff related to payments made before the expiry of the lease. In particular, cheque No. 10884 dated 23rd May 2013 covered rent for May, June and July 2013.

**35.** Although the lease provided for quarterly payment of rent, PW1 explained that he usually paid monthly, typically on or about the 7th day of each month. He confirmed that he had not produced audited accounts, but had instead provided a summary of rent payments.

**36.** PW1 further stated that he would not know whether the Defendant's claim of outstanding rent was correct, as he could only confirm the payments made, and the Defendant had never notified him of any balance due. He acknowledged the contents of a letter dated 25th October 2013, which indicated that Kshs 558,000 was outstanding.

**37.** PW1 also stated that he did not know whether the cheque dated 23rd May, 2013 had cleared. According to him, rent for May, June, July and August 2013 ought to have totaled Kshs 822,000. He recalled that on 26th March, 2014, the court directed that all rent outstanding up to the date of the order be paid.

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**38.** PW1 testified that the outstanding amount at that time was Kshs 2,192,000/=, representing eight months' rent from August 2013 to March 2014. He stated that after March 2014 no further rent was successfully paid because the cheques issued were not banked and were returned; that no rent was paid from April 2014, and the last cheque he issued, dated 2nd March 2015, was also not accepted, after which no further cheques were issued. He further testified that he never received the one-month notice dated 28th April 2014.

**39.** PW1 further stated that the Plaintiff received Kshs 20 million from insurance, although he had not produced the loss adjustment report. He acknowledged that rent remained payable even for the burnt go-down, although he could not confirm whether rent had been paid for June, July and August 2015. Regarding the two go-downs, he testified that no rent was paid for go-down 18 from April 2014, while for go-down 17 all cheques issued between April 2014 and April 2015 were returned.

**40.** He further stated that he did not formally hand over the premises, as the entire building had burned down; that the fire destroyed offices, finished goods and raw materials, whose value was approximately Kshs 100 million; that he had no asset list, audited accounts, or documentary proof showing ownership or purchase of the machines allegedly destroyed and that the Plaintiff later entered into a new

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tenancy agreement in November 2015, and resumed minimal operations in 2016. He added that the company was able to resume work within about a month following the incident.

**41.** PW2 was James Muriuki Kathuri, a trained accountant and a graduate holding a Bachelor of Commerce degree as well as a Certified Public Accountant (CPA) qualification. He testified that he previously worked with the Kenya Revenue Authority (KRA) for five years, where he undertook tax audits in the Medium Tax Office. He adopted his witness statement dated 2[7th] November 2020 as his evidence in chief.

**42.** It was his evidence that he has been associated with the Plaintiff company since 2002, having begun working there while still at the university. In his witness statement, he has set out a schedule of items allegedly carted away during the distress, including finished goods, raw materials stored near the production line, and packaging materials.

**43.** He further commented on the Plaintiff's tax returns, the loan accounts maintained by the company, and the efforts undertaken by the Plaintiff to re-enter the market following the incident. He clarified that the references in his statement to the dates 19th and 20th August 2020 were intended to refer to 19th and 20th August 2015, the dates when the distress occurred.

**44.** PW2 also testified that after the incident the Plaintiff was required to undertake extensive marketing efforts to regain

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its market presence. To that end, the Plaintiff consulted a marketing firm and obtained quotations, which he produced, for advertising through print and electronic media platforms.

**45.** On cross-examination, PW2 stated that the one-year strategy document referred to in his statement was not prepared by him. He explained that his role was limited to tax-related matters, and that he primarily gathered information from the Plaintiff's tax returns, and did not look at the accounts, neither did he conduct a formal audit.

**46.** According to PW2, when tax returns are filed with the Kenya Revenue Authority (KRA), the confirming officer verifies that the audit is in order, and KRA reviews the accounts before confirming the returns. He added that turnover figures generally reflect the operational capacity of a business, while expenses are determined and managed by the company's management.

**47.** He acknowledged that the Plaintiff recorded losses. He further stated that he did not know the size of the godowns, had not conducted any stock-taking, and was not present when the goods were allegedly removed. He also confirmed that he was not involved in reconciling the rent said to be due. PW2 further testified that rent would ordinarily be paid from the company's turnover, and that in assessing profitability, one would have to deduct operational expenses,

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although he did not know the specific percentage applicable in the Plaintiff's case.

**48.** PW2 stated that he had no knowledge of the machinery that was allegedly removed from the suit premises or the 20% charges associated with it, and also noted that some of the invoices he had been given did not have ETR receipts.

**49.** He explained the VAT system, stating that when goods are purchased input tax is charged, and when goods are sold, output tax is charged. At the end of each month, a reconciliation is done by deducting input tax from output tax, with the resulting balance being payable to KRA. He added that in preparing his analysis he had removed VAT from all the payments reflected, noting that the documents he relied upon were invoices rather than proof of actual payments.

**50.** PW2 further testified that the Plaintiff did not purchase new machinery after the incident, but instead resumed operations by mixing shoe polish using the old method. He explained that he was unaware of their annual returns during the year they began working on Mombasa Road at the new premises. He finally clarified that the information contained in pages 4 to 8 of his witness statement was based on information supplied to him by the Plaintiff.

**51.** On re-examination, PW2 testified that he is an accountant by training. He explained that the notation appearing at the bottom of the invoice at page 18, consisting of a combination

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of letters and numbers, represents an electronic signature generated by the Electronic Tax Register (ETR), signifying that tax had been levied on the transaction.

**52.** He further referred to PEXH 2, which contains the Plaintiff's tax returns. According to him, the return reflects a turnover of approximately Kshs 150 million and indicates a profit of Kshs 4,923,357. He noted that the document bears a KRA stamp and that the return was declared on 12th June 2012. PW2 explained that a tax return is essentially a summary of the audited accounts, and that the two must correspond. In turn, the audited accounts summarize the information contained in the company's ledger, while the ledger itself reflects a consolidation of all the company's individual accounts.

**53.** PW3 was John Karanja Gakuo. He adopted his witness statement dated the 27th November, 2020 as his evidence in chief. It was his evidence, vide his witness statement, that he holds a Bachelor of Philosophy in Technology (Electrical and Electronic Engineering) from the Technical University of Kenya and a Higher Diploma in Electrical Engineering from the Mombasa Polytechnic, and that he was at the time pursuing a Master of Science in Energy Technology at the Jomo Kenyatta University of Agriculture and Technology.

**54.** He testified that he had worked in the engineering field for over twenty years and had been employed by Nampak Kenya

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Limited between 1995 and 2019. Nampak Kenya Limited, he explained, is a manufacturer and supplier of metal packaging solutions and had been in existence since 1947.

**55.** PW3 stated that through his employment at Nampak Kenya Limited he became familiar with the operations of the Plaintiff company. He explained that the Plaintiff had for many years sourced its metal packaging tins from Nampak, which supplied containers used in packaging the Plaintiff's products.

**56.** In the course of his professional duties, he had visited the Plaintiff's premises on several occasions to provide technical support relating to the set-up of production lines and the integration of Nampak's packaging materials into the Plaintiff's manufacturing processes; that he was therefore well acquainted with the Plaintiff's production systems and the manner in which the various products were manufactured and packaged and that the Plaintiff company was engaged in the manufacture of a variety of products including shoe polishes, leather dyes, methylated spirits, candles, soaps and moisturizing lotions.

**57.** In relation to shoe care products specifically, he explained that these fell into three broad categories: paste (wax-based shoe polish), cream-based shoe polish and liquid shoe polish, commonly referred to as suede cleaners.

