REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC APPEAL No. E033 OF 2022

KENINDIA ASSURANCE COMPANY LIMITED..... **APPELLANT**

VERSUS

JAVAN KIPNGETICH KIPNYEKWEI T/a NYEKWEI & COMPANY ADVOCATES..... **RESPONDENT**

(Being an Appeal against the Judgment/Decree of the Hon. D. K. Mikoyan - Chief Magistrate in CM ELC No. 116 of 2019 - Javan Kipngetich Kipnyekwei T/a Nyekwei & Company Advocates vs Kenindia Assurance Company Limited dated 7th September, 2022)

JUDGMENT:

1. The Respondent herein filed suit against the Appellant being Eldoret Chief Magistrate's Court ELC Suit No. 116 of 2019 vide Plaint dated 8th July, 2019. He claimed to have entered a lease agreement over the Appellant's premises known as Kenindia Plaza erected on Eldoret Municipality Block 7/95 (the suit property). That the Appellant had unilaterally sought to introduce terms that were not in the original agreement. Further, that the Appellant proceeded to levy distress for service charge by proclaiming his property through Hegeons Auctioneers. The Respondent also accused the Appellant of barring him from exercising his option to renew the lease. The Respondent asked the court to declare that the Appellant had no right under law to levy distress for service charge. The

Respondent also asked for a refund of KShs. 67,884/-being legal fees for lease preparation and KShs. 204,718.67 being excess rent and VAT, as well as an order compelling the Appellant to renew the lease together with costs of the suit.

2. The Appellant entered appearance and filed an Amended Defence and Counterclaim dated 19th May, 2020 denying all the allegations in the Plaint. The Appellant averred that the lease agreement contained a term on service charge, and that the proclamation with respect to service charge arrears was justifiable and in accordance with procedure. The Appellant further averred that the option for renewal was subject to determining the current market value. The Appellant denied breaching the agreement, and instead accused the Respondent of breach of contract and asked that the Respondent's suit be dismissed. In its counterclaim, the Appellant asked for a vacant possession of the premises of the demised premises, an eviction order against the Respondent and outstanding rent arrears and auctioneer's charges, as well as costs and interest of the suit and counterclaim.

3. The trial court delivered its judgment on 7th September, 2022 where it entered judgment in favour of the Respondent in both the original suit and the counterclaim with costs. Being aggrieved with the judgment and decree of the trial court, the Appellant commenced the instant Appeal vide a Memorandum of Appeal dated 4th October, 2022 challenging it on the following grounds:-

(1) THAT the learned Trial Magistrate erred in law and fact by failing to appreciate that the Appellant had discharged its burden of proof to the required standard.

(2) THAT the learned Trial Magistrate erred in law and fact by failing to appreciate that the Respondent did not prove his case to the required standard.

(3) THAT the learned Trial Magistrate erred in law and fact in finding that there were no rent arrears capable of being distressed in line with the lease despite the overwhelming evidence on record and witness testimonies.

(4) THAT the learned Trial Magistrate erred in law and fact by contradicting himself when rendering the decision in that: the trial magistrate appreciated that any dispute in relation to the lease agreement is subject of arbitration but proceeded to deviate from the same and entered judgment for the Respondent without taking into account that all the prayers sought by the Respondent in the Plaint were a subject of the said lease.

(5) THAT the learned Trial Magistrate erred in law and fact by misapprehending the facts and the issues in question hence arriving at a wrong decision.

(6) THAT the learned Trial Magistrate erred in law and fact by failing to appreciate that no arbitration took place before the Respondent filed the suit; Eldoret CM ELC No. 116 of 2019 despite the same being provided for in the Lease agreement produced as an exhibit in court hence arriving at a wrong decision.

(7) THAT the learned Trial Magistrate erred in law and fact by not evaluating and analysing the entire evidence on record adequately hence arriving at an erroneous decision.

(8) THAT the learned Trial Magistrate erred in law and fact by failing to appreciate that the onus of proof does not shift to the Appellant and it was the duty of the Respondent to produce all relevant documents during trial.

(9) THAT the learned Trial Magistrate erred in law and fact by failing to appreciate that there were rent arrears and service charge arrears due and owing to the Respondent and the Respondent had the right to levy distress for the arrears as provided for under the lease agreement.

(10) THAT the learned Trial Magistrate erred in law and fact by awarding costs of the suit to the Respondent who had not proved his case to the required standard.

(11) THAT the learned Trial Magistrate erred in law and fact by rendering a contradictory decision by indicating at paragraph 6 of the Judgment that the Respondent succeeds in prayer 1 of the Plaint and entering judgment for the Respondent against the Appellant in both the original suit and the counterclaim at paragraph 8 of the Judgment.

