



**Mohamed & another v Kabarak University (Civil Appeal E121 of 2024)
[2026] KEHC 2482 (KLR) (25 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2482 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E121 OF 2024
PN GICHOHI, J
FEBRUARY 25, 2026**

BETWEEN

AISHA AHMED MOHAMED 1ST APPELLANT

BIHI INVESTMENTS COMPANY 2ND APPELLANT

AND

KABARAK UNIVERSITY RESPONDENT

(Being an Appeal from Judgment of Hon. E.N. Juma (Chief Magistrate) delivered on 30th April 2024 in Nakuru Chief Magistrate's Court Civil Suit No. 608 of 2019)

JUDGMENT

1. The background of this Appeal is that vide a plaint dated 30th May 2019, the Respondent sued the Appellants seeking a refund of Kshs. 4,099,922/= paid to the Appellants as deposit security.
2. The Respondent's case was that it had leased property reference Number LR. No. 209/583, Bihi Towers from the 2nd Appellant for the purpose of establishing a campus in Nairobi County. The lease covered the 9th, 10th and 11th floors.
3. One of the terms of the lease included the use of the premises as a learning institution, a schedule of monthly rent payments for five years from 2016 through to 2020, and the payment of a refundable security deposit of Kshs. 4,099,027.50, equivalent to three months' rent, which was refundable with interest upon termination of the lease.
4. Upon complying with the terms of the lease, the Respondent took possession of the premises and occupied the same till 24th February, 2017 when it issued to the Appellants, a three-month notice of termination of tenancy effective 31st May, 2017.



5. The Respondent contended that shortly before the termination date, the 1st Appellant, acting under the 2nd Appellant, unlawfully restrained the Respondent from accessing the premises to remove its partitions, claiming further approvals were needed. The Respondent viewed this action as a strategy by the Appellants to forestall the removal of partitions and ultimately detain the security deposit.
6. Subsequently, the Respondent alleges the Appellants unprofessionally removed the partitions themselves and appropriated the deposit to cover unconscionable amounts expended on the removal.
7. Despite a written request dated 3rd September, 2018 for the refund of the security deposit of Kshs. 4,099,927, the Appellants refused to comply causing the Respondent to institute the suit at the Magistrate Court to compel the Appellants to refund the sum of Kshs. 4,099,922/= security deposit and for the Court to declare that the Appellants' actions constituted an unlawful breach of the lease. They also prayed for interest on the deposit, damages, and costs.
8. In their joint statement of defence, the Appellants generally denied the claim but while admitting entering into the lease agreement with the Respondent, terms of the lease, the agreement, and the rent schedule, they contended that despite notice to terminate the lease in February 2017, the Respondent did not deliver vacant possession of the premises until September 2018, over a year later.
9. In the alternative, the Appellants argued that the Respondent was in active occupation/possession without paying the agreed rent until September 2018, and therefore, the security deposit was utilized as rent for part of this occupation period after the lease termination.
10. They denied owing the Respondent any money, claiming instead that they have a claim against the Respondent for rent owed during the unpaid occupation period and that they shall file a counterclaim for the rental income.
11. Lastly, they denied the particulars of breach and the allegations of unjust enrichment. They contested the jurisdiction of the court, stating that they had raised a preliminary objection accordingly, and prayed for the suit to be dismissed with costs.
12. After hearing both parties, the trial court found that after handing over the keys to the Appellants, the Respondent did not have access to the suit premises, hence, the Respondent's rental obligations ceased on 31st May, 2017. The trial court was satisfied that the Respondent specifically pleaded and proved to the required standard its claim for the deposits.
13. It further found the 1st Appellant (Aisha Ahmed Mohammed) jointly and severally liable with the 2nd Appellant (Bihi Investment Company) for the moneys received by the 2nd Appellant.
14. It therefore entered judgment against the Appellants for the refund of Kshs. 4,099,922 , costs and interest at court rates from the date of judgment until payment in full.
15. Aggrieved by that judgment, the Appellant filed the current Appeal vide Memorandum of Appeal dated 27th April, 2024 and based on the following grounds;-
 1. The honourable magistrate erred in fact in finding that the Appellant denied the Respondent access to the suit premises.
 2. The honourable magistrate erred in fact in finding that the Respondent's rental obligations ceased on 31st May, 2017, despite the Appellant removing the items on 8th October, 2017, at the Respondent's request.
 3. The honourable magistrate erred in law by ignoring the provision of Section 57 of the [Land Act](#), and erred in fact by ignoring the clear provisions of the lease agreement between the parties.



