



REPUBLIC OF KENYA



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Sood & 3 others v Kenya Agribusiness Agroindustry Alliance (Environment & Land Case 35 of 2020) [2024] KEELC 386 (KLR) (30 January 2024) (Judgment)

Neutral citation: [2024] KEELC 386 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 35 OF 2020**

JA MOGENI, J

JANUARY 30, 2024

BETWEEN

**MALIKA SOOD 1ST PLAINTIFF
SAMRITI SOOD 2ND PLAINTIFF
KIRAN SOOD 3RD PLAINTIFF
SATISH KUMAR SOOD 4TH PLAINTIFF**

AND

KENYA AGRIBUSINESS AGROINDUSTRY ALLIANCE DEFENDANT

JUDGMENT

1. The Plaintiffs instituted a suit vide a Complaint dated 18/01/2019 and sued the Defendant seeking the following orders:
 - i. Kshs. 9,232,492.50 being office rent arrears for the period 11/10/2016 to 11/07/2018 when Defendant was in actual possession but defaulted in paying rent.
 - ii. Kshs. 1,156,320 being arrears on parking charges for the period 11/10/2016 to 11/07/2018 when Defendant was in actual possession of parking space.
 - iii. Kshs. 65,429,033.43 being compensation for office rent lost due to Defendant's early termination of lease i.e. Rent payable for the period 11/07/2018 to 10/04/2026.
 - iv. Kshs. 8,410,633 being compensation for losses on parking charges due to early termination of lease i.e. for the period 11/07/2018 to 10/04/2026.
 - v. Interest on (i), (ii), (iii) and (iv) above from due date until date of payment.
 - vi. Costs of this suit.



- vii. Any other relief that this Honourable court may deem just to grant.
2. The suit is opposed. The Defendant entered appearance on 14/02/2019 and filed a defence and counterclaim dated 1/03/2019. The Defendant prays for judgment against the Plaintiffs jointly and severally as follows: -
1. Damages
 2. Loss of business
 3. Cost of this suit
 4. Interest at court rates of (1) (2) and (3)
 5. Any other orders that this Honourable court may deem fit.
3. Upon pleadings being closed, the suit proceeded by way of viva voce evidence. The Plaintiffs called one witness who testified on 26/09/2023 and the Defendant called one witness who testified on 5/10/2023.

Plaintiffs' Case: -

4. In the plaint, the Plaintiffs plead that sometimes on or about 11/10/2015, they (jointly) entered into a lease agreement with the Defendant under whose terms, the Defendant, was to take possession and occupy an office space comprising office nos. 9 and 10 situated on Mezzanine 1st Floor, at the Mirage.
5. The Plaintiffs contended that the following were the salient and relevant parts of the aforesaid Lease agreement: The term of the lease was a period of 10 years and 6 months effective from 11/10/2015 expiring on 10/04/2026; The lease was subject to the Defendant paying the Plaintiffs an agreed monthly rent of Kshs. 383,250/- exclusive of value added tax which rent was payable quarterly in advance; In addition to the office space, the Defendant was allocated 4 parking slots at Kshs. 48,000/- per month which was also payable quarterly in advance; A security deposit of Kshs. 766,500/- (exclusive of value added tax) was also payable and the rent and parking charges afore-stated were to escalate at the rate of 10% every year.
6. It is the Plaintiffs' contention that given the term of the lease, the same was to expire on 11/04/2026 but was also renewable at the option of the Plaintiffs.
7. It is the Plaintiffs' averment that notwithstanding the foregoing clear terms of the lease, the Defendant, on or about 11/10/2017 stopped paying rent and other charges payable under the lease without any legal justification. Further, that upon pursuing the Defendant for the aforesaid payments, the Defendant, on or about 31/07/2018 simply handed back the keys to the premises to the Plaintiffs leaving behind its furniture in the premises where the same are still housed to date but no rent or other payments have been received to date.
8. The Plaintiffs stated that the Defendant's actions of stopping to pay rent and other charges and purporting to hand back possession of the premises during the term of the lease is a breach of the terms of the lease.
9. The Plaintiffs listed the particulars of breach of lease agreement by the defendant as follows: Failure to pay rent as per the lease agreement dated 11/10/2015, failure to pay parking charges as per the lease agreement dated 11/10/2015, failure to honor rent and parking fees obligations as per the Lease agreement, purporting to yield back the premises to the Plaintiffs before the expiry of the term of