(12) THAT the learned Trial Magistrate erred in law and fact by limiting his jurisdiction to the issue of distress for service charge only but proceeded to deviate from the issue by entering Judgment for the Respondent against the Appellant in both the original suit and the counterclaim as prayed.

(13) THAT the learned Trial Magistrate erred in law and fact by dismissing the counterclaim by the Appellant despite the

overwhelming evidence produced in Court in support of the counter-claim.

(14) THAT the learned Trial Magistrate erred in law and fact in failing to consider the Appellant's submissions and legal authorities relied upon in support of their case which failure occasioned a miscarriage of justice.

(15) THAT the learned Trial Magistrate erred in law and fact by overly relying on the Respondent's submissions and legal authorities which were not relevant and without addressing his mind to the circumstances of the case.

(16) THAT the learned Trial Magistrate erred in law and fact in making an erroneous decision that had no backing in law.

(17) THAT the learned Trial Magistrate erred in law and fact by making his decision without addressing himself to the law and facts of the case.

(18) THAT the learned Trial Magistrate's decision albeit, a discretionary one was plainly wrong.

4. Arising out of the aforementioned grounds of Appeal, the Appellant prays for judgment against the Respondent herein as follows:-

(i) The Appeal herein be allowed.

(ii) The judgment of the lower Court delivered on 7.09.2022 be set aside and same be substituted with a proper finding/judgment.

(iii) The Respondent to pay costs of this Appeal.

Submissions:

5. On 29th September, 202 when this matter came up for directions, this court directed that the Appeal be canvassed by way of written submissions, and the parties have complied.

Appellant's Submissions;

6. In the Appellant's submissions dated 17th December, 2025 in support of the Appeal, Counsel pointed out that the lease agreement dated 27.12.2018 had an arbitration clause. Counsel submitted that under Section 6 of the Arbitration Act, the party seeking to rely on the arbitration clause had to file an application staying the proceedings before the matter can be submitted to arbitration. Counsel argued that an arbitration clause does not oust the jurisdiction of the court, and in the absence of such an application, the court is not barred from determining the dispute. Counsel submitted that the Respondent opted out of the arbitration clause by filing the suit in court, and that none of the Parties had raised the issue of referring the matter to arbitration.

7. Counsel asserted that the matters raised in the suit are serious issues which could only be conclusively and efficiently determined by a court. That in any event, in the absence of jurisdiction, the court should have struck out the Plaint and Counterclaim and not address the issue of service charge. Counsel however argued that the trial Court therefore had jurisdiction. She relied on ***Agnes Waruguru Gaita vs RSM Eastern Africa LLP***, ***Maina vs Kenya Commercial Bank PLC & Another (Constitutional Petition E003 of 2023) (2024) KEELRC 2287 (KLR)*** and ***Liande vs Heri Development***

Limited & 2 Others (Land Case E147 of 2024) (2024) KEELC 13261 (KLR).

8. On the Appellant's right to levy distress for service charge, Counsel submitted that at clause 1(c) of the lease, the Respondent made a covenant to pay service charge. In addition, that under Clause 6(a) of the lease, the Respondent agreed to pay service charge. Counsel argued that the right to levy distress is guaranteed under Section 3 of the Distress for Rent Act, CAP 293. Counsel submits that the Respondent acknowledged that he had not been paying service charge as required in breach of the lease agreement. She argued that the Appellant was therefore within its right to levy distress for the amounts owed.

9. On the refund of legal fees, Counsel explained that this claim was made on the basis that the lease agreement was not registered. Counsel however stated that the Lease was in fact registered on 23.08.2019 during the pendency of the lease. That even though it was registered late, it was executed and parties performed their obligations thereunder, thus the court cannot order a refund of legal fees. With regard to the claim for refund of excess rent, Counsel argued that the Respondent never paid any excess rent.

10. As to the renewal of the lease, Counsel submitted that the court should be reluctant to dictate to parties what they should do. Counsel acknowledged that there was an option to renew, but the Respondent never applied for the extension as required

upon expiry of his lease, thus prudence dictates that he vacate. Counsel added that the Appellant equally reserved the right to decline the application for extension. Counsel relied on the case of ***Katsuri Limited vs Nyeri Wholesalres Limited (2014) KECA 428 (KLR)***. Counsel asserted that the Appellant had done nothing to warrant granting damages to the Respondent.

11. Counsel added that the Respondent had remained on the premises for 10 months without paying rent, a fact admitted by the Respondent in cross-examination. Counsel submitted that even after vacating, he never handed over the keys and still interfered with its rights over the premises. Counsel urged that the Appellant was entitled to the sum of KShs. 703,153.55 being rent arrears plus interest, and cited the case of ***Pickwell Properties Limited vs Kenya Commercial Bank (2013) eKLR***.

