



**Mohamed & another (t/a Sws Aculaser Weight Loss Institute) v PBM Nominees Limited
(Environment and Land Case 463 of 2018) [2025] KEELC 5389 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5389 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE 463 OF 2018**

OA ANGOTE, J

JULY 17, 2025

BETWEEN

PROF DR AMINMOHAMED AH MOHAMED 1ST PLAINTIFF

PROF DR KARMOHAMED AH MOHAMED 2ND PLAINTIFF

T/A SWS ACULASER WEIGHT LOSS INSTITUTE

AND

PBM NOMINEES LIMITED DEFENDANT

JUDGMENT

1. Vide a Complaint dated 22nd October 2018, the Plaintiffs have sought judgment against the Defendant for the following reliefs:
 - a. A declaration that the sub-lease dated 3rd April 2018 purportedly between the parties herein over SF16 Unit located on the 2nd Floor of the Sarit Centre situate on LR No. 1870/IX/159 [Original No. 88-95] Westlands in Nairobi is null and void on account of fraud.
 - b. An order directed to the Land Registrar not to accept for registration the sub-lease dated 3rd April 2018 purportedly between the parties herein over SF16 Unit located on the 2nd floor of the Sarit Centre situate on LR No. 1870/IX/159 [Original No. 88-95] Westlands in Nairobi and/ or to forthwith cancel any registration of the said sub-lease.
 - c. Costs of this suit.
2. The Plaintiffs' case was that the Defendant was their landlord by sub-lease over the property known as SF16 Unit located on the 2nd floor of the Sarit Centre, situate on LR No. 1870/IX/159 [Original No. 88-95] Westlands in Nairobi [the leased premises]; that at the material time, their tenancy was on account of a sub-lease agreement dated 7th August 2013 for a term of 5 years and 6 months that had expired on 31st January 2017 and that the Defendant, by a letter dated 9th January 2017, sent to them



an agreement for a sub-lease that they were required to sign and send back to the Defendant on 16th January 2017.

3. The Plaintiffs averred that they complied with that direction and duly executed the sub-lease on 11th January 2017 in the presence of an advocate and conveyed to the Defendant two original copies of the signed lease, which was received by the Defendant on 13th January 2017.
4. They asserted that the Defendant sent an attachment by email to them, a document purportedly described as a sub-lease over the suit property purportedly signed on 3rd April 2018, which was presented for assessment for stamp duty and was franked by the collector of stamp duty on 30th May 2018. The Plaintiffs contended that they did not sign any sub-lease in 2018 and the document epitomizes a fraudulent attempt to pass off their signatures.
5. The Plaintiffs particularized the acts of fraud by the Defendant as materially altering the document dated 11th January 2017; superimposing altered pages over their signatures to deceptively express that the signatures were appended on the document in 2018 and uttering the fraudulent document for assessment for stamp duty and registration as purportedly signed by them on 3rd April 2018.
6. The Defendant, through a Defence and Counterclaim dated 6th February 2010, averred that by an Agreement for Lease dated 9th January 2017, the Plaintiffs agreed to rent the leased premises for a term of 5 years and 6 months running from 1st February 2017 to 31st July 2022. Further, that by a sub-lease dated 3rd April 2018, the Plaintiffs sub-leased the leased premises from the Defendant for a term of 5 years and 6 months, running from 1st February 2017 to 31st July 2022.
7. The Defendant contended that both the Agreement of Lease and the sub-lease were voluntarily executed by the Plaintiffs and duly attested by the Advocates; that although the sub-Lease was not registered, as it was duly executed and stamped at the Land's Registry, and was a binding contract between the parties and that the Plaintiffs subsequently paid for stamp duty, legal fees and other expenses necessary for registration of the sub-lease.
8. The Defendant denied the particulars of fraud set out in the Plaint and maintained that there was no alteration to the sublease dated 3rd April 2018; that there was no document that existed dated 11th January 2017; that it is an established conveyancing practice in Kenya for documents to be executed by parties and to be dated on the date the last party executes them and that subsequent to the execution of the agreement for the sub-lease, all documents, invoices and payments by the Plaintiffs were founded on the terms of the Agreement for sub-lease and the sub-lease itself.
9. The Defendant stated that despite the Plaintiff's previous lease having expired, they continued to have possession of the leased premises; that no allegations of fraud occurred until July 2018, over one year after the term began; that the Plaintiffs only disputed the sub-lease after their premises was gutted down in an unfortunate fire on 4th May 2018 and they discovered that under the sub-lease they were required to take out their own insurance for the leased premises and that the Defendant was not responsible for their insurance.
10. The Defendant contended that this suit is an afterthought to buttress the Plaintiffs' claim for damages against the Defendant for the losses the Plaintiffs allegedly suffered following the unfortunate fire that gutted part of the its Mall and burnt the Plaintiffs' leased premises.
11. Further, that under Clauses 7.9, 7.10 and 7.11 of the sub-lease, it was the Plaintiffs' responsibility to take out insurance of their leased premises, their exterior and interior partitions, and property, and that it was not liable for any loss or damage in the event of a fire.