- the lease or earlier termination thereof, failure to promptly pay the amounts payable under the lease agreement.
10. The plaintiffs also state that the lease agreement did not provide for its early termination or handing back of possession before expiry of its term and the Plaintiffs have as a result suffered losses.
 11. The plaintiffs listed particulars of special damages as follows: Kshs. 9,232,492.50 being office rent arrears for the period 11/10/2016 to 11/07/2018 when Defendant was in possession but never paid rent, Kshs. 65,429,033.43 being office rent payable for the remainder of the lease period i.e. 11/07/2018 to 10/04/2026, Kshs. 1,156,320 being arrears on parking charges for the period 11/10/2016 to 11/07/2018 when Defendant was in possession of parking space and Kshs. 8,410,633, being parking charges payable for the remainder of the Lease period i.e. 11/07/2018 to 10/04/2026; Total = Kshs. 76,659,478.98.
 12. The Plaintiffs further state that they have not been able to mitigate their losses through lease of the premises to another tenant, which fact has been compounded by the fact that the Defendant abandoned its furniture in the premises.
 13. Lastly, the Plaintiffs pray that judgment is entered against the Defendant as prayed.

Defendant's Case: -

14. The Defendant denies each and every allegation contained in the Plaintiff.
15. It contends that Paragraph 6 of the plaintiff is denied to the extent that the tenancy that existed between the parties was created as a result of a lease agreement.
16. The Defendant states that it is a stranger to the terms set out in the alleged lease agreement and further asserts that the relationship between the parties was of periodic tenancy wherein the Defendant was paying rent on quarterly basis in advance to the Plaintiffs.
17. Paragraph 8 of the Plaintiff is denied and the Defendant reiterates that it was a periodic tenancy and as such there could not have been a definite date for termination of the tenancy unless by way of 3 months' notice given by either party. It further points out that the expiry date indicated therein (11/04/2016) does not correspond to the assertions made by the plaintiff that the alleged lease was for 10 years.
18. The Defendant states in reply to paragraph 9 that sometime in October 2017, its business was frustrated by an abrupt withdrawal of one of its main funding partner thus straining its liquidity. However, upon negotiating with Plaintiffs, it was agreed that the defendant will be given grace period until September 2018 to offset all outstanding rent arrears as at the said date.
19. However, during this period, the Plaintiff continued to threaten the defendant with eviction and claim that they had secured a new tenant who wanted to take over the occupation of the premises in issue.
20. In the resultant, and in response to paragraph 10 of the Plaintiff on 31/07/2018, it avers that the Plaintiffs locked the defendant out of the suit premises denying it access to retrieve its essential business documents and office furniture thus frustrating its operations and finalization of business dealings with potential clients and/or organizations.
21. In further response to paragraph 10, the Defendant states that it is absurd and unfathomable that it could willfully abandon and hand over all its tools of trade, essential documents in relation to its business included. To the contrary, it was the Plaintiffs who indicated that they were exercising their right to lien by detaining the defendant's furniture, computers, business documents and other valuables.



22. Consequently, the Defendant reiterates that it did not terminate the periodic tenancy but to the contrary it was the Plaintiff who locked it out of the suit premises together with all its employees. Moreover, to date the Plaintiff is still retaining the Defendant's tools of trade thereby frustrating its business.
23. As such the particulars of breach enumerated in paragraph 11 (i-v) are denied. The defendant denies owing the plaintiffs the amounts set out in the plaint and prays that this court dismisses the suit.

Counter-claim

24. In its counterclaim, the Defendant asserts that the action by the Plaintiffs to detain its tools of trade and other office equipment to date is unlawful and has caused it immense financial loss as it could no longer conduct its business. The defendant listed the particulars of damage/loss as follows: "Loss of business, Loss of funds from potential external funding organizations/individuals and Wear and tear of the furniture and computers detained by the Plaintiffs".
25. Reasons wherefore, the Defendant prays that the Plaintiffs' suit be dismissed with costs and judgment be entered against the Plaintiffs jointly and severally on the counterclaim as prayed.