12. Counsel further submitted that the Appellant had demonstrated that the Respondent had rent and service charge arrears, and despite reminders, he had refused to settle them. That the Appellant thus invoked its rights under Section 3 of the Distress for Rent Act. That under Clause 2(f) of the lease, the lessee would be liable for costs incidental to his breach, and the Respondent being the one in breach, he is bound to pay the auctioneer's costs. Consequently, Counsel asked the court to find that the Appellant had a strong and meritorious case in the counterclaim, and allow it with costs.

13. On the refund of the legal fees of KShs. 67,884/-, Counsel argued that the trial court never justified the basis of the refund of legal fees since the lease was prepared and duly registered. Counsel further claimed that the Appellant was being asked to refund monies paid to a party not present in the suit, and that there was no proof it was not paid to the said advocate. On costs, Counsel submitted that having demonstrated the appeal is meritorious, the Appellant should be awarded costs of the Appeal.

The Respondent's Submissions;

14. In the Respondent's submissions dated 7th March, 2026 Counsel submitted that the matter of jurisdiction was raised by the Appellant through its witness statement. That the court thus determined the issue out of the Appellant's evidence, and the Appellant is not allowed to blow hot and cold on it (***Banque de Moscou vs Kindersley (1950) 2 All ER 549***). Counsel submitted that the court could determine the issue of distress under the Distress for Rent Act as it was not covered under the lease. Citing Section 79A of the Civil Procedure Act, Counsel urged that the Appellant's counterclaim was without merit.

15. Counsel further cited Section 112 of the Evidence Act and submitted that the lease executed by the Respondent on all pages has no provision for service charge. Counsel argued that the Appellant having reduced rent and VAT to KShs. 94,560/- from 1st July, 2017, is estopped from reneging on the said representation. Counsel contended that the Respondent is protected by Section 120 of the Evidence Act and cited the case

of ***Esther Akinyi Odidi & 2 Others vs Sagar Hardware Stores Ltd & Another (2006) eKLR***. Counsel asserted that the Appellant acted unlawfully as there existed no legal right to levy distress for service charge. On this, Counsel cited ***Debra Limited vs Board of Trustees National Social Security Fund & Another (2017) eKLR*** and ***C.Y.O. Owayo vs George Zephania & Aduda T/a Aduda Auctioneers (2007) eKLR***.

16. Counsel also submitted that at the time the Respondent vacated the suit property, there were no rent arears. He explained that the court had directed the Respondent to deposit in court the disputed sum of rent arrears, and in its ruling dated 8th July, 2023 the court ordered that the said sum be released to the Respondent, and the Appellant never appealed this finding. Counsel submitted that the Appellant had withheld the lease, and going by Section 107 of the Evidence Act, the presumption is that the contents were favourable to the Respondent.

17. Counsel contended that the lease dated 27th December, 2018 and registered on 23rd August, 2019 did not meet the conditions of a valid and enforceable contract per Section 3(3) of the Law of Contract Act and Section 38(1) of the Land Act. He also challenged the contract for not being properly executed as required under Sections 45(1) & (2) and 48(1) & (2) of the Land Registration Act. Counsel asked the court to be guided by the case of ***Jane Catherine K. Karani vs Daniel Mureithi Wachira (2014) eKLR***. Counsel stated that the prayer for extension of the lease and eviction had been spent since the Respondent had already vacated the suit property. Counsel

termed the levying of distress unlawful since there were no outstanding rent arrears.

18. With regard to the refund of legal fees, Counsel for the Respondent claimed that this ground was misconceived as the trial court did not grant such a relief. Counsel invited the court to consider the case of ***Kabogo vs Gitau (2025) KECA 193 (KLR)***. On costs, Counsel submitted that the Appellant had failed to fault the trial court on appeal, and the appeal was for dismissal. He asked therefore that costs follow the event and relied on the case of ***Jasbir Singh Rai vs Tarlochan Sing Rai & 4 Others (2014) eKLR***.

Analysis and Determination:

19. I have considered the Memorandum of Appeal filed, the Record of Appeal and Supplementary Records of Appeal filed as well as the submissions filed on behalf of the parties herein. The issues that arise for determination in this Appeal are, in my view, the following:-

(i) Whether the lease made between the Appellant and the Respondent is valid.

(ii) Whether an arbitration clause in the Lease Agreement could oust the jurisdiction of the trial court.

(iii) Whether service charge was payable under the lease and whether the Appellant could levy distress on account of service charge arrears.