12. According to the Defendant, investigations of the unfortunate fire that occurred on 4th May 2018 by a Multi-Agency Government Team established that the fire was caused by a fault in the power cabling system within Copy Express Shop at the ceiling space where there was exposed PVC sheathed, PVC insulated twin cable with earth cable and that upon enquiries, it transpired that the Plaintiffs had not taken out insurance as required under the sub-lease and they were exposed to the loss.
13. In his Counterclaim, the Defendant attested that following the fire that consumed the Plaintiffs' premises on 4th May 2018, it issued a notice of abatement of rent and service charge payable under Sub-clause 14.1. However, it was averred, despite repeated requests and meetings, the Plaintiffs refused to yield possession of the leased premises to facilitate restoration of the same and that it was only on 19th June 2018 that it re-took possession of the premises and embarked on restoration works.
14. The Defendant stated that it restored the premises and issued a one month's rent-free notice and demanded that the Plaintiff undertake repartitioning and retake possession by 15th November 2018 and that despite the said notice, the Plaintiff neglected to do so and became liable for payment of rent and service charge at the rates set out in the sub-Lease.
15. It was the Defendant's case that despite repeated demands and notices, the Plaintiffs failed or neglected to retake possession of the leased premises thus necessitating it to issue a Notice of Termination and forfeiture of the sub-lease on 5th July 2018.
16. Having failed to adhere to the Notice of Termination and forfeiture, it is pleaded, the sub-lease was terminated effective 6th August 2019, at which time the balance outstanding of rent and service charge was Kshs. 1,654,310/- inclusive of interest, which continues to accrue interest at the rate of 2% per month until payment in full.
17. The Defendant stated that it repossessed the leased premises on 6th August 2019 and has since issued another sub-lease to another party and that the Plaintiffs breached their obligations under the sub-lease and caused it loss and damage.
18. In the Counterclaim, the Defendant sought judgment against the Plaintiffs as follows:
 - a. The sum of Kshs. 1,654,310/- inclusive of interest accruing at the rate of 2% per month from 6th September 2019 until payment in full.
 - b. Costs of the counterclaim.
 - c. Any other or further relief that this Honourable Court may deem fit and just to grant.
19. In their Reply to Defence and Defence to Counterclaim dated 10th March 2020, the Plaintiffs stated that they will demonstrate that the Defendant's actions were fraudulent by materially altering the document dated 11th January 2017 and registering it without their express authority.
20. It was their further contention that a final report on the fire incident dated 6th June 2018 disclosed that the Defendant negligently failed to discharge its obligations to ensure the safety of their property that was lawfully within its premises and that they did not owe the Defendant the sum of Kshs. 1,654, 310/ together with the alleged interest as alleged in the Counterclaim.

Hearing and Evidence

21. The 1st Plaintiff, PW1, informed the court that this suit arose from the facts that the lease they signed was not the one they were given; that the issue arose in June 2018, when the Defendant gave them a lease that they had not signed, and that they had been tenants in the leased premises since the year 2000.



22. He testified that on 4th May 2018, on the date of the fire, they were evacuated from the clinic because of the fire on the ground floor; that after they signed the lease in January 2017, they were never given the original copy back; that they sought a copy of the lease after the fire and that the initial lease lapsed on 31st January 2017.
23. PW1 stated that the parties had met on 5th January 2017 to discuss the terms of the new lease; that they received the documents on 9th January 2017 and that although the Defendants sent the letter of offer and the lease to be signed by 16th January 2017, they did not sign the letter of offer.
24. PW1 stated that they left the property on 4th May 2018 when they were pushed out because of the fire, at which time they had been there for a year and three months and that they never returned in the premises. It was his case that all along, they wanted the lease nullified because they never signed it and it was never registered. He indicated that he was invoiced by the Defendant until August 2018.
25. PW1 averred that the lease in their bundle dated 11th January 2017 and the lease in the Defendant's bundle were the same except for the dates indicated on the front page and that the Defendant's is dated 3rd April 2018 while their lease is dated 11th January 2017.
26. According to PW1, while Clause 7.12 of the sub-lease states that there were to get a comprehensive public insurance covering the premises, they did not take out insurance for their business because they were waiting for the lease to be signed by the management.
27. PW1 informed the court that they have filed a case, HCCC No. 251 of 2018, against the Defendant, in which they have claimed for negligence and loss of their business, in which suit they are claiming Kshs. 660 million for the loss and that they are not bound by the terms of the sub-lease because it was the landlord's negligence that caused the fire.
28. According to PW1, the fire did not start in their premises; that it was the Landlord who had the responsibility of rebuilding the clinic and restore the equipment, and that they received invoices but they did not pay them.
29. The 2nd Plaintiff, PW2, relied on his statement dated 18th October 2018. He testified that the Defendant, by a letter dated 9th January 2017, sent an agreement for lease for the leased premises that they were required to sign the documents in the presence of a lawyer and to submit several documents together with the signed lease and agreement for lease by 16th January 2017.
30. PW2 stated that he signed the lease and agreement for lease together with his partner on 11th January 2017 before an advocate, Safina Madhani, who attested their signatures by stamping and signing the documents and that the required documents were also sent and officially received at the Defendant's office on 13th January 2017.
31. It was his evidence that he was surprised to receive, through email, a sub-lease document that seemingly bore his signature and that of his partner dated 3rd April 2018, yet they had not signed any document with the Defendant in 2018 and that this was strange because it came right after their clinic at the Sarit Centre was destroyed by fire on 4th May 2018 and the operations of their specialized laser health practice disrupted.
32. PW2 affirmed that the document he signed dated 11th January 2017 was fraudulently manipulated and their signatures transposed to give the false impression that the sub-lease was signed by them in 2018 and that the sub-lease that was presented for registration was a product of fraud.