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**58.** PW3 explained that although the compositions and production methods varied depending on the type of product, the manufacturing process typically involved a combination of waxes, solvents and colorants. The waxes included substances such as Carnauba wax, Licowax, Montan wax and paraffin wax, while the solvents included white spirit, illuminating kerosene, methanol, Isopasol and toluene. Colorants included dyes such as Ponceau 4R, Tartrazine, Rhodamine B, Base Black 5 and Black 7.

**59.** PW3 further testified that the manufacturing process began with the weighing of raw materials, usually using industrial weighing scales of up to 150 kilograms capacity for waxes and solvents, while smaller quantities of colorants were measured using electronic scales ranging between 2 and 10 kilograms and that the measured materials would then be transported across the production lines using hydraulic hand pallet trucks.

**60.** With regard to liquid shoe polish or suede cleaners, PW3 stated that these were manufactured in a 1000-litre stainless steel tank where pigments, solvents and other raw materials were mixed using a 3-horsepower electric mobile stirrer. The mixture would then be transferred to filling machines where the product was dispensed into plastic suede bottles, sealed, packaged together with sponge applicators and thereafter coded, wrapped, boxed and transported to the warehouse for dispatch.

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**61.** PW3 also described the production process for leather dyes, which were manufactured in two colour variants, black and brown, and in several sizes including 75ml, 120ml, 125ml and 250ml. The dye raw materials were mixed in a 1000-litre stainless steel tank, after which the mixture was transferred to filling machines that dispensed the product into plastic bottles. These would then be sealed, coded, packaged together with dye brushes, and ultimately boxed and palletized for storage and dispatch.

**62.** In relation to methylated spirits, PW3 testified that the product, also known as denatured alcohol, was produced by mixing the raw materials in a cooled jacketed tank fitted with a stirrer. The liquid was then manually filled into clear plastic bottles, capped, labelled, batch-coded and packaged through the wrapping and shrink-wrapping process before being placed in cartons and moved to the warehouse for distribution.

**63.** He further explained the candle production process, stating that waxes and wax modifiers were melted in electrically heated jacketed tanks before being poured into mould cylinders fitted with candle wicks using candle-making machines. The molded candles would then be cooled using cold water from a condensing unit, removed from the moulds and packaged into boxes and cartons before being placed on pallets and transported to the warehouse.

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**64.** PW3 concluded by stating that the products he had described formed part of the range manufactured by the Plaintiff company. He emphasized that such manufacturing operations typically involved numerous materials and items at different stages of production, including raw materials, drums, cartons, boxes and storage containers used to facilitate the production process.

**65.** In his view, the manufacturing processes required significant investment in machinery, equipment, labour, capital and goodwill, and that the wrongful removal or destruction of such equipment would inevitably result in substantial loss of capital, business and income to the Plaintiff company.

**66.** On cross-examination, the witness testified that he did not prepare any asset register relating to the alleged loss, nor did he undertake any loss and profit analysis. He further confirmed that he did not witness the removal of the goods and had no knowledge of the cost of the equipment allegedly removed.

**67.** He also stated that he was unable to verify the Plaintiff's claims from a sales or valuation perspective. According to him, his knowledge of the Plaintiff's operations was based on the last time he interacted with the Plaintiff's director, which was in 2009. He clarified that his testimony primarily concerned how his company's products related to the

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Plaintiff's production line, and that, to his knowledge, the machines were located inside the godown.

**68.** On re-examination, he reiterated that his involvement with the Plaintiff related to the interaction between his company's products and those of the Plaintiff. He explained that his company manufactured polish tins and jars, which were used in packaging the Plaintiff's products, and that this is how he became familiar with the Plaintiff's product line and operations. He confirmed that he stood by the contents of his witness statement.

**69.** DW1 was Ramesh Shamji Patel, a director of the Defendant company. He adopted his witness statement dated 11th May 2018 as his evidence in chief. In his oral testimony, he stated that Real Estate Management was responsible for managing the suit property, including collecting rent and handling the day-to-day operational matters relating to the premises.

**70.** He explained that the Defendant had filed a Defence and Counterclaim**,** through which it sought, among other reliefs, recovery of unpaid rent. According to him, the managing agents maintained the relevant records and would provide detailed evidence regarding the sums claimed.

**71.** On cross-examination, DW1 stated that he could not recall precisely when he became a director of the Defendant company. He was also uncertain whether the management

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agreement between the Defendant and the property management company had been produced before the court.

**72.** He further testified that in 2015, he had been committed for contempt of court by Aburili J**,** and that the fine imposed had been paid by his advocate. He added that an appeal had been lodged against that conviction before the Court of Appeal**.**

**73.** His role, according to DW1, was limited to signing the lease documents, and was largely unaware of the operational details of the tenancy. He testified that it was possible that the Plaintiff remained in occupation of the premises until 2015**,** but he could not recall when one of the go-downs was destroyed by fire. He also stated that he had no knowledge of the rent increments, the alleged claim for unlawful distress, or the precise amount said to be owed to the Defendant. According to him, the estate managers handled all operational matters relating to the property.

**74.** He further testified that he did not know the circumstances under which the Plaintiff vacated the premises or when the keys were returned. He also stated that he had no detailed knowledge of the counterclaim**,** explaining that he merely signed documents prepared by his advocates. Similarly, he indicated that he had no recollection of any apology made in relation to the contempt proceedings.

**75.** On re-examination, he testified that he was never informed of any apology made to the Court in relation to the contempt

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proceedings. He further stated that the counterclaim was limited to a claim for rent, and that the computation of the sums claimed had been carried out by the Defendant's agent. He explained that the agent's role was to forward the lease documents to the parties for execution, and once the leases were signed, the agents would thereafter assume responsibility for the management of the premises.

**76.** DW2 was Ramila Chauban, the General Manager of the Defendant company. She adopted her witness statement dated 31st May 2015 as her evidence in chief, subject to certain corrections. In particular, she clarified that the rent referred to in paragraph 4 of the statement related to both go-downs collectively and not each unit separately. She also corrected the date in paragraph F**,** stating that the lease expired on 31st May 2013**,** and not 30th December 2012 as previously indicated.

**77.** DW2 testified that as at 31st May 2013, when the lease expired, the outstanding rent stood at Kshs 5,300,002.14**/=.** Thereafter, the Plaintiff remitted a sum of Kshs 2,192,000.00/=**,** which had initially been deposited in court and was later released to the Defendant.

**78.** The Defendant credited that amount in its accounts on 11th July 2014 upon receiving it from the court. According to DW2, the figures reflected in the accounts comprised rent, service charges, borehole water charges, 16% VAT**,** as well

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as City Council rates and land rent. She stated that by November 2018, when the statement of account was prepared, the outstanding balance had risen to Kshs 36,544,146/= while the principal amount excluding interest stood at Kshs 25,420,888/=.

**79.** DW2 explained that the rent initially charged was Kshs 360,000/= per month for the two go-downs combined, in addition to Kshs 6,000/= for borehole water and Kshs 36,000/= for service charges, together with 16% VAT amounting to Kshs 64,320/=, bringing the quarterly rent to Kshs 1,398,960/=.

**80.** This rate remained unchanged until 1st July 2015**,** when the rent was increased to Kshs 435,600/= per month**,** plus Kshs 6,000/= borehole charges**,** Kshs 43,560/= service charge**,** and VAT of Kshs 77,625/=, resulting in a total of Kshs 1,688,356.80 as at August 2016**.**

**81.** DW2 further testified that from 1st June, 2016, the rent was revised to Kshs 479,160/= per month**,** with Kshs 6,000/= borehole charges**,** Kshs 47,916/= service charge, and VAT of Kshs 85,292.96/=, bringing the total payable to Kshs 1,855,105.48/=.