(iv) Whether the Appellant levied distress for rent arrears or on account of service charge arrears and whether it was within its rights to do so.

(v) Whether there are any rent arrears on account of the said lease agreement.

(vi) Whether the Appellant should be ordered to refund the money paid as legal fees to the firm of M/s Christine Oraro & Co. Advocates.

(vii) Who shall bear the costs?

i. **Whether the lease made between the Appellant and the Respondent is valid;**

20. On the validity of a contract, the Respondent attacked the lease agreement purporting that it did not meet the requirements of a valid contract under Section 3(3) of the Law of Contract Act as it was not properly executed, and thus is invalid. It is indeed a requirement in law that a valid contract must meet the requirements set out at Section 3(3) of the Law of Contract Act, which is repeated at Section 38 of the Land Act, which provides that:-

(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

21. The Respondent produced two copies of the lease herein, one is undated and the other is dated 27th December, 2018. At page 24 of the both copies of the Lease, it shows that it was registered on 23rd August, 2019. The Lease is duly signed by the

Respondent herein as the Tenant, and his signature is attested to by Daniel Lawrence Were Advocate, whose stamp is affixed against his signature. On the part of the landlord, the Lease is executed by the Appellant's Director and Secretary and their signatures are attested to by one Kevin O. Omondi Advocate. A counterpart of the said lease agreement duly registered was produced before the trial court and it was duly affixed with the seal of the Lessor Company, which is the Appellant herein.

22. The Respondent claims the lease presented before the court is not the one he signed. He claims that he signed all the pages of the lease that was sent to him, however, the lease before the court is only signed by him on the last page as the Tenant. The Respondent did not produce any copy of the said lease he claims he initialled on every page. If at all the Respondent did not sign the lease dated 27th December, 2018 that has been produced before the trial court, then it was upto him to demonstrate the contrary. Sections 107 of the Evidence Act provide that:-

107. Burden of proof.

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

23. And, in addition, Section 109 of the same Act provides that:-

109. Proof of particular fact.

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.

24. As matters stand, aside from mere allegations, the Respondent has tendered no evidence that he did not sign the lease agreement produced before the trial court. In the absence of such evidence, the court finds that the lease agreement produced before the trial court dated 27th December, 2018 and registered on 23rd August, 2019 is valid.

ii. **Whether an arbitration clause in the Lease Agreement could oust the jurisdiction of the trial court;**

25. There is no doubt that a dispute arose touching on the terms of the lease that was presented before the trial court for determination. The question therefore is whether the arbitration clause contained in the said lease ousted the jurisdiction of the trial court. The arbitration clause in the Lease Agreement is to be found at Clause 6 on Page 17 of the lease and it reads as follows:-

"6. In case of any difference touching on this Lease the same shall be determined by a single Arbitration in accordance with the Arbitration Act (Act No. 4 of 1995 Laws of Kenya) or any statutory enactment in that behalf for the time being in force."

26. Ordinarily, such an arbitration clause does not oust the jurisdiction of the court, and had it purported to do so, it would be contrary to public policy. Despite this, in determining the

issue of its jurisdiction in relation the arbitration clause, the trial court held that:-

"The court takes this trajectory of analysing the dispute between the parties herein by narrowing down only to one main issues concerning cause of action to recover arrears in service charge, despite several issues been thrown for the court's consideration and determination.

Quite a number of the said legal issues raised in this suit concern the terms of the Lease which has explicit in built dispute resolution mechanism to be found in para 6 of the Lease which provides that…

I have already shown that the lease agreement has an arbitration clause which sufficiently will address any issue relating to the terms of the lease. Consequently, any prayer in the Original suit and the counterclaim seeking to enforce and terminate the lease is hereby dismissed with costs.

However, this court jurisdiction in respect of the lease will confine itself to the issue of distress for service charge."

27. The issue of the arbitration clause was indeed raised in the Appellant's testimony in the trial court. The Appellant's testimony however pointed out that under the lease, the matter ought to have been referred to arbitration, but it was not. I note that the Appellant's testimony did not question the jurisdiction

of the court, or claim that its jurisdiction was ousted by the arbitration clause.

28. Furthermore, Section 6(1) has this to say about the enforcement of arbitration clauses:-

6. Stay of legal proceedings

(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—

(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

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

29. From Section 6 above, a party to an arbitration agreement may bring a suit in court. However, if any of the parties wish to have the arbitration clause enforced, they must file an application for stay of the court proceedings under Section 6(1) of the Arbitration Act 1995 so as to pave way for the arbitration. It follows that if none of the parties to the agreement opt out of the arbitration clause, then the suit will proceed as filed in court.