33. He states that their advocate wrote to the Defendant seeking an explanation, and the response given by the Defendant through its lawyers was that indeed the signed sub-lease was received by the Defendant on 13th January 2017 and that Defendant dated the document 3rd April 2018 and submitted it for registration.
34. In cross-examination, PW1 stated that it was agreed that they would pay for registration and they sent a cheque of Kshs. 182,200 to the Defendant dated 9th December 2017; that the cheque was sent together with the lease and were receipted for this sum and that lease was not registered until 2018.
35. It was the evidence of PW2 that their copy of the lease has blanks, as it was not signed by the Defendant, and does not have franking for stamp duty and that other than the dates of the documents, all the other clauses of the sub leases were the same as the registered lease held by the Defendant.
36. PW2 stated that the main difference in the two leases is the date on the first page. He also stated that his lawyer did not sign the lease and that they did not receive the signed lease.
37. He indicated that after the fire, they could not occupy the premises because everything burned down and that they had to clean up the premises after the fire; that they then suspended payment of the rent and that while he acknowledged receiving the demand for rent and termination of lease on 5th July 2019, he could not recall responding to the letter.
38. According to PW1, the Defendant gave them the shell for them to do their own partitions, yet it should have given them back the premises the way it was before the fire.
39. The Defendant had two witnesses. DW1 was Atul Shah, the Finance Manager of Soma Associates, the managing entity of Sarit Centre, which was leased by the Defendant. DW1 relied on his statement dated 6th February 2020 and the bundle of documents dated 6th February 2020 as DEXB1. DW1 stated that the Defendant has a counterclaim for Kshs. 1,654,310.
40. DW1 averred that Soma Properties Ltd is the registered owner of the suit property which it has leased to the Defendant; that the parties to this suit executed an Agreement for lease dated 9th January 2017 with respect to the leased premises, being Unit number SF16 in Sarit Centre Mall, which was to run for five years and six months from 1st February 2017 to 31st July 2022 and that the Letter of Agreement for Lease was properly and voluntarily signed by both parties.
41. DW1 asserted that subsequently, the Plaintiff and the Defendant entered into a sub-lease dated 3rd April 2018 through which the Plaintiff sub-leased from the Defendant Unit Number SF 16 for a term of five years and six months running from 1st February 2017 to 31st July 2022.
42. He stated that the sub lease was not registered immediately for the reason that the Plaintiffs did not release the same in time before this dispute arose and that previously, the process was delayed because the Plaintiffs delayed in remitting the legal fees and stamp duty charges to the Defendant's advocates.
43. It was his sworn statement that the formalities of the sub-lease were met as it was signed by the Plaintiffs in the presence of the advocate, Ms. Safina Madhani and the directors of the Defendant also placed the seal of the company on the sub-lease and witnessed it.
44. According to DW1, Njenga Mwaura Advocate attested the sub-lease on behalf of the Defendant and that the sub-lease having been duly executed, witnessed and attested constitutes a valid contract between the parties who are bound by the terms therein.
45. He asserted that there are no differences in the contents of the unsigned sub-lease the Plaintiffs produced in their bundle of documents and the one the Defendant produced and that conveyancing



documents tend to be dated once the last party has signed and the documents are about to be presented for registration. It was his testimony that there was no documents that exists/existed that is dated 11th January 2017 as alleged by the Plaintiffs.