Plaintiffs' Reply To The Defendant's Defence And Defense To Counterclaim: -

26. The Plaintiffs reiterates the contents of the plaint in response to the defendant's defense.
27. The Plaintiffs reiterates that the parties entered into a lease agreement sometimes on or about 11/10/2015, and therefore the tenancy was created as a result of this agreement. The Plaintiff avers that the relationship between the parties was governed by the lease agreement.
28. In response to paragraph 5 of the Defence and Counterclaim, the Plaintiff reiterates that the term of the lease as stipulated in the agreement was a period of 10 years and 6 months.
29. The Plaintiff avers that on or about 11/10/2017, the Defendant stopped paying rent and other charges payable under the lease without any legal justification.
30. The plaintiff contends that it did not any point lock the defendant out of the suit premises and furthermore, the keys to the premises were all along in the possession of the Defendant and it was therefore not possible for the Plaintiff to lock the Defendant out of the suit premises.
31. The Plaintiff reiterates that upon pursuing the Defendant for payment, the Defendant handed back the keys to the premises leaving behind its furniture.
32. The Plaintiff reiterates that the Defendant breached the terms of the lease by his actions of stopping to pay rent and other charges as well as purporting to hand back possession of the premises during the term of the lease. The Plaintiff further reiterates the particulars of breach enumerated in paragraph 11 of the Plaint.

Defence To The Counterclaim

33. The plaintiffs denies each and every allegation contained in the counterclaim.
34. The Plaintiffs aver that upon pursuing the Defendant for the unpaid rent and other charges, the Defendant simply handed back the keys to the premises to the Plaintiff leaving behind its furniture in the premises. That it did not detain the Defendant's tools of trade and office equipment, but it is the Defendant who handed over possession whilst the equipment was in the premises. They pray that the counterclaim be dismissed with costs to the plaintiffs.



Plaintiff's Evidence: -

35. PW1 – Mrs. Malika Sood adopted her witness statement dated 25/01/2013 together with a list of documents dated January 18, 2018 and a supplementary list of document dated April 17, 2019. She produced them as her evidence in chief and exhibits. She testified that there was a lease agreement between the parties, it was signed and stamped. The lease was for 10 years and 6 months. There was default in terms of rent and parking charges amounting to Kshs. 9,232,492.50 for rent and Kshs. 1,156,320 for parking. The defendant left their property in the premises. She added that they never locked the defendant out of the premises. She gave the key to the driver to give them so they can access the premises. They never gave a grace period for restructuring the payment of the rent. Since the defendant left, they have not found a tenant. The property is still in the house. They have not found a tenant. She testified that they have never prohibited the tenant from picking their property.
36. In cross examination, it was her testimony that she is one of the plaintiffs, the rest are her parents and her sister. She reiterated that they entered into a lease of 10 years 6 months. She has produced a contract. For the period that the defendant stayed on the property, the tenant paid rent for one year. The tenant paid directly to the bank but they never issued receipts. The direct transfer statements are not before the court. The bank statements are not before the court. Their agreement was for 10 years 6 months. The tenant asked for time to pay the rent, she sent whatsapp messages. The tenant gave the key to her driver. At page 9 of the defendant's list of documents dated 18/02/2022, the message was from the tenant to PW1. She stated in her message that the key is in the penholder for her offices. Her driver Pius brought them the key for the main door. At page 10, she (tenant) wanted her personal belongings.
37. She added that she was not aware that the defendant filed a defence on the said date but she saw one filed on 1/03/2019. In the defence, the defendant said PW1 locked the premises but she did not. See her reply to defence and counterclaim. The tenant handed over the keys to PW1 on 10/09/2018 and therefore they had no access to the suit premises. She added that she is aware of the items on the premises. There is no tenant in the suit property. She is not aware that she can sell the properties belonging to tenant to recover the rent after the period of the lease.
38. In re-examination, she testified that the messages about the doors was written by the defendant. That it is her who wrote the message about the doors being locked. She cannot remember any further communication with the defendant after the one screenshot at page 10 of the defendant's bundle. She added that she never denied the defendant access. She has not been able to get another tenant and they have never denied them access.
39. After hearing the testimony of the one witness, the Plaintiffs' case was closed.