30. It must further be noted that an arbitration clause does not totally oust the jurisdiction of the court but operates to suspend it, allowing the court to stay proceedings and refer parties to arbitration. While parties cannot absolutely divest the court of its authority, the Arbitration Act requires courts to respect arbitration agreements and refer disputes to arbitration if a timely application is made before taking substantive steps in court.

31. As submitted by the Appellant, the suit herein was commenced by the Respondent in the Chief Magistrate's court. Neither the Appellant nor the Respondent applied to stay the proceedings before the trial court and have the matter referred to arbitration. They both opted out of the application of the arbitration clause.

32. That being the case, the trial court had the requisite jurisdiction to hear and determine all the issues raised in the suit presented before it for determination. Therefore, the trial court erred in refusing to determine the entire suit on its merits on grounds of existence of the arbitration clause and limiting itself only to the issue of service charge.

33. In any event, from the record, all the copies of the lease presented before the trial court contained the provision for payment of service charge. Therefore, if indeed the trial court was of the opinion that it had no jurisdiction, it ought not have entertained any part of the dispute.

iii. **Whether service charge was payable under the lease and whether the Appellant could levy distress on account of service charge arrears;**

34. One of the fundamental obligations that the Appellant claims that the Respondent breached is the obligation to pay service charge. The Respondent however claimed both in the trial court as well as in this court, that the lease he signed with the Appellant did not include a term for payment of service charge. This court thus needs to determine whether service charge was payable under the lease agreement.

35. In his Further List of Documents dated 30th June, 2021, the Respondent included what appears to be a Letter of Offer dated 19th May, 2014 from the Appellant. Clause 7 thereof indicates there would be service charge payable of KShs. 15 per square foot per month, paid quarterly in advance together with the rent. According to Clause 1(c) of the Lease produced on the record, the Respondent was to pay service charge equal to the fair portion of the outgoings and operating expenses of the building. This specific rate at which service charge was apportioned/charged is provided at Clause 6(a) of the said Lease. The Lease further provides that the service charge was payable quarterly together with the rent.

36. The Respondent also included invoices issued by the Appellant. The earliest of such invoices was issued on 23rd June, 2014 all the way to 3rd June, 2019. In all these invoices, the Appellant included a head for service charge. Vide letter dated 17th October, 2017, the Appellant wrote to the Respondent that they

had conducted a service charge audit for the year 2015 and would be adjusting the balances. According to the said letter, it is clear that the Respondent had been paying service charge but had outstanding service charge arrears. The picture painted by all this evidence is that service charge was payable under the lease and the Respondent had acknowledged it and been paying for it.

37. The Respondent alleges that he signed a different lease from the one presented before court that had no service charge obligations. The Respondent did not, however, produce a copy of the lease he purports to have signed that did not require him to pay service charge. He does not even have a draft of the alleged lease that he claims the Appellant is concealing from this court. The only lease the Respondent produced is in his Further List of Documents dated 30th June, 2021 and is dated 27th December, 2018 and is the same one relied on by the Appellant herein. This allegation that there is a different lease with regards to the demised premises aside from the one seen by this court was thus not proved. Therefore, the claim that service charge was not payable under the charge is untrue.

38. Since service charge was payable under the lease, the Respondent had an obligation to pay service charge. The purpose of paying service charge is well explained in the case of ***Melisa Awour Odera vs Keringet Estates Limited (2021) KEELC 1454 (KLR)***, where the court explained the importance of service charge as follows:-

"27. I am afraid that I am unable to buy the reasoning of the plaintiff. How did the plaintiff expect the premises to be kept secure, and the common areas to be taken care of? … I have no doubt in my mind that securing it requires massive resources. Even without the contract, one cannot fault the defendant for charging the plaintiff the service expenses. This was a gated community where services were shared. It behoved every member of this community to chip in on the payment of any services being rendered. … My holding therefore is that the plaintiff and Dr. Gaeckle, while the latter was still a joint holder of the sublease, had an obligation to pay KShs. 23,000/= per month from the date that the sublease was executed. … The plaintiff is thus liable to pay service charge at the rate of KShs. 23,000/= per month from May 2011 to the date of this judgment, and thereafter for the duration that she will still hold the sublease."

39. Having determined that the Respondent had a duty to pay service charge as agreed under the lease, the question then is whether the Appellant could levy distress on account of service charge arrears, Section 3 of the Distress for Rent Act provides that:-

3. Right of distress

(1) Subject to the provisions of this Act and any other written law, any person having any rent or rent service in arrear and due upon a grant, lease, demise or contract shall have the same remedy by distress for

the recovery of that rent or rent service as is given by the common law of England in a similar case.

(2) No distress shall be levied between sunset and sunrise or on any Sunday.