46. DW1 denied that any pages or documents were superimposed or altered after the signatures by the Plaintiffs; that there was no possibility or need to superimpose a tenant's sublease and further that the Plaintiffs had been in the suit premises for a long period of time. DW1 averred that after some delay, the Plaintiffs settled legal fees and stamp duty by issuing the Defendant's Advocates with a cheque of KShs. 182,200 and a receipt was issued to them.
47. DW1 urged that this payment was evidence that they willingly and voluntarily executed the sub-lease; that all documents and invoices sent to the Plaintiff and payments made by the Plaintiffs were founded on the terms of the Agreement for Lease and the sub-lease Agreement, and denied the issues raised by the Plaintiffs questioning the authenticity or validity of the sub-lease and disputed the allegation of fraud, which he argues was not supported by the Plaintiffs' documents.
48. DW1 averred that following the fire that occurred on 4th May 2018, which investigations established was caused by a fault in power cabling in another shop in the Mall, the issue of compensation for the loss occasioned by the fire arose between the parties and that under Clauses 7.9, 7.10 and 7.11 of the sub-lease, it was the Plaintiffs' responsibility to take out insurance for their leased premises, including their exterior and interior partitions and property.
49. He opined that the sub-lease provided that the Defendant was not to be liable for any loss or damage in the event of a fire; that the Plaintiffs had not taken out insurance and therefore, they were exposed to loss and that the Defendant was not liable for the loss caused by the fire.
50. DW1 contended that once the Plaintiffs realized they were exposed to the losses, on 23rd July 2018, their advocates, Messrs Echesa & Bwire Advocates, issued a demand questioning the sub-lease, over a year after the date the Plaintiffs allege to have executed the same and that the Plaintiffs failed to yield possession of the premises to allow the Defendant to restore/ re-build the burnt down premises.
51. DW1 asserted that it was pursuant to a letter dated 18th June 2018 by their Advocates to the Plaintiffs' Advocate that they retook possession of the leased premises on Tuesday 19th June 2018; that as per the sub-lease, the Defendant had already suspended the accrual of rent pending the rebuilding process and that under Clause. 14.1 of the sub-Lease, the Defendant was enjoined to undertake restoration of the burnt premises expeditiously.
52. According to DW1, instead of the Plaintiffs waiting for the reconstruction of the affected leased premises, it filed two suits on 26th October 2018: this suit, ELC No. 463 of 2018 seeking to prevent formalization of the sub-lease and the second suit, HCCC No. 251 of 2018 seeking damages for the loss caused by the fire on 4th May 2018.
53. DW1 opined that the real motivation of disputing the validity of the sub-Lease is to attempt to avoid the rights and obligations provided for under the sub-Lease, which would absolve the Defendant of any liability for the other claims.
54. He stated that rebuilding and restoration of the Plaintiffs' premises was completed on 15th October 2018; that as per the sub-lease, the Defendant allowed the Plaintiffs a one month rent free period for them to undertake re-partitioning, which period ran out on 15th November 2018 and that despite notice, the Plaintiffs refused to retake possession of the premises and failed to pay rent that accrued from 15th November 2018.



55. It is the Defendant's case that following continued breach of the terms of the sub-Lease, the same was terminated and forfeited on 6th August 2019; that at that date, the Plaintiffs owed the Defendant rent and service charge of Kshs. 1,654,310 and that under sub-clause 3.1.3, the said sum continues to accrue interest at the rate of 2% per month. DW1 stated that the interest that had accrued as at 31st January 2020 was at Kshs. 292,145/=.
56. DW2 was Robert Njenga Mwaura, an Advocate of the High Court trading as Njenga Mwaura & Co. Advocates. DW2 relied on his statement dated 27th February 2020 as his evidence in chief. It was his evidence that he is a conveyancing advocate and that his clients are the landlords of Sarit Centre Mall in Westlands.
57. DW2 stated that he drafted the sub lease as the lawyer of the landlord and that he had the original lease, which was a standard lease for tenants at Sarit Centre. He averred that the sub lease was executed by both parties and it was registered in Nairobi IR 39566/614.
58. DW2 stated that he was paid for his services, and the cheque for Kshs. 182,200 included instruction fees, stamp duty and other disbursements that accompany registration of the lease; that he paid stamp duty of Kshs. 31,460 and that once a tenant expresses their wish to take a premises, the management sends the letter of offer setting out the terms that will follow in the sublease.
59. According to DW2, the letter of offer will have an attached standard sub-lease; that it is upon execution of the letter of offer by the tenant, that the tenant will sign the sublease; that the landlord's lawyer would send to the landlord the same sub lease once the tenant executes it and that the Landlord would execute his part and the process of stamping and registration would follow.
60. DW2 stated that the Defendant signed the sub lease on 3rd April 2018 and that at that time the sub lease was not dated but was already signed by the Plaintiffs and that he received the undated lease from his client on 5th May 2017.
61. Having not been paid his legal fees and stamp duty having not been paid, DW2 stated that he could therefore not proceed with registration of the sub lease; that he wrote a letter to the tenant to pay the stamp duty and fees, which they eventually did on 9th December 2017, six months after the issuance of the fee note and that he did not date the lease until he received payments for stamp duty, which he argued was common practice in conveyancing.
62. DW2 stated that in January 2018 the Registry closed for digitization for almost three weeks and they were not accepting documents. He stated that he presented the documents for stamp duty in April 2018 when the land registry opened and that the first assessment was Kshs. 75,120 and later on it was re-assessed at Kshs. 31,460/, which is what they paid on 25th May 2018.
63. DW2 averred that he also obtained the consent of the Commissioner of Lands to lease the suit premises and that sub lease was thereafter registered on 29th June 2020.
64. In cross-examination, he admitted that he dated the documents on 3rd April 2018 and paid the stamp duty within 30 days in May 2018. He argued that if a lease is not registered, it does not render it invalid and that a lease can be registered any time before expiry of the lease and it is enforceable inter partes.
65. He also clarified that there are two legal agreements, which are the agreement of lease which is signed in anticipation of signing a lease and that the Plaintiffs must have signed the Agreement of Lease dated 9th January 2017.