Defendant's Evidence: -

40. DW1 – Lucy Muchoki testified that she filed a defense and counterclaim. She adopted her witness statement dated 1/03/2019 together with a list of documents dated 18/02/2022 and produced them as her evidence in chief. She testified that she would want the Court to dismiss the suit and grant her the prayers in the counterclaim. That they have lost a lot of business since their offices were shut down.
41. In cross examination, it was her testimony that she has looked at the agreement at page 42. She saw that there is a stamp which bears the name of the defendant. She confirmed that there is a stamp and it bears the name of the defendant. That there is a stamp purportedly by the defendant but she added that they do not use those fonts. At page 31 there is a copy of summons dated 30/01/2019 and the stamp bears the name of the defendant. At page 42 of the plaintiff's bundle there is the plaintiff's signature and the same is purported to be signed by a director but there is no name. At page 5 of the Defendant's



bundle there is a signature signed by Lucy Muchoki. She testified that the two signatures, one at page 5 and the one at page 42 are different. She stated that she did not sign any of the signatures. Though, she disowns the signatures at page 42, she did not report to the police about the signature as she only saw the signature today. A stamp is a sensitive document and she reported that the stamp was stolen but not to the DCI. At page 35 paragraph B is about the term of the lease agreement. Before October 2017, she testified that she was paying her rent without difficulties, the default started after October 2017 – September 2018. She has not brought any document to prove that she was given a grace period nor any document to show that there were any negotiations. At the same time, there is proof before court to show the plaintiff had threatened to evict her. See page 10. The text that states she has sent an amended text. She sent that to the plaintiff. The text that stated, “Hi. Please..... as per agreement” is from the Plaintiff. She confirmed that the text at page 9 about the CEO office and access are from Malika. In fact, Malika stated that all doors are locked. She then sent a number belonging to Pius Mulandi who is the driver and she stated that the key was in the green key holder. By this message, she was surrendering the key to Malika on 7/07/2018. The conversation at page 10 was on 10/09/2019 after she had surrendered the keys. She used to make quarterly payments. She paid through the bank. She has not brought the documents to show. She was never in default. Her items are in the plaintiff’s premises and she has not gone for them. Nor has she reported that the plaintiffs have denied her access to the said premises.

42. In re-examination, she testified that the nature of the payment was periodical payment on quarterly basis. She added that she defaulted the last quarter of 2017 and the office was closed by the landlord. She communicated to the landlord about closure. At page 10, she was asking the landlord about her documents since she could not access the office. She did not recognize the stamp nor signature at page 42. No name nor co-secretary’s name is there. The agreement was not witnessed by any advocates. The document shows that the agreement was drawn by Ating’a Linda Advocates. She has not referred to the office because there is a tenant already. The plaintiff at paragraph 12 states that she was in the premises but this was not true. At sub-paragraph 2 of paragraph 12, she was not in the premises. She has not been in the premises. She prays that the court grants prayers in the counterclaim. Page 1 of the plaintiff’s bundle, she saw two stamps but the stamp on the right is not their stamp. They had their offices closed on 1/07/2018 and so it is not possible that the stamp was from their office.
43. With that evidence, the Defendant closed its case.
44. After hearing, parties closed their respective cases and the Court gave directions of filing of written submissions on 5/10/2023.

Submissions: -

45. The Court gave directions on filing of written submissions on 5/10/2023, which the Plaintiffs and the Defendant did, and I have considered them. The Plaintiffs’ submissions are dated 4/11/2023 and filed on 4/12/2023, the Defendant’s submissions are dated 9/11/2023 and were filed on the even date.

Issues For Determination: -

46. The Court has now carefully read and considered the pleadings, the submissions filed by both parties together with the evidence adduced by the Plaintiffs and the Defendant and I find the issues for determination are as follows.
 - i. Whether the tenancy was a fixed term lease or of a periodic tenancy agreement.
 - ii. Whether the Plaintiffs are entitled to the orders sought.
 - iii. Whether the Defendant is entitled to the orders sought in the counterclaim.



- iv. Who should bear the costs of this suit and the counterclaim?