40. The ***Black's Law Dictionary 9th Edition at Page 1411*** defines *'rent'* as the "consideration paid, usually periodically, for the use or occupancy of property (esp. real property)". The same text on the same page defines the term '*rent service*' as a "rent with some corporeal service incident to it (as by fealty) and with a right of distress". It went on to explain that:-

"Rent service exists only where the relation of landlord and tenant is found, and in such a case rent derives its name from the fact that it was given as a substitute for the services to which the land was originally liable," G,c' Cheshire, Modern Law of Real Property 198 (3rd Ed. 1933)."

41. It is evident that from the above definition, in my view, service charge does not and cannot amount to rent or rent service within the meaning of Section 3 above. Since Section 3 of the Distress for Rent Act allows a party to levy distress only with respect to rent or rent service, then it follows that no landlord can lawfully levy distress to recover service charge arrears. In interpreting this provision, Justice L. Gacheru in ***Debra Limited vs Board of Trustees National Social Securities Fund & another [2017] KEELC 3807 (KLR)***, explained that:-

"There is no doubt that the 1st Defendant levied distress upon the Plaintiff/Applicant because of the arrears for service charge. Service charge is not rent

as service charge is a debt which can be demanded from and recovered as a civil debt. In the instant case, trying to recover arrears of service charge through distress for rent is therefore a wrong move."

42. The Court in the above case cited the decision of the Court of Appeal in the case of ***C.Y.O Owayo vs George Zephania & Adudata T/A Aduda Auctioneers (2007) eKLR***, where it was held that:-

"Thus in looking into what constitutes illegality of distress for rent, we must not only consider our laws, but must also consider what in England would be considered an illegality in the levy of distress. In Halsbury Laws of England, 4th Edition volume 12, Page 368, it is stated:-

An illegal distress is one which is wrought at every outset that is to say either where there was no right to distrain or where a wrongful act was committed at the beginning of the levy invalidating all subsequent proceedings. The following are instances of illegal distress, a distress by a Landlord after he has parted with reversion, a distress by a person in whom the reversion is not vested, a distress whom no rent is in arrears or for a claim or debt which is not rent…"

43. It is therefore evident from the above provision of law that the right to levy distress for rent accrues only where the tenant is in arrears of rent and rent services. There is however no law that

allows a landlord to levy distress for purposes of recovering service charge arrears.

iv. **Whether the Appellant levied distress for rent arrears or on account of service charge arrears and whether it was within its rights to do so;**

44. Having determined that although service charge was payable under the lease, the Appellant had no legal basis to levy distress to recover service charge arrears, the next step is to determine what the Appellant sought to recover when it levied distress on the Respondent. From the judgment of the trial court, it would appear that the Trial Court only concentrated on the claim of distress for service charge without confirming from the documents placed before it whether indeed the Appellant had levied distress for rent arrears or service charge arrears.

45. At page 38 of the Record of Appeal is a Proclamation Notice from the firm of M/s Hegeons Auctioneers for the amount of KShs. 258,324.85 and an additional KShs. 81,065 being the auctioneers' fees. The Proclamation Notice clearly states that it was with regard to a matter of distress for rent. The said firm had been instructed through a letter dated 25th June, 2019 by the firm of M/s Omwenga & Company Advocates, who were, on their part was appointed by the Appellant herein to pursue the rent arrears.

46. Notably also, the Appellant had on several occasions issued reminders to the Respondent with regards to the outstanding rent arrears over the years as evidenced by several letters and

the invoices issued to the Respondent throughout the lease. The Appellant also issued several demand letters which are part of the Record of Appeal, asking the Respondent to settle the rent arrears.

47. This court therefore disagrees with the finding of the trial magistrate on the issue of distress as it is evident that what the Appellant sought to recover are rent arrears, for which it had every right to do. The allegation by the Respondent that the Appellant levied distress against him to recover service charge arrears therefore was not proved.

48. The Respondent's claim that the Appellant had unlawfully levied distress for service charge is incorrect, since the Proclamation Notice clearly indicates that the distress levied was in respect of rent arrears.

v. **Whether there are any rent arrears on account of the said lease agreement;**

49. The Respondent filed suit claiming that the Appellant had unlawfully levied distress for service charge arrears. The trial court allowed the suit in his favour in terms of prayer 1 of the Plaint which is to the effect that:-

"THAT a declaration is issued that the Defendant (Appellant herein) has no right to levy distress for rent service charge which is not part of the agreement between the parties under the lease, no right exists in law to levy distress to recover service charge, the continued retention of kshs.67,884 as legal fees for

lease preparation and registration by the Defendant's agent namely Christine Oraro & Company Advocates without undertaking the task intended amounts to unjust enrichment and giving of the notice to surrender the demised premises dated 21st May, 2019 amounts to an anticipatory breach of contract by the Defendant of the Plaintiff's right to exercise the option to renew the lease from an extended term."