Submissions

66. The Plaintiffs, through their counsel, submitted that by the time of the fire incident and subsequent termination of the lease agreement, no lease documents had been registered, and that the terms and conditions in the said lease cannot act retroactively upon the registration.
67. Counsel argued that the legal effect of the unregistered agreement for lease created a periodic tenancy upon which the provisions of the Landlord and Tenant Act [Shops, Hotels and Catering Establishments Act] took effect. Counsel relied on Section 36[1] and [2] of the [Land Registration Act](#), which prescribed that an unregistered instrument still operates as a contract.
68. It was counsel's submission that the last date of tenancy was 4th May 2018 and that the governing instrument at the time of the fire incident was the document dated 11th January 2017. It was his argument that under Section 53 of the [Land Registration Act](#), the rights under leases cannot take effect if the lease agreement has not been registered.
69. Counsel relied on Section 43 [1] and [2] of the [Land Registration Act](#) which provides that no instrument affecting the disposition of an interest in land shall operate to create a lease until it has been registered in accordance with the relevant laws.
70. The Plaintiff's counsel proffered the argument that where there is a statutory requirement for registration, an unregistered lease is not capable of conferring legal or equitable estate in land. They referenced the cases of Said Ben Sultan Bin Mohamed v Jokha Binti Sultan Bin Sahim El Muisking [1955] I EACA 273] and Rogan-Kamper v Lord Grosvenor [No. 2] [1976-80] I KLR 558.
71. Counsel highlighted that the lease dated 3rd April 2018 was registered and took effect on 29th June 2020, yet the Plaintiffs' lease was terminated on 4th May 2018 after the fire incident. He contended that the document that was registered three years after signing and two years after termination of the lease cannot purport to bind a party who is no longer a lessee.
72. Counsel submitted that a lease has to be registered to enjoy the rights bestowed therein and if it is not registered, then such a lease shall be treated as a contract and only enforceable in its generality. They quoted the case of Mega Garment Limited v Mistry Jadva Parbat & Co. [EPZ] Limited [2016] eKLR.
73. Counsel stated that the Defendant's Counsel had admitted to changing the dates of the lease agreement to avoid penalties during payment of the stamp duty; that any alteration of the terms and conditions of the lease agreement requires consent from the parties and no consent was procured by the Defendant when it unilaterally changed the agreement and that the dates of an agreement are not merely technical, but substantial in nature, and any change can have serious consequences.
74. Counsel argued that the delay in commencing the process of registration was not occasioned by the Plaintiffs' delay in effecting the payment. Her asserted that the registration was with the aim of defeating the Plaintiffs' other suit, as the lease was taken to the collector of stamp duty on 20th May 2018, 26 days after the fire incident in the suit property.
75. The Defendant's counsel submitted that the purported sub-lease dated 11th January 2017 was only signed by the Plaintiffs and that there was no sub-lease dated 11th January 2017 between the Plaintiffs and the Defendant. On the other hand, the sub-Lease dated 3rd April 2018 was signed by the Plaintiffs and Defendant and the consent was signed by the landlord and that PW1 and PW2 confirmed that the signatures on the sub-lease dated 3rd April 2018 were their signatures and were genuine.



76. Counsel highlighted that PW1 and PW2 also confirmed that the terms on the two documents were the same, confirming the Defendant's assertion that there was no alteration of the sub-lease dated 3rd April 2018 and no pages were superimposed or altered.
77. The Defendant's Advocate relied on the definition of 'contract' as set out in Black's Law Dictionary 8th Edition, Section 3[3] of the *Law of Contract Act* and *Curtis v Chemical Cleaning & Dyeing Co. Ltd* [1951] 1 All E.R. 631. Counsel also relied on the testimony of DW2 that the lease can be registered any time before its expiry and that even if a sub-lease is not registered, it does not render the lease invalid.
78. The Defendant's counsel submitted that the Plaintiffs were bound by the sub-lease dated 3rd April 2018 that the Plaintiffs breached their obligations under the sub-lease as articulated in the Counterclaim, and that the Defendant has consequently suffered loss and damage in the sum of Kshs. 1,654,310/-, which continues to accrue interest at the rate of 2% per month.
79. Defendant's counsel submitted that a court cannot rewrite a contract between the parties. Counsel relied on the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit [K] Ltd* [2002] 2 EA 503 and that the sub-lease was thereafter terminated and forfeited on 6th August 2019, at which time the Plaintiff owned the Defendant rent and service charge of Kshs. 1,654,310/=.
80. It was the Defendant's counsel's submission that the Plaintiffs have not proved the element of fraud on the part of the Defendants that they materially altered the document, superimposed and altered pages and uttered fraudulent documents and that it is the Plaintiffs who have committed fraud by adding two different letters.