Analysis And Determination

Whether the tenancy was a fixed term lease or of a periodic tenancy agreement

47. The bone of contention in this matter revolves around the lease agreement dated 11/10/2015. The Court rightly notes that there is an agreement made between the parties herein on 11/10/2015 and signed on behalf of the Plaintiffs and the Defendant. A perusal of the agreement indicates that the Plaintiffs agreed to let and the Defendant agreed to lease the suit premises for a term of 10 years 6 months from 11/10/2015 to 10/04/2026 at a monthly rent of Kshs. 383,250.00 to be paid quarterly in advance, parking lot charges at Kshs. 48,000.00 per month payable quarterly in advance and a security deposit of Kshs. 766, 500.00 among other terms and conditions contained in the agreement. The rent and parking charges were to escalate at the rate of 10% every year. The agreement dated 11/10/2015 was produced as exhibit at the trial.
48. The Defendant denied entering into a lease agreement with the Plaintiffs. According to her, the relationship between the parties was of a periodic tenancy wherein the Defendant was paying rent on quarterly basis in advance to the plaintiffs.
49. The question that arises here is whether the document produced by the Plaintiffs can pass the test of legality. Section 3(3) of the [Law of Contract Act](#) provides that;
- “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...”
50. I have had a look at the lease agreement dated 11/10/2015. The agreement entered between the Plaintiffs and the Defendant is in writing. The same is signed by both parties herein however, the signatures of each party are not attested as required by the law. It is noteworthy that the Defendant has disputed executing the said lease agreement. DW1 disowned the signature and the stamp appearing on the agreement. It was her testimony that she did not sign any of the signatures. It was her admission however that she did not report the alleged forgery to the police or to the DCI. It was the Defendant’s submission that the lease agreement was not validly witnessed by the secretary of the company whose portion remained blank. That the fact that sections of the secretary of the company and that of the advocates who allegedly drew the document were left blank leaves more to desire about the entire transaction. Counsel for the Defendant relied on Section 37 (2) & (3) of the [Companies Act 2015](#) in submitting that since the secretary and the advocate had their respective places for signing, the execution of that document ought to have been in accordance with the said sections of the law.
51. I disagree. A mere denial is not sufficient. The Defendant admitted that she did not take any step to report the alleged forgery to any authority. The Court is not a forensics expert and there was no forensic evidence presented before the Court but from a look at the signature on the lease agreement dated 11/10/2015 and the signature appearing on the Defendant’s witness statement dated 1/03/2019 at page 5 of the Defendant’s bundle, the two signatures bear some resemblance. Further, Section 37 of



the *Companies Act* provided the following options for execution of documents by a company at the material time.

“ 37.

- (1) A document is executed by a company— (a) by the affixing of its common seal (if any) and witnessed by a director; or (b) in accordance with subsection (2). (2) A document is validly executed by a company if it is signed on behalf of the company — (a) by two authorized signatories; or (b) by a director of the company in the presence of a witness who attests the signature.”

52. The lease agreement in this case was signed by Malika Sood & Satish Kumar Sood, two out of the four plaintiffs on the one part and the director of the Defendant company. There is a stamp bearing the name of the Defendant company affixed under the common seal and one signature. It is my considered view that the agreement was duly executed by both parties.
53. The main thing that stands out in this agreement is that the signatures of both the Plaintiffs and the Defendant have completely no attestation on it. The instrument purporting to be a lease ought to be properly attested in order to be relied on as evidence of the lease between the parties. The advocate who drew the lease agreement did not appear before the Court to testify on the document. Since the agreement needed to be attested, the evidence of the certification witness was imperative as required by Section 71 of the *Evidence Act*, which provides as follows: -

“ 71. Proof of execution of document required by law to be attested;

If a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive and subject to the process of the court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document which has been registered in accordance with the provisions of any written law, unless its execution by the person by whom it purports to have been executed is specifically denied.”

54. The instrument needed to be attested pursuant to Section 3(3) of the *Law of Contract Act* as demonstrated hereinabove. Pursuant to Section 71 of the *Evidence Act*, the document needed to be proved by having the attesting witness prove its execution. No attesting witness was called by the Plaintiffs. The Defendant maintained that she is disputing the lease agreement, meaning that the Plaintiffs needed to prove that there was a valid lease agreement between the parties. I am afraid that the plaintiffs failed to meet the test set out in section 3 (3) of the *Law of Contract Act* and section 71 of the *Evidence Act*.
55. To this end, there is no written instrument that can be used as a fixed term lease between the Plaintiffs and the Defendant. This challenge for the Plaintiffs means that the lease instrument cannot be enforced following the provisions of Section 3 of the *Law of Contract Act*.
56. It is my finding therefore that the lease agreement is invalid for want of attestation as attestation is demanded by Section 3(3) (b) of the *Law of Contract Act* and thus unenforceable in law.