4. The honourable magistrate failed to take into account the aforesaid considerations, made an erroneous determination, and this honourable court has jurisdiction to interfere with the judgment delivered on 30th April, 2024.
5. The honourable magistrate erred in law and in fact in finding the 1st appellant jointly and severally liable with the 2nd Appellant for moneys received by the 2nd appellant without any basis whatsoever, and despite the 1st Appellant being a mere employee of the 2nd Appellant.
16. They therefore urged this Court to allow the appeal, set aside the judgment dated 30th April 2024 and award costs of this Appeal to them.

Appellant's Submissions

17. The Appellants emphasised this court's duty as a first appellate court as stated in *Selle v Associated Motor Boat Co.* [1968] EA 123 and *Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 E. A. C. A. 270.
18. In regard to the first ground of Appeal, the Appellants referred to Section 107 and Section 109 of the [*Evidence Act*](#) which provide that whoever alleges must prove the fact's existence, and the burden of proof lies on that person, hence the Respondent herein ought to have demonstrated that they were denied access to remove partitions.
19. It was submitted that pleadings are averments, not evidence, until proven or admitted, and no decision can be founded upon them. In support of this argument, reliance was placed on the case of *CMC AVIATION LTD.V. CRUISAIR LTD NO 1 1978 KLR 103* [1976-80 1 KLR 835] where Madan J (as he then was) held that;-

“Pleadings contain the averments of the parties concerned. Until they are proved or disapproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them... Averments in no way satisfy, for example the definition of 'evidence' as anything that make clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth”.
20. It was therefore submitted that while the trial court made reference on “to and fro” correspondence, no such evidence was produced. That the only communication shown was a letter on 22nd September, 2017, requesting access, which was granted.
21. The Appellants argued that they did not deny access and had no cause to, as they had prospective clients including Baraton University, whose letter was produced as evidence, who could not lease the premises because the Respondent was still in possession and had not removed the partitions. A fact which the trial court ignored.
22. It was maintained that the Respondent failed to provide any evidence like a request or denial to support their claim of being denied access, thus, the trial court considered issues that the Respondent had not proved and therefore the judgment was founded on errors of both law and fact.
23. On the second ground, the Appellant submitted that both parties relied on the lease agreement, specifically Clause 2 (x), which required the tenant (Respondent) to yield up the building at the expiration of the term with fixtures and fittings, other than partitions and other tenant-installed items, which were to remain the tenant's property and be returned in good repair and condition.