**82.** It was the evidence of DW2 that a further increment took effect from 1st June, 2017**,** when the rent was set at Kshs 527,076/= per month**,** together with Kshs 6,000/= water charges**,** Kshs 52,707.60/= service charge, and VAT of Kshs

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93,725.40/=**,** producing a total monthly obligation of approximately Kshs 2,038,527/= up to 31st May 2018.

**83.** Thereafter, it was stated, from 1st July 2018**,** the rent was revised to Kshs 579,783.63/=, plus VAT of Kshs 103,00257/=, plus 6000/= borehole charges, service charges of 57, 978.40/= and VAT of 103,002/= bringing the total rent payable to approximately Kshs 2,240,292/= per period up to November 2018.

**84.** DW2 added that the Defendant received the keys to the premises through the court on 26th November 2018, after which it took possession and undertook repairs to the go-downs for about seven months**,** which contributed to the accumulation of the claimed amount of approximately Kshs 41 million**.**

**85.** On cross-examination, she testified that invoices are ordinarily prepared depending on the terms of the lease, although none had been produced in the present pleadings. Instead, statements of account for the tenant were prepared by Real Management.

**86.** DW2 further stated that the Defendant had offered the Plaintiff an option to renew the lease through a letter dated 11th August 2013, although the said letter was not produced in evidence. According to her, the landlord was not willing to renew the lease unless the tenant agreed to the revised rental terms.

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**87.** She added that after the fire incident, the Plaintiff was expected to hand over possession of the premises but failed to do so; that while the Plaintiff did not physically occupy the premises thereafter, the Plaintiff's goods allegedly remained on the property and that the Defendant included in its counterclaim the period during which one of the go-downs had been burnt.

**88.** According to DW1, rent continued to be charged during that period because the Plaintiff had not surrendered possession and that rent for go-down no. 17 was charged until August 2019. However, she acknowledged that a letter dated 24th August 2015**,** written by the Defendant's advocates to the Plaintiff, indicated that go-down No. 17 had already been leased to another tenant which in her view was not the position.

**89.** It was the evidence of DW2 that the court had issued orders directing that the said go-down should not be leased pending determination of the suit. She further referred to a letter sent to Kenya Power and Lighting Company (KPLC) notifying them that the tenant had vacated the premises. She stated that she was unaware of the amount, if any, paid by the insurer to the landlord following the fire.

**90.** According to DW2, the sum of Kshs 2,192,000/=, which had been deposited in court, was later released and credited to the landlord's account, although that amount had not been

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excluded from the Defendant's counterclaim. Finally, she testified that the Defendant levied distress for rent covering the period May to December 2013.

**91.** In re-examination, DW2 testified that the statements produced in court were system-generated documents prepared by their office. She maintained that at no point had the Plaintiff disputed that the outstanding sum claimed was due. She further explained that, as managing agents, their role included advertising the property, sourcing for tenants, and ensuring that lease agreements were executed between landlords and tenants.

**92.** She also clarified that the sum of Kshs 2,192,000/= had been credited in the accounts, although she was unable to explain how the final figure in the statement of account had been computed. According to her, the Defendant continued to demand rent because the Plaintiff had failed to provide the Nairobi City County Fire Report and the DOSS report, which had been requested following the fire incident.

**93.** She added that the Plaintiff also failed to surrender the keys to the premises. She further testified that a letter had been written to Kenya Power and Lighting Company (KPLC) informing them that the tenant had vacated the premises leaving behind an outstanding electricity bill of Kshs 128,337.69. In her view, the Defendant remained entitled to continue charging rent because the Plaintiff's goods were

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still on the premises, thereby preventing the landlord from re-letting the property.

**94.** DW3 was Nathan Pala Muhatia, an Advocate of the High Court of Kenya with approximately nine years' experience. He testified that prior to being admitted to the bar, he had worked as a court clerk and later as an auctioneer until 2016. In the course of his work, he had interacted with both the Plaintiff and the Defendant companies. He referred the court to page 98 of the Defendant's bundle, which contained a proclamation listing the goods that were seized.

**95.** He explained that he became involved in the matter to assist an auctioneer known as Lumwanji, who had initially been instructed but was unwell at the time; that he stepped in to complete the exercise and that the goods were taken with his authorization and in the presence of a manager at the go-down where manufacturing activities were being carried out.

**96.** On cross-examination, DW3 confirmed that he was involved in the distress and removal of the Plaintiff's goods. He stated that the Defendant was the instructing principal, although he did not have any written instructions or specific documentation governing the assignment and that he could not recall the exact rent he was to recover but testified that the amount claimed was Kshs 10,786,015.34, as indicated in a letter dated 20th August 2015, which figure had been communicated to him by the parties.

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97. He further stated that the goods were later returned pursuant to a court order and that he and the landlord were found in contempt of court and jointly fined Kshs 5,000,000. He added that when obtaining the breaking order from the court, he had not disclosed the existence of an ongoing suit relating to the dispute and that after the matter was concluded, he demanded and received his professional fees of approximately Kshs 200,000.

98. In re-examination, DW3 clarified that the court order authorizing the action was dated 13th August 2015, while the order issued by Onyancha J. was dated 20th August 2015; that the proclamation was dated 19th August 2015 and that when the goods were eventually returned, the go-down had not yet been leased to another tenant.

99. DW4 was John Njoroge, a registered valuer and director of Paragon Property Valuers Limited, with over 30 years' experience in valuation practice. He produced a valuation report and assessment in respect of the suit premises, which he tendered in evidence.

100. He testified on cross-examination that his terms of reference were to advise on the market rental value of the premises, namely go-down numbers 17 and 18. In preparing the report, he conducted a site visit; that go-down No. 17 was available for inspection, although it was closed at the time and had no

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tenant in occupation and they did not access the interior as the windows were open and it appeared vacant.

**101.** It was the vidence of DW4 that Go-down no. 18 had previously been available but had been destroyed by fire at the time of the inspection. According to him, the two go-downs were otherwise similar in design and characteristics. He confirmed that the valuation report was signed by himself and one Elizabeth, who was a trainee valuer working under him.

**102.** DW4 further testified that, according to the information available to him, Doric had been paying rent of Kshs 158,000 per month as at 30th November 2008, which later increased to Kshs 226,829 per month as at 31st May 2018. He acknowledged that he did not calculate the escalation rate in the report, noting generally that rent increments could rise significantly depending on market conditions.

**103.** Based on his assessment, he concluded that the rent being charged, Kshs 360,000/= per month, for the two go-downs was fair in the circumstances, observing that the premises were commercial in nature and that a tenant dissatisfied with the rent could elect to vacate the premises.

**<u>Submissions</u>**

**104.** The Plaintiff's counsel filed submissions on 20th December 2025. Counsel submitted that the plea for permanent injunction restraining the Defendant from distressing for

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rent, proclaiming, attaching, evicting or otherwise interfering with the Plaintiff's quiet possession of the property is moot having been overtaken by events.

**105.** Counsel submitted that the Defendant admitted removing, destroying and converting the Plaintiff's heavy machinery, equipment and goods. It was argued that the Defendant levied distress and effectively evicted the Plaintiff in direct breach of the orders issued by Ougo J. on 26th March 2014.

**106.** It was urged that the court should be guided by the decision in ***Pampa Grill Limited & Another vs North Lake Limited & Another [2021] KEELC 2938 (KLR),*** as well as the principles articulated in ***Macfoy vs United Africa Co Ltd (1961) 3 All ER 1169***, to the effect that actions founded on illegality are null and void and incapable of conferring any lawful benefit.