57. The Court has held that there is no written contract between the Plaintiffs and the Defendant. The Defendant denied entering into a lease agreement with the Plaintiffs and according to her, the relationship between the parties was of a periodic tenancy wherein the Defendant was paying rent on quarterly basis in advance to the Plaintiffs. A periodic tenancy is a tenancy that continues for successive period until the tenant gives the landlord notification that he wants to end the tenancy. The period depends on how the rent is paid. For calendar month, it becomes monthly tenancy. If rent is paid quarterly, it becomes a quarterly tenancy and if paid yearly, a yearly tenancy. See *Ukwala Supermarket (Eldoret) Limited v Amritral Sojpar Shab Wholesalers Limited* [2017] eKLR.
58. Section 57(2) of the *Land Act* contemplates a scenario where a land owner permits the exclusive occupier of the land by any person at a rent. Section 57(2) and (3) of the *Land Act* 2012, on periodic leases provides as follows: -
- “2) If the owner of land permits the exclusive occupation of land or any part of it by any person at a rent but without any agreement in writing, that occupation shall be deemed to constitute a periodic tenancy.
 - 3) The periodic tenancy contemplated in subsection (1) shall be the period by reference to which the rent is payable.”
59. From the facts of this case, I am convinced that there was a tenancy relationship between the Plaintiffs and the Defendant. DW1 confirmed as much in her testimony. She admitted that the Defendant’s furniture was still in the suit premises. This shows that the Defendant took possession of the premises. DW1 did not deny having taken possession of the suit premises from 11/10/2015. It was DW1’s testimony that the nature of the payment was periodic on a quarterly basis. It is also not in dispute that the Defendant surrendered the keys to the premises on 31/07/2018. What therefore emerges from the relationship between the Plaintiffs and the Defendant is that of periodic tenancy.

Whether the Plaintiffs proved their case to be entitled to the orders sought.

60. Having found that there is a periodic tenancy between the Plaintiffs and the Defendant, I shall now focus on the prayers sought in the Plaint. The Plaintiffs have sought for payment of the outstanding rent and parking charges arrears for the period beginning from 11/10/2016 to 11/07/2018 as seen on prayers (i) and (ii) on the Plaint.
61. It is the Plaintiffs’ submissions that the Defendant was to pay a monthly rent of Kshs. 383,250 payable quarterly together with parking charges for the parking spaces allocated to the company at Kshs. 48,000.00. The Plaintiffs submitted that the Defendant after entering into the lease agreement on 11/10/2015, only paid rent and parking charges up to 11/10/2016 and that afterwards it never paid any monies up to the time when the Defendant surrendered its keys to the premises to the Plaintiffs on 11/07/2018.
62. The Plaintiffs’ counsel further submitted that from the Plaintiffs adduced evidence of amounts owed in terms of rent as per schedule 1 and parking charges as per schedule 2 at page 20 – 23 of the Plaintiffs’ bundle together with the demand letter dated 11/11/2018, it is evident that the Defendant’s default started on 11/10/2016 and not October 2017 as the Defendant alleges.
63. Counsel added that it was upon the Defendant to avail proof in support of its position that it indeed paid rent for the period between 11/10/2016 and October 2017, as it would have been as easy as providing its bank statement for the said period. He relied on the case of *Sambayon Ole Semera v Kaka Flowers Limited & another* [2021] eKLR. Lastly, it was their submission that the Plaintiffs’ testimony