24. However, that despite the termination notice taking effect on 31st May, 2017, the Respondent remained in possession until 8th October, 2017, contrary to the condition of the lease that provided that the Respondent to yield up the premises in good condition by removing their erected partitions. The Appellant submitted that the premises were only yielded up on 8th October, 2017, when the items were collected.
25. It was submitted that the Respondent requested access to remove partitions only on 22nd September, 2017, and removed them on 8th October, 2017, thus they were liable to pay rent for the intervening period. In support of their submissions, the Appellants cited the case of Raza Properties Limited v Panafcon Engineering Limited [2006] KEHC 339 (KLR) where the court stated:-
- “...In so far as the defendant did not remove its partitions installed in the suit premises until sometime about 23rd March, 2000, I must assume the defendant, for all practical purposes, remained in possession of that premises during the month of March, 2000...”
26. The Appellants submitted that the Respondent remained in possession and did not remove the partitions on 31st May, 2017, but did so on 8th October, 2017 which was five months later, hence, their obligations continued until the partitions were removed.
27. It was further submitted that the Respondent failed to pay rent during the intervening period and failed to repair the premises after removing the partitions as required by the lease. Thus, the Respondent's unsubstantiated claim during the hearing that it was denied access should be disregarded.
28. The Appellants therefore submitted that by failing to consider the date the partitions were removed, the trial court erred by finding the Respondent's obligations ceased on 31st May, 2017.
29. On the third ground that the trial court ignored the provisions of Section 57 of *Land Act*, the Appellants submitted that Section 57 ((1) (c) provides that if a lessee remains in possession with the lessor's consent after the lease term has expired, the lease shall be deemed a periodic one unless otherwise agreed, and all consistent terms and conditions of the original lease continue in force until termination.
30. On that basis, it was argued that since the Respondent remained in possession from the termination notice's effective date until 8th October, 2017, they were both legally and contractually bound under Section 57 to pay rent to the 2nd Appellant for that intervening period as the intervening possession created a periodic lease under the same terms and conditions as the terminated lease.
31. In support of that argument, the Appellants relied on the case of Shirbrook (K) Limited V Nakuru Industries Limited & Another (2013) eKLR, where the Court held:-
- “However, being a tenant holding over under the expired Tenancy Agreement of 10th January 1994, the Plaintiff was under both a legal and contractual obligation to pay the same rent for the holding over period at the rate at which it was liable to pay in terms of the expired lease”.
32. The Appellants therefore submitted that there is no dispute that the Respondent vacated on 8th October, 2017, and did not pay rent for the period from 31st May, 2017 to 8th October, 2017, while they were in possession. The Appellants therefore urged this court to be persuaded by the authority cited.
33. On the fourth ground, in regard to the trial court's finding that the 1st Appellant was jointly liable with the 2nd Appellant, the Appellants cited the case of Victor Mabachi & another v Nurturn Bates Ltd, Civil Appeal No. 247 of 2025 [2013] eKLR to submit that the 2nd Appellant is a body corporate,



a separate legal entity from its directors and shareholders, and therefore, its liabilities cannot be held against them except in circumstances warranting the lifting of the corporate veil.

34. It was argued that during trial, it was established that the 1st Appellant was neither a director nor a shareholder, but solely an employee of the 2nd Appellant.
35. On that basis, the Appellants submitted that the trial court's entry of judgment against both Appellants jointly and severally was in error and without any basis, as the required factors for lifting the corporate veil were not satisfied. In light of the foregoing, the Appellants urged the Court to allow the appeal with costs.

Respondent's Submissions

36. The Respondent identified five issues for determination:-
 1. Whether the trial court erred in holding that the Respondent lawfully terminated the lease and vacated the premises on 31st May 2017.
 2. Whether or not the Respondent/ Plaintiff is entitled to a refund of the security deposit.
 3. Whether the trial court erred in failing to find that the Respondent was in possession until October 2017 and thus liable for rent.
 4. Whether the trial court erred in holding the 1st Appellant jointly and severally liable with the 2nd Appellant . e) Who should bear the costs.
37. On the first issue, it was submitted that there was no dispute that :- a valid lease existed; it was terminable by notice; the Respondent issued a 3-month notice on 24th February, 2017, and the effective termination date was 31st May, 2017.
38. The Respondent submitted that its uncontroverted evidence before the trial court was that it vacated the premises on that date, handed over the keys, and removed all its property except for partitions for which it was denied access to retrieve.
39. He argued that PW2, Ms. Jepketeny Bowen, confirmed that though vacant possession was offered, attempts to remove partitions were frustrated by the 1st Appellant. The partitions were eventually removed by the Appellants themselves.
40. Citing Kenya Commercial Bank v Pickwell Properties Ltd Civil Appeal No. 165 of 2016, it was argued that possession is determined by control and occupation, and therefore, the trial court correctly found that the Appellants retained control from June 2017 to October 2017. In any event, that the Appellants failed to produce credible evidence of continued possession beyond 31st May, 2017, as the burden of proof lies on he who alleges, as codified in Sections 107-109 of the *Evidence Act*.
41. As regards entitlement of deposit, the Respondent admitted the validity of the lease, the termination notice, and holding the refundable security deposit of Kshs. 4,099,922/=.
42. The Respondent argued that the staff and students vacated, leaving only partitions but the 1st Appellant, acting on instructions the 2nd Appellant, prevented access for their removal, and that was a breach of contract by the 2nd Appellant , a fact established by the testimony of PW1 and PW2.
43. It was therefore submitted that as per PW2 who was an eye witness, the keys were handed over on 31st May, 2017, and access to collect partitions was later denied by the 1st Appellant. PW2 pleaded for access,



and the 2nd Appellant eventually removed the partitions around October 2017. The Respondent therefore argued the Appellants' conduct was a calculated ploy to illegally withhold the deposit.