50. However, the Appellant pleaded in its Defence that the Respondent owed rent arrears which at the time were calculated at KShs. 285,749.85. In the Appellant's Amended Statement of Defence and Counterclaim, the Appellant sought an order directing the Respondent to settle the said rent arrears as well as the auctioneer fees of 81,065/-. At the hearing, the Appellant's witness (DW1) stated that they levied distress for rent. According to DW1, as at 24th July, 2020 when the matter came up for defence hearing, the premises had not yet been handed back to the Appellant. He thus testified that as at that date, the rent arrears due was KShs. 703,154.55/-.

51. Throughout the lease period, the Appellant issued various invoices stating the rent payable. The Appellant equally sent various demands throughout the pendency of the lease, asking the Respondent to settle the rent arrears. The Respondent however insists that he has no rent arrears on account of the demised premises.

52. The Respondent's argument that he has no rent arrears stems on an alleged agreement to reduce his rent. The Respondent in his pleadings claimed that there was an oral agreement under which his rent was reduced. However, in his submissions in this appeal, the Respondent referred to an invoice by M/s Christine Oraro Advocate claiming that it acknowledged the reduction in rent.

53. I have seen no such invoice. What was drafted by Ms Christine Oraro Advocate was a Fee Note for preparation of the Lease, and I note that it did not mention any reduction in the rent payable under the lease. In any event, the said firm of advocates was not a party in the lease and could not alter the terms made by the parties thereto. Be that as it may, the fact remains that there is no written addendum indicating that there was any reduction in the rent payable by the Respondent.

54. In fact, during his testimony given in the trial court, the Respondent admitted that although he had said rent was revised downwards, he did not have evidence. The Respondent was referred to paragraph 5 of the Lease and acknowledged that it required all notices under the lease to be in writing. The Respondent admitted that he had no notice to show that there was a rent reduction.

55. From the documents produced by the Respondent, on 19th July, 2018, the Respondent wrote to the Appellant claiming that he had no rent arrears since the rent payable was pursuant to an agreement purported to have been signed in 2017. The

Appellant raised this issue that there was no record of a reduction in rent in its letter dated 18th October, 2018 where it demanded the accumulated rent of KShs. 297,958.95. In response, the Respondent wrote on 29th October, 2018 forwarding a cheque of KShs. 94,560/- and refused to address the issue of the outstanding rent or the missing record of rent reduction.

56. All in all, from the foregoing, it is clear that there were rent arrears due and owing at the time the lease came to an end on 30th September, 2019. The only question is what amount the Appellant is entitled to by way of rent arrears. According to the Appellants Amended Defence and Counterclaim, the amount due and owing was KShs. 285,749.85 being the rent arrears, and KShs. 81,065/- being the auctioneers' fees.

57. The Respondent disputes that there is any rent owing, and only insists that he was entitled to pay less rent owing to the purported reduction, which he has failed to prove. Notably, the Respondent has not offered any tabulation challenging the sums claimed by the Appellant in any way, and so those sums stand uncontroverted.

58. At prayer (iv) of the Amended Defence and Counterclaim, the Appellant also sought unpaid rent for the period after 1st October, 2019. By the time the Appellant's witness testified, he told the trial court that the Respondent did not immediately move out of the premises after the suit was filed, until he was ordered to vacate on application by the Appellant to court. DW1

thus claimed KShs. 703,154.55/- in total as rent arrears and the auctioneers fees.

59. By the Respondent's own admission when he testified before the trial court, he vacated the suit property in August 2020 despite the lease lapsing on 30th September, 2019. Clause 5(e) at page 20 of lease shows that at the time the lease lapsed, the rent payable was KShs. 27,013.25/-. Therefore, for the 11 months that the Respondent remained in the premises without paying rent, he owed KShs. 297,145.75/- as unpaid rent only, without any service charge amount for that period.