**107.** Counsel further relied on ***Kimatu Mbuvi t/a Kimatu Mbuvi & Bros vs Augustine Munyao Kioko [2006] KECA 130 (KLR)*** for the principle that a wrongdoer must take his victim as he finds him, and cannot escape liability merely because the quantification of damages may present difficulty. The Defendant's actions, it was submitted, completely disrupted the Plaintiff's operations, thereby depriving it of its full earning capacity. On that basis, Counsel urged the court to award Kshs 134,441,012.50 per year from August 2015 until settlement in full as compensation for loss of profits.



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**108.** With respect to the claims for general damages for illegal distress, unlawful conversion and detention of goods, the market value of the seized items amounting to Kshs 106,554,875.30/=, as well as Kshs 2,004,910/= being monthly loan repayments and Kshs 34,516,951.82/= owed to suppliers, Counsel submitted that the evidence on record sufficiently demonstrated these losses and that the Plaintiff was therefore entitled to the sums claimed.

**109.** Counsel submitted that the Defendant never returned the Plaintiff's chattels and did not dispute either the listed items or their stated values. Counsel relied on ***Charles Mutuma Mkanake vs Diocese of Meru Trustees Registered [2021] KEHC 4941 (KLR)*** and ***Patrick Muturi vs Kenindia Assurance Co. Ltd [1993] eKLR*** for the principle that a party who has been wrongfully deprived of his chattels is entitled to recover their full value together with any consequential loss suffered. Also cited was ***UAP Insurance Company Limited v Maina & Another (Civil Appeal No. E078 of 2021) [2024] KECA 392 (KLR)***.

**110.** On the issue of exemplary, punitive and aggravated damages, Counsel relied on ***Obongo & Another v Municipal Council of Kisumu (1971) EA 91, Macharia t/a Gusii Properties Club v Dakianga Distributors Limited [2023] KEELC 16938 (KLR)*** and ***Matata Oyondi Nyakenya v Moseti & 4 Others [2024] KEELC 1206***

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***(KLR)*** for the proposition that where damages are at large and the court is called upon to make a general award, it is entitled to consider aggravating factors such as malice, arrogance, or oppressive conduct on the part of the defendant.

**111.** Counsel submitted that in light of the Defendant's illegal actions, the court should ensure it doesn't benefit from his own wrong. Counsel proposed that the court award damages equivalent to Kshs 466,320/= per month, being the rent allegedly imposed by the Defendant, multiplied over the period from the eviction to the determination of the suit, together with interest at commercial rates at 24% per annum.

**112.** Counsel submitted that the Counterclaim is fictitious and unsupported, arguing that the claims, being in the nature of special damages were neither specifically pleaded nor strictly proved, contrary to the principles in ***John Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd [2013] KECA 73*** and that the claims for mesne profits is untenable in light of **Section 77** of the **Land Act,** which relieves a lessee from liability for rent upon unlawful eviction. Also relied on was ***Shimmers Plaza Limited vs National Bank of Kenya Limited [2015] KECA 945 (KLR)***.

**113.** The Defendant filed submissions on 20th January 2026. On the question whether the Defendant had a right to levy



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distress, Counsel relied on **Sections 60, 65, 75** and **76** of the **Land Act, 2012** noting that where a lessee remains in possession after termination or expiry of a lease, the lessor retains its rights and remedies, including termination for non-payment of rent upon service of notice.

**114.** Counsel contended that the Plaintiff failed to comply with the consent order of 19th June 2012 in HCCC No. 684 of 2011, and did not deposit the rent arrears as directed by Ougo J. on 26th March 2014 and that the Plaintiff remained in occupation without a valid lease and in breach of its obligation to pay rent as discussed in ***Samuel Kipkori Ngeno & another vs Local Authorities Pension Trust (Registered Trustees) & another [2013] eKLR***, thereby amounting to trespass. Reliance was placed on **Section 3** of the **Distress for Rent Act,** to argue that the Defendant lawfully exercised its right to levy distress for rent arrears.

**115.** It was further asserted that the injunctive order restraining distress was conditional upon the Plaintiff's continued payment of rent, a condition which the Plaintiff failed to honour. Following that default, the Defendant instructed auctioneers and subsequently obtained orders in Misc. Cause No. 613 of 2015 authorizing the levy of distress.

**116.** It was submitted that the unconditional stay orders issued in HCCC No. 507 of 2015 were obtained without disclosure of the earlier proceedings. It was also pointed out that the

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contempt findings arising therefrom have since been appealed. In any event, it was maintained that the goods proclaimed during the distress process were eventually returned, as reflected in the Notification of Sale.

**117.** Counsel opposed the Plaintiff's claims for loss of business, loss of profits, and the alleged loss of plant, machinery, and stock, arguing that such claims must be strictly proved as affirmed in ***Micro-City Computers Limited & another vs NSSF Board of Trustees & another [2024] KECA 444 (KLR).***

**118.** It was submitted that the Plaintiff failed to produce audited accounts and that KRA returns showed losses in 2014, rendering any award of general damages unjust enrichment. The claim of Kshs 106,554,875.30 for plant, machinery, finished goods, raw materials, and work in progress was likewise challenged for lack of proof, as no inventory records, stock-taking reports, delivery notes, or independent audit reports were produced.

**119.** Counsel further argued that PW2's reliance on invoices alone, coupled with the fact that the witness had not inspected the premises since 2009, significantly weakened the evidentiary foundation of the claim. Also, the Plaintiff failed to account for items that may have been returned, depreciation of assets, the insurance proceeds of Kshs

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10,000,000/= received for the burnt godown, and deductions for wear and tear reflected in its tax returns.

**120.** On the prayer for punitive, exemplary and aggravated damages, Counsel relied on ***Municipal Council of Eldoret v Titus Gatitu Njau [2020] KECA 782 (KLR)*** and related authorities to submit that exemplary damages are only awardable in rare and exceptional cases involving oppressive or unconstitutional conduct. It was argued that the Plaintiff failed to prove forceful eviction or unlawful conduct warranting punishment, and therefore the claim for punitive damages should fail.

**121.** Counsel further submitted that the counterclaim is merited and the Defendant is entitled to aggravated damages in the sum of Kshs 15,000,000/= arising from the Plaintiff's continued occupation of the premises until March 2019, together with mesne profits for the period between June 2013 and March 2019.

**122.** In support of this position, reliance was placed on **Section 2** of the **Civil Procedure Act** and **Order 21 Rule 13 of the Civil Procedure Rules**, as well as the decisions in ***Attorney General vs Halal Meat Products Limited [2016] eKLR*** and ***Rajan Shah t/a Rajan S. Shah & Partners v Bipin P. Shah [2016] eKLR.***

**123.** The Plaintiff filed further submissions on 10th February, 2026 stating that the Defendant had made misleading assertions

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regarding the evidence of DW3, Nathan Pala. Counsel maintained that DW3 did not testify that he received instructions from the Defendant to levy distress and referred the court to the contempt ruling, where it was noted that the instructions had allegedly come from another party.

**124.** Counsel also reiterated that the dispute over rent arose during the second lease after the Defendant arbitrarily increased rent, prompting HCCC No. 684 of 2011, which was later settled by consent removing the illegal increment. It was submitted that after the lease expired, the Defendant had accepted rent payments, and in the ruling of 26th March, 2014, Ougo J. held that the principle of estoppel applied, restraining the Defendant from interfering with the Plaintiff's occupation.

**125.** Counsel further clarified that the Kshs 20 million insurance payment related solely to the fire incident at go-down no. 18 and not to the unlawful distress concerning go-down No. 17. Relying on several authorities including ***Karanja t/a Ndungu Karanja & Co Advocates vs Omuga John Otieno Maurice [2024] KEHC 4435 (KLR)*** and ***UAP Insurance Company Limited v Maina & Another [2024] KECA 392 (KLR),*** Counsel argued that a party cannot benefit from its own wrongdoing and that courts may rely on the best available evidence when assessing loss.