Analysis and Determination

81. Upon careful consideration of the pleadings, testimony and submissions of the parties, the following issues arise for this court's consideration:
 - a. Whether the Defendant fraudulently altered the sublease.
 - b. Whether the Plaintiffs breached the sublease in failing to remit rent and service charge.
82. The Defendant in this matter is the Lessee of the property known as Sarit Centre situate on LR No. 1870/IX/159 [Original No. 88-95] Westlands, which it has leased from its proprietor, Soma Properties Limited. The Plaintiffs, on their part, have been long-standing sub-lessees and tenants of Unit No. SF16 located on the 2nd floor of the Sarit Centre [the suit property] since about the year 2000.
83. This dispute arose upon the expiry of the lease between the Plaintiffs and the Defendant dated 7th August 2013 for a term of 5 years and 6 months, which expired on 31st January 2017. It is not refuted by either party that the Defendant sent to the Plaintiffs a letter dated 9th January 2017 whose subject was "An Agreement for Lease Part of LR No. 1870/IX/159 Sarit Centre Westlands Nairobi."
84. The Plaintiffs assert that they signed the said letter in acceptance of the terms and conditions therein and agreed to rent the leased premises for a further term of five years and six months from 1st February 2017 to 31st July 2022. They also assert that they executed a copy of the sublease in the presence of their advocate and dated the same as 11th January 2017.
85. The Plaintiffs contend that while they conveyed the same to the Defendant before 16th January 2017, as had been indicated, the Defendant did not send a copy of the fully executed and registered lease to them until later in 2018 when they sent a lease dated 3rd April 2018 which had their signatures, and which was franked for stamp duty on 30th May 2018 and thereafter lodged for registration.



86. The Plaintiffs deny signing any lease in 2018 and assert that the lease was prepared fraudulently by materially altering the document dated 11th January 2017.
87. The Defendant, on its part, assert that the Plaintiffs voluntarily signed the Agreement for Lease in 2017 and the sublease dated 3rd April 2018. They deny that there was any fraud or alteration in the sublease and contend that it is an established conveyancing practice in Kenya for documents to be executed by parties and to be dated on the date the last party executes them.
88. In its counterclaim, the Defendant asserts that on 4th May 2018, there was a fire that originated from another shop in the Sarit Centre Mall, which spread and impacted other units, including the property leased by the Plaintiffs, causing loss and damage; that in May 2018, it issued a notice of abatement of rent and service charge payable under the sub-clause 14.1 and that despite repeated requests and meetings, it was only on 19th June 2018 that the Defendant took possession of the premises and embarked on restoration works.
89. It is the Defendant's case that it issued one month's rent free notice and demanded that the Plaintiffs undertake repartitioning and retake possession of the suit property by 15th November 2018, and that despite the said notice, the Plaintiff neglected to do so and became liable for payment of rent and service charge at the rates set out in the sub-Lease.
90. According to the Defendant, the sub-lease was terminated effective 6th August 2019, at which time the balance outstanding of rent and service charge was Kshs. 1,654,310 inclusive of interest, which continues to accrue interest at the rate of 2% per month until payment in full, which sum it has claimed in this suit.
91. The Plaintiffs, in their Defence to the Counterclaim, argue that the lease was terminated after the fire on 4th May 2018 and deny that they owe the Defendant any rental arrears.
92. Being a civil matter, each party was obligated to prove their case on a balance of probabilities, which is the required standard of proof. This principle is succinctly captured in Sections 107, 109 and 112 of the *Evidence Act*.
93. Section 107 provides as follows:
- “ [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.
- [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.”
94. Sections 109 and 112 of the same Act states as follows:
- “ 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.”



Whether the Defendant fraudulently altered the sub lease

95. Fraud is defined in Black's Law Dictionary [12th Edition] in the following four ways:

- “ 1. A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.
2. A reckless misrepresentation made without justified belief in its truth to induce another person to act.
3. A tort arising from a knowing or reckless misrepresentation or concealment of material fact to make another to act to his or her detriment.
4. Unconscionable dealing.”

96. Black's Law Dictionary also refers to the definition of fraud in John Willard, A Treatise On Equity Jurisprudence [Platt Porter Ed., 1897] where fraud is defined as follows:-

“Fraud has been defined to be, any kind of artifice by which another is deceived. Hence, all surprise, trick, cunning, dissembling, and any other unfair way that is used to cheat any one, is considered as fraud.”

97. It is trite law that fraud must not only be pleaded and particularized but strictly proven. This position was affirmed by the Court of Appeal in the case of Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR where the Court stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

98. As regards the standard of proof, the Court of Appeal in the case of Kinyanjui Kamau v George Kamau [2015] eKLR expressed itself as follows: -

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo v Ndolo [2008] 1 KLR [G & F] 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...” In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

99. The particulars of fraud asserted by the Plaintiffs are that the Defendant materially altered the document dated 11th January 2017; that the Defendant superimposed altered pages over their signatures to deceptively express that the signatures were appended on the document in the year 2018 and that the Defendant uttered the fraudulent sub lease for assessment and stamp duty and registration purportedly signed by them on 3rd April 2018.