44. Further, it was argued that the 1st Appellant's (DW1) allegation that the Respondent was in active possession for over a year post-termination was implausible because the monthly rent was approximately Kshs. 1,566,695/= and therefore, it is illogical for the 2nd Appellant not to claim approximately Kshs. 18,800,340/= in rent for a year of alleged possession.
45. It was further submitted that DW1's claim that she reached out for vacant possession and that the Respondent failed to restore the premises lacked any supporting evidence and hence considered disproved under Section 3 (3) of the Evidence Act, which states that:- "A fact is disproved when, after considering the matters before it, the court either believes that it does not exist, or considers its nonexistence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it does not exist."
46. The Respondent argued that active possession means actual, factual, physical occupation, and therefore, leaving partitions does not constitute occupation. On that basis, it was submitted that the trial court correctly found the Appellants' justification failed for reasons that; no counterclaim for rent arrears was filed, no demand or invoice was issued for rent post-May 2017, and there was a material contradiction in the vacating date between the Appellants' defence and the oral testimony.
47. While citing *Raza Properties Ltd v Panafcon Engineering Ltd* [2006] eKLR and *Shirbrook (K) Ltd v Nakuru Industries Ltd* [2013] eKLR, the Respondent argued that continued control and not mere presence of fixtures constitutes possession, and the retention of the deposit was unjust enrichment and a clear breach of contract.
48. Distinguishing the *Pickwell* case (supra), the Respondent argued that in this case, it returned keys, removed all property but was denied access to retrieve partitions and therefore, possession ceased on 31st May, 2017, and a rent claim would require evidence of continued occupation, which was lacking.
49. It was submitted that clause 2 of the Lease Agreement required the tenant to remove partitions but did not state that failure to do so extended the tenancy and therefore, the Appellants' argument that Section 57 of the Land Act created a periodic tenancy fails as Section 57(1) (c) requires the lessee to remain in possession with the consent of the lessor.
50. Consequently, the Respondent submitted that it vacated, was denied access, and therefore, the landlord's failure to remove the partitions promptly cannot revive the lease.
51. Regarding the 1st Appellant's liability, it was submitted that the trial court made no specific orders against the 1st Appellant outside her role as agent of the 2nd Appellant. The Respondent argued that the claim was primarily against the landlord, and the 1st Appellant acted solely on instructions hence, any error in holding her personally liable is deemed inconsequential, as the payment obligation lies with the corporate landlord.
52. On costs, the Respondent relied on *Republic -v- Rosemary Wairimu Munene, Ex-Parte Applicant -v- Ihururu Dairy Farmers Co-operative Society Ltd*, where the court held:-

"The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event...It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case."



53. On that basis, it was submitted that costs should be awarded to the Respondent.
54. In conclusion, the Respondent submitted that the trial court made no error as the lease was validly terminated and the premises vacated and therefore, the security deposit was unlawfully withheld. Further that no rent was due post-termination, and the appeal discloses no arguable point of law or fact.

Analysis and determination

55. After considering the Memorandum of Appeal, the Record of Appeal and the rival submissions. the issue for determination are;-
- i. Whether the trial court erred in holding that the Respondent lawfully terminated the lease and vacated the premises on 31st May, 2017.
 - ii. Whether possession continued until the partitions were removed on 8th October, 2017, thus making the Respondent liable for rent during that intervening period.
 - iii. Whether the Respondent continued possession hence created a periodic tenancy requiring the payment of rent for the holding-over period in line with section 57 of the Land Act;
 - iv. Whether the 2nd Appellant was justified in withholding or appropriating the deposit.
 - v. Whether the trial court erred in law and in fact by finding the 1st Appellant (Aisha Ahmed Mohamed) jointly and severally liable with the 2nd Appellant (Bihi Investments Company).
 - vi. Who should bear the costs of the appeal and the original suit.
56. On whether the trial court erred in holding that the Respondent lawfully terminated the lease and vacated the premises on 31st May, 2017 , the letter of Notice of Termination of tenancy dated 24th February, 2017 is on record. It gave the 2nd Appellant herein three months' notice period with effect from 1st of March, 2017 to 31st of May, 2017 allegedly in line with Lease Agreement paragraph 6(f).
57. The lease Agreement upon which the parties herein based their case before the trial court was not signed by any of the parties. They tendered in evidence as unsigned and unwitnessed Lease.
58. Faced with such a Lease, the Court of Appeal in the case of Kenya Commercial Bank Limited v Popatlal Madhavji & another [2019] KECA 799 (KLR), affirmed the enforceability of the agreement to lease based on the parties' conduct, despite the draft lease remaining unsigned.
59. The Court of Appeal further found that an enforceable agreement for a fixed term of 5 years and 3 months came into existence by virtue of the terms set out in the respondent's letter of 23rd December, 1998, and the subsequent correspondence. The Court also upheld the High Court's finding that whether or not the draft lease was unsigned or unregistered did not negate the appellant's obligations.
60. Similarly, in this case, though the lease agreement was not signed, the parties herein did not object to terms of the lease therein. Vide the letter of offer dated 4th February, 2016, the 2nd Appellant indicated in clause 24 that;-