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**126.** The Plaintiff also challenged the Defendant's counterclaim for repair costs and auctioneer's charges, contending that since the Defendant had re-let go-down no. 17 within six days of eviction, the premises could not have required extensive repairs, rendering the claim illogical and unproven. The court was therefore urged to dismiss the counterclaim and allow the Plaintiff's suit.

**Analysis and determination**

**127.** Vide the Amended Plaint, the Plaintiff seeks, *inter alia,* for permanent injunctive relief together with various monetary remedies, including general and punitive damages, the alleged value of goods, machinery and apparatus seized, damages for wrongful detention of those goods, loss of profits, loan repayment obligations, supplier debts, as well as costs and interest.

**128.** According to the Plaintiff, these losses arose from events that occurred on 19th and 20th August, 2015, when the Defendant's auctioneers in an apparent distress for rent entered the suit premises and removed machinery, goods, and raw materials belonging to the Plaintiff.

**129.** The Plaintiff maintains that the distress and subsequent eviction were unlawful as it was at the relevant time a protected tenant; that the Defendant had continued to accept rent even after the expiry of the lease, and that the Defendant acted in breach of subsisting court orders

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restraining any interference with its possession of the premises.

**130.** Conversely, the Defendant, vide its Defence and Counterclaim, seeks, *inter alia,* for mesne profits, repair costs, auctioneer's charges, aggravated damages, interest and costs.

**131.** The Defendant's position is that the Plaintiff's occupation of the premises was governed by a formal lease dated 10th March 2009 for a fixed term of five years and six months, which expired on 31st May 2013. According to the Defendant, that lease was never renewed, and the Plaintiff thereafter remained in possession without the Defendant's consent while at the same time accumulating substantial rent arrears.

**132.** The Defendant maintains that it lawfully exercised its right of distress for rent, and that the Plaintiff was in breach of the lease for failing to pay rent and for failing to yield vacant possession.

**133.** In resolving the aforesaid competing claims, it must be borne in mind that each party bears the obligation of proving its own case. That principle is codified in **Section 107(1)** and **(2)** of the **Evidence Act,** which provides:

> ***"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the***

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***existence of facts which he asserts must prove that those facts exist.***

***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."***

**134.** This is reinforced by **Sections 109** and **112** of the **Evidence Act,** which state:

***"109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***

***112 In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."***

**135.** As regards the applicable standard, the burden in civil claims is discharged on a balance of probabilities. In ***Mumbi M'Nabea vs David M. Wachira [2016] eKLR***, the Court of Appeal stated as follows:

***"In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence***

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***advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.”***

**136.** The court is so guided.

**137.** Having examined the pleadings and the evidence tendered by the parties, the court is of the view that the following issues arise for determination:

- ***i.*** *Whether the Defendant lawfully levied distress for rent and/or evicted the Plaintiff from the suit premises?*
- ***ii.*** *Whether the Plaintiff has proved its entitlement to the various heads of damages sought?*
- ***iii.*** *Whether the Defendant has proved its counterclaim?*

**Whether the Defendant lawfully levied distress for rent and/or evicted the Plaintiff from the suit premises?**

**138.** To determine this issue, it is first necessary to consider the nature of the relationship between the parties. The evidence on record shows that the Plaintiff operated its manufacturing business from two go-downs, namely numbers 17 and 18 situated on L.R. No. 209/12042, Alpha Centre, Mombasa Road. This arrangement established a tenancy relationship between the Plaintiff and the Defendant in respect of the said premises.

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**139.** The parties entered into two successive lease arrangements. The first lease ran from 2002 to 2007 for a term of five years and six months, during which time no dispute arose between the parties, while the second lease commenced in December 2007 and expired in May 2013.

**140.** However, during the subsistence of the second lease disagreements arose around 2011, culminating in HCCC No. 684 of 2011. That suit was ultimately compromised by a consent order adopted on 19th June 2012, by which the Defendant, its servants and agents were restrained from distressing for rent, proclaiming, attaching, evicting or otherwise interfering with the Plaintiff's quiet enjoyment of the suit premises so long as the Plaintiff continued to pay the monthly rent due.

**141.** The second lease expired in May 2013 and no new lease was executed. Nevertheless, the Plaintiff remained on the suit property and the Defendant initially accepted rent payments. This fact was acknowledged in the ruling delivered on 26th March, 2014, where the court observed that by accepting rent despite the lapse of the lease, the doctrine of estoppel by conduct became relevant. The Plaintiff paid rent as per the terminated lease.

**142.** Indeed, the law is settled that acceptance of rent after expiry of a lease may give rise to a periodic tenancy, unless the parties clearly demonstrate a contrary intention. In the

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circumstances, that conduct created a continuing landlord–tenant relationship notwithstanding the expiry of the formal lease.

**143.** However, this general proposition of the law has to be weighed against these proceedings and the consent order that was recorded by the parties in HCCC No. 684 of 2012. In the said consent order which was adopted by the court on 19th June, 2012, the parties agreed that there shall be no distress for rent or eviction of the Plaintiff from the suit property subject to the payment of the rent or determination of the lease.

**144.** When the 2009 Lease between the parties lapsed on 31st May, 2013, the Plaintiff remained on the suit property notwithstanding the Defendant's refusal to renew the Lease under the old terms. Disputes arose once more leading to the Defendant levying for distress on 27th November, 2013, in the sum of Kshs 3,317,242.14, allegedly outstanding as at 31st December 2013. The Plaintiff challenged that distress before the court in a fresh suit.

**145.** In its Ruling delivered on 26th March 2014, Ougo J granted conditional injunctive orders restraining the Defendant from interfering with the Plaintiff's possession, including distressing for rent, subject to the Plaintiff depositing in cash the value of the cheques held by the Defendant together with any outstanding rent within 5 days.

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**146.** In the said Ruling, Ougo J further directed that "parties shall have a meeting to decide on whether to renew the lease or not. In the event they did not agree, the Respondent to serve the requisite notice to take effect as provided for under the law."

**147.** It is not disputed that while the aforesaid orders remained in force, the Defendant, together with Muhatia Pala Auctioneers, moved the lower court through Misc. Cause No. 613 of 2015 seeking orders to levy distress for rent. Those orders were granted on 13th August 2015, and the distress was carried out on 19th and 20th August, 2015 for rent up to August, 2015.

**148.** Immediately thereafter, the Plaintiff moved the court, which on 20th August, 2015 ordered that the distress be stopped unconditionally and directed the return of the seized goods. It would appear the seized goods were not returned as directed, leading to the institution of contempt proceedings against the Defendant. In finding the Defendant in contempt, the court observed as;

> ***"This court has not lost sight of the undisputed fact that is apparent on record that Hon. Ougo J. had on 26th March 2014 restrained the Defendants from distressing for rent or evicting or in any other manner interfering with the***

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***Plaintiff's peaceful occupation of the demised premises. In flagrant and brazen disobedience of that particular order, which had not been vacated, varied or appealed from, the Defendants proceeded to distress and in the process evict the Plaintiff from the premises."***

**149.** Although the Defendant has argued that the order of Ougo J of 26th March, 2014 should not have been issued in view of the consent order in the earlier suit, this court notes that the order of Ougo J had not been varied as at the time of the distress for rent. Indeed, the strict interpretation of the said Order shows that the only option the Defendant had was to issue a notice requiring the Plaintiff to vacate the suit property and claim for mesne profits.