60. As to whether the Appellant is entitled to this amount, the court of Appeal awarded unpaid rent in ***Patel & Another vs MJC & Another (Suing as the guardians of PJP) (2022) KECA 364 (KLR)*** and in ***Saheb vs Hassanally (1981) KECA 9 (KLR)*** on account of continued occupation without paying rent.
61. This in essence means that the Appellant is entitled to unpaid rent for the period the Respondent remained on the premises and yet failed to pay rent. Thus, the Appellant is entitled to the amount of KShs. 285,749.85 in rent arrears accrued before lapse of the lease, KShs. 81,065/- being the auctioneer's fees and KShs. 297,145.75 unpaid rent from 1st October, 2019 upto August 2020. Therefore, in total, the Appellant is entitled to a sum of KShs. 663,960.60/- and not the KShs. 703,154.55 stated in the Appellant's testimony.

vi. **Whether the Appellant should be ordered to refund the money paid as legal fees to the firm of M/s Christine Oraro & Co. Advocates;**

62. The final question for determination is whether the Appellant herein should be ordered to refund the entire amount of KShs. 67,884/- paid as legal fees. Although the Respondent submitted that there was no order of a refund of the said legal fees, the trial court did find that the continued retention of the KShs. 67,884/- as legal fees for preparation and registration of the lease without undertaking the task amounts to unjust enrichment. Further, in issuing a blanket statement that it had entered judgment in favour of the Respondent in the main suit, the trial court essentially allowed all the prayers in the main suit, which included the refund of the legal fees.

63. Section 45 of the Advocates Act answers the question whether clients can recover unearned legal fees if work was not performed, primarily by requesting a detailed, itemized invoice of hours worked and demanding a refund of the retainer balance. Section 45 requires that there be proof in writing of the agreement between the Advocate and the Client.

64. As per the letter of offer dated 19th May, 2014, the Tenant, who in this case is the Respondent, was to bear the costs of all legal fees and all other incidental costs incurred in relation to preparation and registration of the sub-lease. The firm of Christine Oraro & Company Advocates drew a Fee Note dated 7th March, 2017 addressed to the Respondent for the sum of KShs. 67,884/- being legal fees for preparation of lease.

65. From the letter dated 22nd September, 2017 written by the Respondent herein to the Appellant, it is clear that the Appellant paid for the legal fees of KShs. 67,884/- through Cheque No. 000733 drawn in favour of the firm of M/s Christine Orara & Co. Advocates. The question then becomes, should the Appellant now be ordered to refund the amount paid to its advocate as legal fees on claim that the no work was ever done on the matters instructed?

66. First and foremost, the cheque for payment of the legal fees was drawn in favour of the Advocate, being the firm of Christine Oraro & Company Advocates and not the Appellant herein. No doubt any order for refund of the legal fees by the Appellant would not be supported by any law, as there is no principle that allows a party to refund money that has not been paid to them. Moreover, under Section 45(3) of the Advocates Act, a client is not entitled to recover from any other person.
67. Secondly, turning to the allegation that the work was not done, evidently, by the time the payment for legal fees was made, the lease had already been drafted and forwarded to the Respondent for execution. By the Respondent's own admission, the Lease was registered, albeit late, on 23rd August, 2019. The allegation that the work was not done therefore is untrue, and cannot be a basis for ordering a refund.

vii. **Who shall bear the costs?**

68. On costs, Section 27 of the Civil Procedure Act provides: -

"27 (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct."

69. Costs therefore follow the event and are awarded to the successful party to compensate them for the trouble taken in prosecuting or defending a suit, in terms of the lawful and legitimate steps taken by the parties in the case in pursuit of remedy or putting forward a defence.

70. The Courts have discretion to award costs, which is explained in the ***Halsbury's Laws of England; 4th Edition (Re-issue), (2010), Vol.10. para 16*** in the following words:-

"The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be

exercised arbitrarily but in accordance with reason and justice."

71. In this instance, the Appellant has clearly succeeded in the Appeal. And having overturned the decision of the lower court, the Appellant is entitled to the costs of this Appeal and those of the lower court.

Orders:-

72. In the end I do find that the Appellant's Appeal herein is merited. Judgment is accordingly entered as follows: -
    (a) The judgment/decree of the Hon. D. K. Mikoyan - Chief Magistrate in CM ELC No. 116 of 2019 - Javan Kipngetich Kipnyekwei T/a Nyekwei & Company Advocates vs Kenindia Assurance Company Limited dated 7th September, 2022 is hereby set aside.
    (b) The Respondent be condemned to pay KShs. 285,749.85 in rent arrears accrued before lapse of the lease and KShs. 81,065/- being the auctioneer's fees.
    (c) The Respondent is also condemned to pay a further KShs. 297,145.75 being unpaid rent from 1st October, 2019 upto August 2020 when he vacated the suit premises.
    (d) The Appellant shall have the costs and interests of this Appeal as well as costs of the suit in the lower court.
73. Orders accordingly.

DATED, **SIGNED** and **DELIVERED** virtually at **ELDORET** on this **7TH** day of **MAY**, **2026** vide Microsoft Teams.

HON. C. K. YANO

ELC, JUDGE

In the virtual presence of:-

Mr. Mogambi for the Respondent.

Ms. Mbogaa for the Appellant.

Court Assistant - Laban.