“By accepting the terms of this letter of offer, you are deemed to approve the standard form of the lease and agree to execute and return the lease when it is submitted to you until the lease is executed by both parties, this letter of offer shall be deemed to be and construed as an agreement for lease enforceable inter-parties;



- (a) Signing the letter of offer in triplicate and return two copies.
- (b) Unconditional payment of deposit specified herein.
- (c) this Invitation will remain open for acceptance for three days after execution.”

61. Following this offer, the Respondent accepted the offer vide its letter of 7th March, 2016 agreeing to pay the three months security deposit of Kshs. 4,099,927.50 , and also to pay rent and service charge for another three months of Kshs. 4,700,087.10 plus legal fees of Kshs. 20,000 adding up to Kshs. 8,820,014.60.

62. Payment vouchers of this amount complete with the Transnational Bank Funds transfer were exhibit before the trial court. It is a lease relied on by both parties and therefore, the parties herein are bound by the terms therein even if the lease was not signed.

63. Clause 2(h),(l) and (x) of the unsigned lease Agreement provides that;-

“ Clause 2(h)-In the last year of the Term or upon the sooner determination thereof well and sufficiently to clean off, if necessary, and paint with at least two coats of plastic emulsion oil or other best paint and in such manner and style and of such colour or colours to the reasonable satisfaction of the Landlord all the inside parts of the Building previously or usually painted and clean off and polish all polished wood (if any) in a proper and workmanlike manner”

Clause 2(l)-Not to drive any nails screws bolts or wedges in the floors walls partitions or ceilings of the Building nor to cut maim or injure any of the walls or timbers thereof nor to suffer or permit the same to be the consent in writing of the Landlord first has been obtained, such consent shall not be unreasonably withheld or delayed. Provided always that in any case where work shall have been carried out by the Tenant in pursuance of this sub- clause the Tenant shall if the Landlord so requires at the expense of the tenant restore the affected portion or portions of the Building to its or their former, condition at the expiration or sooner determination of the Term AND PROVIDED FURTHER that the Tenant will subject to the prior written consent of the Landlord (such consent shall not be unreasonably withheld or delayed) having been obtained be permitted to erect such additional partitions to those installed by the Landlord on or before the commencement of the Term as shall be desired for the purpose of further sub-dividing the Building for the purpose of the Tenant's business together with all the requisite shelves counters and other fixtures (which said partitions shelves counters and other fixtures are hereinafter collectively referred to as "the Tenant's Fixtures") but the Tenant's Fixtures shall prior to the expiration or sooner determination of the Term (unless otherwise agreed with the Landlord in writing and subject as is hereinafter otherwise provided) be removed by the Tenant and the Tenant will at the Tenant's own expense make good to the complete satisfaction of the Landlord all damage occasioned by such installation or removal.