**150.** Indeed, while a landlord is entitled to levy distress where rent remains unpaid, that remedy is not absolute. It must be exercised strictly within the confines of the law and in compliance with any subsisting court orders.

**151.** In the present case, and as was aptly observed in the contempt ruling of 17th December 2015, the dispute between the parties was already the subject of active court proceedings, and injunctive orders issued on 26th March 2014 had expressly restrained the Defendant from interfering with the Plaintiff's possession, other than issuing the requisite notice in accordance with the law.

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**152.** In those circumstances, it was not open to the Defendant to circumvent the pending proceedings by moving to the lower court to obtain orders for distress. In the circumstances, the court finds that the distress levied on 19th and 20th August 2015 was unlawful.

**153.** The next question is whether, beyond being unlawful, the distress complained of also translated into the eviction of the Plaintiff from the suit property. It is trite, and as affirmed by the Court of Appeal in ***Gusii Mwalimu Investment Co. Ltd vs Mwalimu Hotel Kisii Ltd [1996] eKLR,*** a landlord cannot use distress as a means of repossessing premises without a lawful order for possession. The court stated as follows:

> "***To obtain possession by carrying out illegal distress is per se wrong… A court of law cannot allow such a state of affairs whereby the law of the jungle takes over… unless a tenant consents or agrees to give possession, the landlord has to obtain all orders from a competent court or statutory tribunal to obtain an order for possession***."

**154.** That principle is directly applicable here. Distress for rent, by itself, does not mean eviction, and it cannot lawfully be used as a substitute for repossessing premises without a court order.



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**155.** In resolving this issue, the court must distinguish between go-down no. 17 and go-down no. 18, as the circumstances affecting each were materially different. It is common ground that go-down no. 18 had been destroyed by fire around 7th May, 2015, rendering it un-inhabitable, an event not attributable to the Defendant. In those circumstances, it cannot properly be said that the Plaintiff was evicted from go-down No. 18.

**156.** The position regarding go-down no. 17, however, is markedly different. The evidence shows that following the distress carried out on 19th and 20th August 2015, the Defendant removed the Plaintiff's machinery and goods from that godown.

**157.** Significantly, by a dated 24th August, 2015, the Defendant's advocates informed the Plaintiff that the goods could not be returned because go-down no. 17 had already been leased to a new tenant. This fact was also affirmed by the court in its ruling of 17th December 2015, where the court observed as follows:

> "***Distress for rent in my view does not amount to eviction of a tenant from the premises and dispossessing him of occupation thereof. It could therefore not have been expected that by 24th August 2015, the Defendant, after distressing for***

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***rent on 20th August 2015, had already leased the premises."***

**158.** The implication of that evidence is clear. By removing the Plaintiff's goods and thereafter re-letting and/or informing the Plaintiff that go-down no. 17 had been relet to a third party, the Defendant effectively excluded the Plaintiff from possession of the premises. In the circumstances, the court finds that the distress carried out on 19th and 20th August 2015, in so far as it related to go-down no. 17, amounted to the eviction of the Plaintiff.

**Whether the Plaintiff has proved its entitlement to the various heads of damages sought?**

**159.** Having found that there was unlawful distress, the court now turns to the question whether the Plaintiff has proved its claims for damages arising therefrom. The Plaintiff seeks several heads of damages, including the alleged value of seized goods amounting to Kshs 106,554,875. 30, loss of profits of Kshs 134,441,012.50 annually, monthly loan repayments of Kshs 2,004,910/=, and supplier debts of Kshs 34,516,951.82/= as well as general damages.

**160.** At the outset, it is trite that not every loss said to follow a wrongful act is recoverable in damages. Recovery is limited to such loss as flows naturally from the breach or wrongful act, or such as may reasonably be taken to have been within the contemplation of the parties as the probable result of



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that breach. That is the well-known principle on remoteness of damage in ***<u>Hadley vs Baxendale (1854) 9 Exch. 341,</u>*** a principle that has long been applied in this jurisdiction.

**161.** The Court of Appeal in ***<u>Johnson Mugwe Wanganga vs Joseph Nyaga Karingi [2014] KECA 662 (KLR)</u>*** addressed a similar claim where a tenant sought recovery of bank loans and trade debts from a landlord following distress. The court noted thus:

> **"As regards both trade debts and bank loans, it is our considered view that a landlord tenant relationship is not a novation contract where the landlord undertakes to pay all debts due and owing to third parties by the tenant in the event of breach of the tenancy agreement. We find that the learned judge erred in law in awarding damages for loss of trade debts and bank loan to the respondent in this case.**
>
> **21. In the instant case, if the respondent's claim for general damages is founded on tort, the principle of remoteness of damage as enunciated in the Wagon Mound, cases apply. (See Overseas Tankship (UK) Limited –v– Morris dock Engineering Co. Ltd. (The Wagon Mound), [1961] AC 388. Applying the Wagon Mound principles, it <u>is our considered view that the chain of proximate</u>**

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**<u>causation between the appellant's distress and attachment of the respondent's goods and the alleged loss of trade debts and non-payment of bank loans is remote…"</u>**

**162.** Applying those principles to the present case, the Plaintiff's claims for Kshs 2,004,910 being monthly loan repayments and Kshs 34,516,951.82 being debts owed to suppliers cannot be sustained. The causal connection between the distress complained of and the Plaintiff's inability to meet those obligations is too remote, and such losses cannot, in law, be shifted to the Defendant as recoverable damages.

**163.** Other than that, the Plaintiff did not produce evidence in the form of documents to show his indebtness to enable the court ascertain the causal link between the distress for rent and the said loans. The Plaintiff did not call the alleged suppliers or lenders to testify thus leaving his claim unsupported.

**164.** The Plaintiff also seeks Kshs 106,554,875.30 as the alleged value of plant, machinery, finished goods, raw materials, packaging materials and work in progress said to have been removed during the distress. This claim is plainly one for special damages, and the law is settled that special damages must not only be specifically pleaded but must also be strictly proved. The Court of Appeal reaffirmed this principle in ***<u>Capital Fish Kenya Limited v Kenya Power & Lighting Company Limited [2016] KECA 56 (KLR).</u>***

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**165.** The court harbours no doubt that during the distress undertaken by the Defendant, certain goods and materials belonging to the Plaintiff were removed from the premises. However, the issue before the court is not merely whether items were taken, but whether the Plaintiff has proved, with the degree of certainty required in law, the existence and value of the specific goods said to have been removed.

**166.** As emphasized by the Court of Appeal in ***National Social Security Fund Board of Trustees vs Sifa International Limited [2016] KECA 550 (KLR),*** that:

> "***Special damages, we repeat, can only be awarded when they have been properly pleaded and strictly proved. There is no middle ground. It is either they are strictly proved or not."***

**167.** PW1 took the court through a dozen of quotes and invoices. Items number 2 to 16 of the Plaintiff's Further List of Documents were quotations for the several machines including an Air Compressor; Oil Pump; Condensing Unit; Conveyor; Shrink Wrapping machine; Batching machine amongst others. The other set of documents which were captured under items 17 – 63 were invoices for the raw materials and finished shoe polish products.

**168.** Other than listing the items that were allegedly carted away by the auctioneer, the Plaintiff did not produce any

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inventory, stock register, asset register, receipts, warranties or contemporaneous record demonstrating that the alleged goods were present in the premises at the time the distress was carried out. This was conceded to by the Plaintiff and its witnesses.

**169.** Further difficulty arises from contradictions in the Plaintiff's own evidence. In paragraph 41 of PW1's witness statement dated 10th December, 2020, PW1 stated that go-down no. 18, which had been completely destroyed by fire in May, 2015, housed the Plaintiff's offices, finished goods and raw materials.