100. The Plaintiffs have in their Bundle of Documents dated 22nd October 2018 and the Supplementary Bundle dated 15th March 2024 adduced the Defendant's letter dated 9th January 2017, the letter of offer dated 9th January 2017, the sub lease agreement executed on 11th January 2017; the sublease agreement dated 3rd April 2018, and a letter dated 15th March 2024, by Safina Madhani Advocate in which she asserted that she had certified the signatures of the Plaintiffs in the Lease dated 11th January 2017 on the same date.
101. According to the Plaintiffs' testimony, the lease in their bundle dated 11th January 2017 and that in the Defendant's bundle are the same except for the dates indicated on the front page. This court has also considered the two documents and found the same to be identical save for the dates on the first page.
102. Other than the date of the sub lease, the terms of the lease with respect to rental dues, payment of service charge, Landlord's covenants, tenant's covenants, insurance and events of default are identical in both documents.
103. The Defendant admits that the date of 3rd April 2018 was specifically annotated on the lease to avoid penalties for late payment of stamp duty. According to the Defendant, although the Plaintiffs signed the sub lease much earlier, the copy that was sent to the landlord for his signature was already signed by the Plaintiffs but not dated.
104. The sublease shows that it was presented for stamp duty on 30th May 2018. The Defendant explained the delay in payment of the stamp duty as being due to delays on the Plaintiffs' part in payment of the sums for legal fees and stamp duty, as well as delays on the part of the Land Registry which was closed for three weeks in 2018 for digitization.
105. The Plaintiffs do not refute that they delayed sending the legal fees and stamp duty, which they paid in December 2017. A cheque of Kshs. 182,200/- to the Defendant dated 9th December 2017 was exhibited by the Defendant.
106. This court duly notes that the fully executed sub lease was only sent to the Plaintiffs in June 2018, which was after the incidence of the fire. While these circumstances prove the materiality of the date of the agreement, they do not however indicate fraud on the Defendant's part. Such an allegation ought to have been proved through the testimony of a document examiner who would have informed the court whether or not the Plaintiffs' signatures were superimposed on the document or not.
107. Indeed, the explanation by the Defendant's advocate, who was a witness during trial, that it is conventional in conveyance to have the lease document dated on the day the last party signs the document, which, in this case, is the date the Defendant's Director signed the same, and not the date the Plaintiffs signed it, is believable. This is so considering that it was the Plaintiffs who signed the document first before the same was forwarded to the Defendant's advocate for the same to be signed by the Defendant, and registration.
108. In any case, PW1 testified that the signatures on the Lease dated 3rd April 2018 are the Plaintiffs' genuine signatures and as established above, the terms of the two documents were identical.
109. The Plaintiffs accordingly failed to discharge their burden of proof and did not prove any fraud on the part of the Defendant by way of evidence.
Whether the Plaintiffs breached the sublease in failing to remit rent and service charge
110. The Defendant has in its Counterclaim asserted that the Plaintiffs breached the sublease in failing to retake possession of the leased premises and by failing to remit rent and service charge between 15th November 2018 and 6th August 2019, when it terminated the sub lease. The Plaintiffs contend that



they cannot be bound by the terms of the sub lease which was registered on 29th June 2020, way after they had abandoned the premises.

111. It is not refuted that at the material time, between November 2018 and August 2019, the sublease between the parties was unregistered. According to Section 36 [2] of the *Land Registration Act*, an unregistered instrument, including a lease, can operate as a contract. The effect of this provision is that parties are bound to meet their contractual obligations under unregistered instruments over land.

112. This position was upheld by the Court of Appeal in *Mega Garment Limited v Mistry Jadva Parbat & Co. [Epz] Limited* [2016] KECA 172 [KLR], where it stated:

“The time-honoured decision of this Court in *Bachelor’s Bakery Ltd v Westlands Securities Ltd* [1982] KLR 366 which has been followed in a long line of subsequent decisions elucidates the status of an unregistered lease. It reiterates and confirms the firmly settled law, first, that a lease for immovable property for a term exceeding one year can only be made by a registered instrument; that a document merely creating a right to obtain another document, like the one in this dispute, does not require to be registered to be enforceable; that such an agreement is valid inter partes even in the absence of registration, but gives no protection against the rights of third parties. That exposition of the law hold true in this case.”

113. In its earlier decision, the Court of Appeal similarly held in *Chon Jeuk Suk Kim & Another v E.J. Austin & 2 others* [2013] eKLR that non-registration of a lease, though such registration is required by statute, does not preclude the use of the document to show the terms of contract between the parties.