Clause 2(x)- At the expiration or sooner determination of the Term to yield up the Building to the Landlord with the futures and fittings thereto (other than the partitions and other fixtures and fittings installed by the Tenant at its own cost and expense in the Building with consent of the Landlord which shall remain the property of the Tenant) in such good and tenantable repair and condition (fair- wear and tear expected) of the time of the initial lease to the Tenant as shall be in accordance with the Tenant's covenants and agreements herein contained and with all lock a keys and fastenings complete:



Clause 6(f)-In the event that either the Tenant or the Landlord wishes to terminate this Lease for any other reason save for expiry of the Lease period, then either party will give a written three (3) calendar months' written notice delivered to the Building or sent by registered post to the Tenant's last known address in Kenya.”

64. From the above, it is evident that if the Tenant (the Respondent) wished to terminate the Lease early, it was required to provide the Landlord with three (3) calendar months' written notice. Further, the Tenant's obligations were to maintain the property's cosmetic state by thoroughly cleaning, repainting all interior surfaces with at least two coats of paint, and polishing wood in the final year, to remove any Tenant's Fixtures (like partitions) installed, while making good all resulting damage at their own expense and finally, to surrender the building upon term expiry in good and tenantable repair and condition (fair wear and tear excepted), complete with all its fixtures and keys.
65. The Respondent herein was therefore obligated to act as per the lease agreement before vacating the said premises. Indeed, it was ascertained that the Respondent gave the notice and vacated the said premises by expiry of the said Notice of 31st May, 2017, and handed over the keys to the premises back to the 2nd Appellant. However, both parties admit that the partitions which were affixed by the Respondent were not removed at the time of the expiry of the Termination Notice.
66. Through its witness, the Respondent argued that they attempted removal of the said partitions but the Appellants herein blocked the Respondent from accessing the said premises. On the other hand, the Appellant argued that the Respondent ought to have removed the said partitions on or before expiry of the Tenancy Termination Notice.
67. This Court has looked at the evidence before the trial court. Prof. Ronald Chepkilot (PW1) who was the Deputy Vice Chancellor Administration and Finance testified that they vacated the premises on 31st May 2017 and handed over to the keys of the premises on to the 2nd Appellant but on trying to remove the partition they were denied entry.
68. Jeptepkeny Chebet Bowen (PW2) Assistant Registrar at Nairobi Campus told the court:-
- “After termination of the lease, the students vacated the premises on 31st May ,2017 and we removed equipment and furniture. We went to the premises to demolish the partitions but we were denied access to the premises. This was a week after 31st May 2017. After the termination of lease, we handed over the keys to the caretaker of the premises. I was present with the people in charge of the demolishing the partitions when we were denied access. Phone calls were made to allow us access but we were told to wait. We sought guidance from our office in Nakuru to write a letter to the landlord to allow us access to the premises. The 2nd Defendant demolished some of the partitions.”
69. That was corroborative evidence that Respondent , through PW2 physically went to the premise one week after 31st May 2017 while in company of those who were in charge of demolishing the partitions but the Appellants denied them access.
70. Indeed, it was that verbal request by the Respondent and the denial of access by the Appellants , that the Respondent put the formal request. That was vide the letter dated 22nd September, 2017 written by the Respondent's Registrar of Administration and Human Resource, requesting for access to the 2nd Appellant premises, 9th, 10th and 11th floors, to enable them demolish and recover the partitions materials.