**170.** If those items were destroyed in the fire, it becomes difficult to reconcile that position with the Plaintiff's assertion that the same finished goods and raw materials were later removed by the Defendant during the distress exercise in August, 2015, and which are now claimed.

**171.** Furthermore, the quotations which the Plaintiff relied upon to show the alleged prices of the machines that were supposedly carted cannot amount to the value of the said items, taking into account deprecation, and the fact that the quotations were procured after the act. The ideal situation was for the Plaintiff to get the actual receipts that were issued when the said machines were purchased, and delivery notes, indicating when the said machines were received.

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**172.** This also applies to the issue of the purchase of the alleged raw materials. It was imperative for the Plaintiff to produce in evidence the actual receipts and delivery notes indicating the purchase of the same. As regards the finished products, the value of the same can be shown by looking at the market price then. However, as I have indicated, there was no evidence to show that the items listed in the Amended Plaint are the ones which were actually carted away considering the Notification of Sale of dated 19th August, 2015.

**173.** In the absence of documentary evidence demonstrating both the existence and value of the alleged machines and goods, the court is unable to conclude that the Plaintiff has strictly proved the claimed sum of Kshs 106,554,875.30 to the standard required in law. Consequently, the claim cannot be sustained.

**174.** The Plaintiff also seeks damages for loss of profits and revenue in the sum of Kshs 134,441,012.50 annually, which it asserts represents its average annual revenue between 2011 and 2014.

**175.** In considering this claim, the court is guided by the principles articulated by the Court of Appeal in ***Micro-City Computers Limited & another v National Social Security Fund Board of Trustees & another (Civil Appeal Nos. 49 & 59 of 2020 (Consolidated)) [2024] KECA 444 (KLR)*** thus:

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***"…whether the claim for loss of profits was proved. In this respect, the claimant is required to prove a difference between the position he is in ('the breach position') and the position he would have been in but for the breach ('the non-breach position'). The breach position is a question of historical and actual fact, and what happened, what was spent, and what was received can be established with precision by the claimant on the balance of probabilities. On the other hand, the non-breach position is of its nature a hypothetical, and proof of it is a different type of exercise, namely an approximation of how the parties would have operated and the situation the claimant would have been in if the primary contractual obligations had been performed. (See in this respect the chapter on 'Damages and Proof', by Adam Kramer in the text Commercial Remedies: Resolving Controversies, 2017 Edition).***

**176.** The court further observed that claims for loss of profits cannot always be proved with mathematical precision, particularly where the assessment involves a hypothetical reconstruction of what might have occurred but for the Defendant's wrongdoing.

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**177.** In such circumstances, the court may adopt a reasonable estimation of the loss where the uncertainty has been occasioned by the Defendant's conduct. However, this flexibility does not relieve a claimant of the obligation to present the best evidence reasonably available. The claimant must still lay credible evidentiary foundation from which the court can reasonably infer both the existence and the extent of the alleged loss.

**178.** Applying those principles to the present case, the Plaintiff relied primarily on income tax returns to demonstrate the historical performance of its business. The Plaintiff referenced the total turnover for the quoted years. However, as correctly submitted by the Defendant's counsel, turnover is not synonymous with profit.

**179.** Turnover is the total money generated from sales before any costs are deducted, indicating business volume. Profit is the "bottom line" remaining after all expenses, taxes, and costs of goods sold are subtracted. A high turnover does not guarantee high profit if the expenses are high.

**180.** Indeed, the evidence on record reveals that the Plaintiff reported taxable profits of Kshs 4,923,257 in 2011, Kshs 5,156,423 in 2012, and Kshs 1,176,680 in 2013**,** but recorded a loss of Kshs 8,471,779 in 2014, that is to say before the distress of August 2015 and even before the fire that destroyed go-down no. 18 in May 2015.

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**181.** This significantly undermines the Plaintiff's claim for loss of profits. To make such an award in the face of the Plaintiff's own financial records showing declining profitability and eventual loss would amount to speculation rather than judicial estimation based on proven facts. Indeed, despite the Plaintiff being a limited liability company, no audited accounts were availed to this court thus rendering the claim for loss of business and or profits a non-starter.

**182.** This conclusion is reinforced by the limitations in the financial evidence presented by PW2, who testified on the financial aspects of the claim, acknowledged during cross-examination that he did not prepare the company's accounts, or look at them or conduct an audit and relied largely on information supplied by the Plaintiff. His testimony therefore did not provide an independent evidentiary basis upon which the court could reliably determine the Plaintiff's alleged lost profits.

**183.** Further, the evidence on record shows that the Plaintiff entered into a new tenancy agreement in November 2015 with Duldul Enterprises Limited and resumed operations in 2016. In such circumstances, a comparison between the Plaintiff's subsequent financial returns after resuming operations and its historical performance would ordinarily assist the court in determining whether any measurable difference in profitability existed and whether such

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difference could be attributed to the Defendant’s conduct. No such comparative financial evidence was presented.

**184.** Ultimately, the claim of Kshs 134, 441, 012.50 as loss of profits fails. Although the Plaintiff has failed to strictly prove the specific heads of special damages claimed, the court has already found that the Defendant unlawfully levied distress, and evicted the Plaintiff’s from go-down no. 17. It is as such entitled to general damages in that regard.

**185.** The Plaintiff has prayed for aggravated damages. The Court of Appeal in ***Miguna Miguna vs The Standard Group Ltd & 4 others [2017] eKLR***, citing ***John vs GM Limited [1993] QB 586,*** held that aggravated damages may be awarded where the Defendant’s conduct is high-handed, malicious or oppressive.

**186.** In ***Viktar Maina Ngunjiri vs Jack and Jill Supermarket Limited [2019] KECA 144 (KLR),*** the Court of Appeal observed that the appellant had unlawfully invaded the respondent’s premises and trespassed thereon, an act which exposed the premises to members of the public and ultimately resulted in looting of goods from the supermarket. In those circumstances, the court found that the conduct complained of was sufficiently egregious to warrant an award of punitive damages.

**187.** In the present case, the evidence shows that the Defendant levied distress which led to the relocation of the Plaintiff to

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other premises. Although the court has found that the levying of distress was against an existing court order, the evidence on record shows that the Defendant had agreed to renew the Lease after the lapse of the existing Lease on 31st August, 2013 pursuant to an offer of 3rd June, 2013.

**188.** It would appear that the Plaintiff was not willing to renew the Lease under the said terms, and insisted on staying in the premises even after the lapse of the Lease. This was despite the Defendant's notice dated 2nd May, 2013 where it informed the Plaintiff that the Lease shall not be renewed and that it required vacant position on 31st May, 2013. Reminders to this effect were done on 24th May, 2013, 27th May, 2013 and 28th May, 2013.

**189.** It took the intervention of the court for the Plaintiff to continue occupying the suit premises after the Lease expired. The reading of the court order by Ougo J of 26th March, 2014 shows that the Defendant was entitled to the suit property in the event the parties did not agree on the payable rent, subject to the issuance of a notice. Despite the said order, the Plaintiff continued occupying the premises without paying rent stipulated in the letter of offer by the Defendant until 19th August, 2015 when the Defendant distressed for rent, and in the process evicted it.

**190.** Notwithstanding the fact that the court has found the said distress to have been unlawful, the eviction of the Plaintiff

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was aggravated by its conduct in refusing to pay the demanded rent and refusing to vacate the premises. This is despite the notice that was issued to the Plaintiff vide the letter dated 25th April, 2014 requiring it to vacate the suit premises within one (1) month as contemplated under the **Land Act**.