114. In this case, the sublease is applicable as a contract between the Plaintiffs and the Defendant. It is a trite principle that a court cannot and will not rewrite contracts between parties. In the case of *National Bank of Kenya Ltd V Pipeplastic Samkolit [K] Ltd*, [2002] 2 EA 503 the Court held as follows:

“A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”

115. Similarly, in the Court of Appeal case of *Fidelity Commercial Bank Limited vs Kenya Grange Vehicle Industries Limited*, [2017] eKLR it was held:

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

The supporting rationale for this rule is that, since the contracting parties have reduced their agreement to a single and final writing, extrinsic evidence of past agreements of terms should not be considered when interpreting that written contract agreement, as the parties had consciously decided to ultimately leave them out of the contract. In other words, one may not use evidence made prior to the written contract to contradict the ultimate contract that has been reduced into writing.”



116. Following the fire incident that occurred on 4th May 2018, the Defendant asserts that pursuant to sub-clause 14.1, it issued a notice to the Plaintiffs about abatement of rent and service-charge on 4th May 2018.

117. Clause 14.1 of the sublease reads as follows:

14.1 Insurance

That if at any time during the currency of this lease the Premises or any part thereof be damaged by fire or any other insured risk so as to render them unfit for occupation or use in whole or in part for the purposes for which they were let [unless the insurance moneys shall be wholly or partially irrevocable be reason solely or in part of any act, default or omission of the Tenant or its servants, agents, visitors or licensees] and if the insurance policy in respect of the Premises has not been vitiated or voided by any acts of omissions of the latter, the Landlord may within a period of six [6] months after the occurrence of the said event elect to rebuild or reinstate the Premises and in such event this Lease shall not be terminated but the Tenant shall be entitled to a total or partial abatement of rent as determined by the Landlord who shall be obliged to proceed expeditiously with the work of such rebuilding Provided That if the Landlord elects within the said period of six [6] months not to rebuild or elects the Premises or fails to make any election within such period then this Lease shall automatically be deemed to have been determined by frustration upon the expiry of the said period of six [6] months And the Tenant shall not have any right of termination by virtue of the provisions in that behalf contained in Section 65[1][e] of the Land Act or any other relevant enactment for the time being in force in Kenya.

118. The terms of the sub lease were clear. The occurrence of the fire did not automatically determine the contract. This is especially because the Defendant opted to rebuild the leased premises. However, it appears that the parties were at odds as to the extent of the Defendant's responsibility to rebuild the premises.

119. The Defendant was of the view that the restoration of the premises went only to the extent of repairing the four walls. It was on this basis that they issued a notice to the Plaintiffs and demanded that the Plaintiffs undertake repartitioning and retake possession of the premises by 15th November 2018.

120. The Plaintiffs do not dispute that they did not re-enter the leased premises after the fire, for the reason that the premises were not restored to the way they were before the fire. According to the Plaintiffs, this includes the partitions within the leased premises, and fully restoring the equipment destroyed by the fire. This position was expressed by the Plaintiffs in the letter dated 15th August 2019 sent by the Plaintiffs' advocate Wambugu & Muriuki Advocates to the Defendant.

121. Noting the nature of the Plaintiffs' business, this court opines that partitions were essential to the conduct of their business. However, the Plaintiffs have not shown the clause in the sub lease that directed the Defendant to restore the suit premises in the same state it was in before the fire gutted down the premises, and especially on the issue of partitioning the premises.

122. To the contrary, the letter of offer dated 9th January, 2017, which the Plaintiffs accepted, provides that the Plaintiffs shall be responsible to partitioning of their premises subject to the landlord's written approval. This obligation on the part of the Plaintiffs is repeated under clause 7.2 of the sub lease which the Plaintiffs signed.



123. In any event, even if the Defendant was in breach of the sub lease, the Plaintiffs never issued any formal notice to the Defendant of the said breach of contract. Instead, they proceeded to file suits against the Defendant before this Court and the High Court.
124. Despite the Plaintiffs not being in possession of the suit property, and their filing of this suit, they did not terminate the sublease between themselves and the Defendant. The Plaintiffs admitted to the court that they received invoices from the Defendant, which they did not settle.
125. The Defendant has adduced the said invoices for rental arrears and service charge issued between 1st January 2019 and August 2019 as well as invoices for accrued interest up to 2020. The Defendant also adduced a tabulated breakdown of the rental arrears, service charge and interest accrued by the Plaintiffs, amounting to Kshs.1,654,310/-.
126. Having found that the Plaintiffs failed to tender their rental dues for the period between 15th November 2018 and 6th August 2019, and the Plaintiffs having failed to prove their case on a balance of probabilities, this court dismisses the Plaintiff's suit and allows the Defendant's Counterclaim.
127. The following final orders are hereby issued:
- a. The Plaintiff's suit is dismissed.
 - b. The Defendant's Counterclaim is allowed.
 - c. The Plaintiffs are hereby ordered to pay jointly and severally the sum of Kshs. 1,654,310/- inclusive of interest accruing at the rate of 2% per month from 6th September 2019 until payment in full.
 - d. Costs of the suit and the Counterclaim to be borne by the Plaintiffs.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 17TH DAY OF JULY, 2025

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Maina for Plaintiffs

Mr. Gakungu and Wanyoike for Defendant

Court Assistant: Tracy