71. In the circumstances, this Court is satisfied that the Respondent lawfully terminated the lease on 31st May 2017 and one week after termination of lease, the Appellants denied the Respondent access to remove the partitions and that the Respondent actually did the removal of the partitions on 8th October 2017.
72. Further and in the circumstances herein, this Court is satisfied that having lawfully terminated the lease as aforesaid, handed over the keys to caretaker of the Appellants, then the Respondent could not have been said to be in possession of the premises between 31st May 2017 and 8th October 2017 and therefore, Section 57 ((1) (c) of the Land Act relied on the by the Appellants does not apply here and neither does the case of Shirbrook (K) Limited (supra).
73. On the issue of security deposit, the Respondent formally requested for the refund of security deposit vide letter dated 3rd September, 2018 which was more than a year after termination of the Lease Agreement. Clause 9 of the offer of lease dated 4th February, 2016 provide for deposit security in part as follows;-
- “The deposit will be retained by the landlord as security for the due performance by the tenant of its obligations under the lease. The deposit is refundable without interest to the tenants after the expiry of the lease and delivery up of the premise in accordance with the covenant in the lease.”
74. This Court has considered the terms governing the security deposit. While the initial agreement indicated that the deposit would be refundable only upon the Tenants' full compliance with all Lease Terms, it is on record that neither the Lease Agreement nor the Offer Letter contained any express provision for the automatic forfeiture or withholding of the said deposit in the event of a breach by the Tenant.
75. The Court has further noted that both PW1 and PW2 confirmed that the partitions were ultimately removed in September 2017, albeit past the stipulated timeline. That fact is uncontroverted and therefore, this Court finds that if the Appellants ever suffered any loss or damage due to the Respondent's delay in removing the partitions or the alleged failure by the Respondent to repaint the premises, the Appellant ought to have quantified and formally pleaded by way of a counterclaim in the trial court proceedings.
76. However, the trial court record shows that though the Appellants had intimated that they would file a Counterclaim, that was not done. In absence of any such quantification of loss suffered and a corresponding claim for expenses incurred in restoring the premises, the Appellant cannot raise the issue in this appeal. In the circumstances, the 2nd Appellant was under an obligation to remit the security deposit to the Respondent.
77. Lastly, on the issues as to whether the trial court erred in making a finding that 1st and 2nd Appellants were jointly and severally liable for monies received by the 2nd Appellant, this Court notes that in the plaint dated 30th May 2019, the Respondent described the 2nd Appellant as a limited liability Company, registered as such pursuant to the provisions of the Companies Act 2015 laws of Kenya. In regard to the 1st Appellant, the Respondent is simply described her as a female adult. In her witness statement, she describes herself as an employee of the 2nd Defendant (2nd Appellant herein).
78. In the case of Victor Mabachi & another (supra) relied on by the Appellants, the Court of Appeal held;-
- “(22) ...In the absence of factors vitiating the liability of the principal, we consider that the enjoinder of the appellants in the case is unwarranted. Although it



was argued before us on behalf of the respondent that Mediacom was not a limited liability company at the time of institution of the suit, the plaint lodged in the High Court by the respondent avers that Mediacom is a limited liability company duly incorporated under Cap 486 Laws of Kenya.

(23) In our view, moreover, the corporate status of Mediacom was not in question in the pleadings in the suit. This much is confirmed by the plaint, drawn and filed on behalf of the respondent, and supported by an affidavit sworn by the respondent's representative. This being the case, Mediacom, as a body corporate, is a persona juridica, with a separate independent identity in law, distinct from its shareholders, director sand agents unless there are factors warranting a lifting of the veil."

79. With evidence that the 1st Appellant was merely an employee of the Bihi Investments Company (2nd Appellant) , and there being no basis for piercing the corporate veil, there would have been no reason to find her jointly and severally liable with the 2nd Appellant.

80. However, the Court notes that in the judgment dated 30th April 2024, the trial court concluded:-

"...the court is of considered view that plaintiff has specifically pleaded the case and has adduced sufficient evidence in support of its claim for the refund of the of the security deposit The court finds that the plaintiff managed to proof its case against the defendant to the required standards. Judgment is hereby accordingly entered for the plaintiff against the defendant for the refund of Kshs. 4099922. Costs follow event as such the plaintiff is also awarded costs of the suit plus the interest at court rates hereof until payment in full."

81. There is no mention that the Appellants are jointly and severally liable and indeed, there is no reference to "defendants" in that concussion. The trial court mentions " defendant".

82. With that uncertainty , the Respondent submitted that the trial court did not make specific orders against the 1st Appellant outside her role as an agent for the 2nd Appellant, and that the alleged error was inconsequential as the corporate landlord holds the liability.

83. In the circumstances, this Court makes a finding that the liability lies on the Principal which is the 2nd Appellant to refund the security deposits.

84. Ultimately, the trial court's judgment dated 30th April 2024 be and is hereby varied to read that:-

1. Judgment is hereby accordingly entered for the plaintiff against the 2nd defendant for the refund of Kshs. 4,099,922/=.
2. Costs follow event as such the plaintiff is also awarded costs of the suit plus the interest at court rates hereof until payment in full.

85. Otherwise, the Appeal is hereby dismissed with no Orders as to costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 25TH DAY OF FEBRUARY, 2026.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Ng'eno for Gatei for the Appellants



Mr. Mutai for Respondent
Erickson , Court Assistant