**191.** Considering the Replying Affidavit of the then advocate for the Defendant sworn on 21st August, 2015, the Defendant distressed for rent on 19th November, 2015 under the mistaken believe that the injunctive order by Ougo J had lapsed by effluxion of time, thus its actions.

**192.** Further, the said advocate deposed that before the said distress for rent, the Defendant had written to the Plaintiff's advocate requesting them to pay the sum of Kshs 10, 786,015.34 being rent arrears as at 31st July, 2015 which correspondence was ignored.

**193.** It is trite that with or without a written Lease, **section 65 (2)** of the **Land Act** empowers the landlord to terminate a Lease by serving a notice of intention to terminate. Considering the circumstances of the distress for rent of 19th August, 2015 in totality, and the notices that the Defendant had issued to the Plaintiff, it cannot be said that the Defendant's actions were malicious, high-handed or oppressive to warrant an award of punitive or aggravated damages.

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**194.** Accordingly, the court will award the Plaintiff Kshs 3,000,000 as general damages for the unlawful distress of rent.

**Whether the Defendant has proved its counterclaim**

**195.** Vide its Counterclaim, the Defendant seeks several monetary remedies arising from what it characterizes as the Plaintiff's continued occupation of the suit premises after expiry of the lease. In particular, the Defendant claims mesne profits for the period June 2013 to March 2019.

**196.** The Defendant also claims mesne profits in the nature of monthly rent stated in the letter of offer dated 3rd June 2012, initially at Kshs 512,256/= and later Kshs 526,785/= per month, together with interest at the commercial rate of 24% per annum until the Plaintiff vacates the premises and reinstates the same as well as repair costs, auctioneer charges and aggravated damages.

**197.** The law governing mesne profits is well settled. **Section 2** of the **Civil Procedure Act** defines mesne profits as:

> *"**Profits", in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession."***

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**198.** Speaking to the same, the Court of Appeal in ***Attorney General vs Halal Meat Products Ltd [2016] eKLR,*** observed:

> "***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."***

**199.** Thus, mesne profits are premised on proof that a party was wrongfully kept out of possession of property by another person who remained in unlawful occupation. In the present case, the Defendant's claim for mesne profits presupposes that the Plaintiff remained in wrongful possession of the premises from June 2013 until March 2019.

**200.** The evidence before the court shows the lease between the parties expired on 31st May 2013. The evidence demonstrates that the Defendant continued to receive rent from the Plaintiff after expiry of the lease.

**201.** Thereafter the Plaintiffs continual stay was subject to the orders of the court. As already stated, the Plaintiff was allowed by the court to be on the property on condition that it continues to pay rent, and if the rent payable was not agreed upon, to vacate the property upon being served with the requisite notice (s). In my view, the Plaintiff was under an obligation to continue paying rent under the old terms until

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he vacated the premises considering that the parties did not agree on the new terms.

**202.** The court has found earlier in this judgment that the Defendant levied unlawful distress in August 2015, removed the Plaintiff's machinery and goods from go-down No. 17 and effectively took over possession. Once the Defendant resumed possession and/or re-let the premises, it cannot logically or legally maintain that the Plaintiff continued to occupy the premises thereafter so as to justify a claim for mesne profits up to March 2019. The Defendant would, at most, be entitled to recover only such mesne profits as was lawfully outstanding at the time the Plaintiff vacated the premises, and no more.

**203.** By his own admission, PW1, on behalf of the Plaintiff, informed the court that the last time the Plaintiff made payments for the two premises was in March, 2014. That means that the Plaintiff having remained in the premises until 19th August, 2015 when its goods were carted away from go-down 17 by the auctioneer, and May, 2015 when go-down 18 was destroyed by fire should have paid rent until then.

**204.** I say so because although the Defendant argued that the Plaintiff remained in possession of the two go downs until 2019, the letter dated 24th August, 2015 by its advocate addressed to the Defendant's advocate stipulated otherwise:

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***"Kindly note that godown number 17 has already been leased to a new lessee and godown number 18 was terribly burned down by the Plaintiff, and thus cannot be occupied and is not in good occupational conditions under the provisions of the Public Health Act."***

**205.** The issue of the Plaintiff having vacated the suit premises in 2015 is further supported by the Defendant's letter dated 14th October, 2015 addressed to Kenya Power and Lighting Company, in which the Defendant informed KPLC that the tenant vacated the premises. The Defendant offered to assist KPLC locate the Plaintiff's current premises.

**206.** Therefore, the rent payable by the Plaintiff for godown 17 is for the period April, 2014 until 18th August, 2015 (16months) while for godown 18, the payable rent is for the period April, 2014 to April, 2015 (12 months).

**207.** As already stated, having failed to agree on the payable rent after the lapse of the Lease in May, 2013, the payable rent by the Plaintiff until he vacated the suit premises was as per the Lease that lapsed in May, 2013, and not the rates that the Defendant had suggested in its letter of offer.

**208.** According to the said Lease, the last rent that the Plaintiff was paying was Kshs. 226,828 per month exclusive of VAT and service charge. According to the Plaintiff's own

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documents, including the cheques that it issued before and after the lapse of the Lease in May, 2013, it was paying a total of Kshs. 274,000 per month for the two godowns, meaning that the payment for each godown was Kshs 137,000 per month inclusive of VAT and service charge.

**209.** The total payable mesne profits by the Plaintiff for godown no. 17 for 16 months is therefore Kshs. 2,192,000 while the payable mesne profits for godown 18 for 12 months is 1,644,000. According to clause 6 (g) of the Lease, the Plaintiff was obligated to pay interest at commercial rates, but not less that 24% per annum on the outstanding rent until payment. That will be the applicable interest rate which shall commence from August, 2015 when the Plaintiff vacated the premises until payment in full.

**210.** The claim for repair costs of Kshs 12,396,270.00 was not strictly proved. The evidence shows that go-down no. 18 was destroyed by fire, for which insurance compensation was paid, and that go-down No. 17 was broken into during the distress process undertaken by the Defendant’s agents.

**211.** In those circumstances, it was incumbent upon the Defendant to clearly demonstrate that the repairs claimed were necessitated by damage caused by the Plaintiff and not by the fire or the Defendant’s own actions in carrying out the distress. This was not done. Neither was the pleaded sum demonstrated.

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**212.** The claim for auctioneer's charges of Kshs 30,500.00 must also fail. Even assuming such charges were incurred, they arose from the distress process which this court has already found to have been unlawful. A party cannot recover expenses incurred in the course of its own unlawful conduct.

**213.** As for the claim for aggravated damages, the Defendant did not lay any legal or factual basis warranting such an award. That claim also fails.

**214.** In the end, the court makes the following final determination:

**a) The Plaintiff's suit partly succeeds in the following manner:**

**i) The Plaintiff is hereby granted general damages as against the Defendant for the illegal distress, and unlawful eviction from go-down no 17 on L.R 209/12402 to the tune of Kshs 3,000,000.**

**ii) The Defendant shall pay interest on the above sum at court rates from the date of this Judgment until payment in full.**

**b) The Defendant's Counterclaim is partly allowed in the following terms:**

**i. The Plaintiff to pay to the Defendant mesne profits of Kshs 3,836,000.**

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ii. **The Plaintiff to pay to the Defendant interest rate on the above amount at the rate of 24% per annum from 19th August, 2015 until payment in full.**

c) **Each party shall bear its own costs.**

**Dated, signed and delivered virtually in Nairobi this 12th day of March, 2026.**

**O. A. Angote**
**Judge**

**<u>In the presence of</u>:**

Ms Jahmohammed for Defendants

Mr. Kamau Lawrence and Kamau for Macharia for Plaintiff

Court Assistant: Tracy

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