- to the effect that the Defendant's default started on 11/10/2016 remaining uncontroverted and the Defendant having failed to prove its allegation to the extent that it made payment for the said period and having admitted default from October 2017 to 10/07/2018, it only follows that the Plaintiffs are entitled to the unpaid rent and parking charges as pleaded and elaborated in the 1st and 2nd schedule.
64. The Defendant's submission on the other hand was that despite the Plaintiffs being served with the notice to produce dated 11/10/2019, the Plaintiff made no attempt to produce evidence in support of the claim for parking charges and rent arrears for the period of October 11, 2016 to July 11, 2018. That the plaintiffs failed to produce evidence of previous payments and when the Defendant stopped remittance as the evidence would have been crucial in determining the outstanding rental and parking chares payments. Counsel for the Defendant submitted that having failed to provide and produce the relevant and necessary documentary evidence which would ordinarily be in their possession, the Plaintiffs failed to discharge their burden of proof as envisaged by the law.
65. The Court held that the lease agreement is invalid for want of attestation and thus unenforceable in law. Notwithstanding the unenforceability of the lease agreement, the Defendant was bound to fulfil its obligations under the periodic tenancy. Having been put into possession of the suit premises, the Defendant could not escape its duty under the tenancy by defaulting in payment of rent. The Defendant did not contest the Plaintiffs' assertion that the rent payable as per the terms set out in the lease agreement. Her only contention was with regard to the period in which the Defendant was in default. It was her submission that the Plaintiff made no attempt to produce evidence in support of the claim for parking charges and rent arrears for the period of 11/10/2016 to 11/07/2018. The Plaintiffs also submitted that their testimony to the effect that the Defendant's default started on 11/10/2016 remaining uncontroverted and the Defendant having failed to prove its allegation to the extent that it made payment for the said period and having admitted default from October 2017 to 10/07/2018, it only follows that the Plaintiffs are entitled to the unpaid rent and parking charges as pleaded and elaborated in the 1st and 2nd schedule.
66. The principles in law relating to the legal burden of proof and the evidential burden of proof remain constant. The legal basis for the legal burden of proof is provided in Section 107 of the *Evidence Act*. The onus is therefore upon the Plaintiffs who seeks the payment of the outstanding rent owed to adduce cogent and credible evidence to prove his case to the satisfaction of the Court. That is the legal burden of proof. The Plaintiffs on whom the legal burden of proof lies may or may not adduce sufficient and admissible evidence in proof of any allegations in the suit. On one hand, if no sufficient evidence is adduced to the required standard, then the allegation(s) fail and it all ends there. On the other hand, if evidence is adduced to the satisfaction of the Court that the Defendant ought to pay the outstanding rent arrears, then it becomes the burden of the Defendant to adduce evidence rebutting the allegations and to demonstrate that she indeed only failed to pay rent from October 2017 as alleged. At that point the burden is said to shift to the Defendant. That is the evidential burden of proof.
67. The Court in *Abmed Mohammed Noor v Abdi Aziz Osman* [2019] eKLR had this to say on the above issue;
- “The majority decision of the Supreme Court in Presidential Election Petition No. 1 of 2017 between *Raila Amolo Odinga & Another v IEBC & 2 Others* (2017) eKLR had the following to say on the evidential burden of proof in paragraphs 132 and 133 thereof: -
- (132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and



its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

(133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law.....

22 The foregone analysis therefore settles the issue of burden of proof. For clarity, the legal burden of proof in a case is always static and rests on the Claimant throughout the trial. It is only the evidential burden of proof which may shift to the Defendant depending on the nature and effect of evidence adduced by the Claimant.”

68. On the standard of proof, the *Black’s Law Dictionary*, (9th Edition, 2009) at page 1535 defines ‘the standard of proof’ as ‘[t]he degree or level of proof demanded in a specific case in order for a party to succeed.’

69. The standard of proof in civil cases is proof on the balance of probability. In criminal cases the standard of proof is proof beyond any reasonable doubt.

70. There is no doubt that there is a periodic tenancy between the Plaintiffs and the Defendant. There is also no dispute that the Defendant took possession of the suit premises on 11/10/2015. The Defendant reiterated that it did not terminate the periodic tenancy but to the contrary it was the Plaintiff who locked it out of the suit premises together with all its employees. The Plaintiffs denied having locked out the Defendant from the Premises. The Plaintiffs have produced before this Court two schedules elaborating the unpaid rent and parking charges that they plead to be entitled to. The Defendant only disputed that she was unable to pay rent from October 2017. No evidence was adduced in support of this allegation.

71. The issue of rent arrears is factual. In such a case the onus of proof first rested upon the Plaintiffs. It was incumbent upon them to prove the existence of a tenancy relationship between the parties herein. Once the Plaintiffs discharged that evidential burden, then the evidential burden would shift to the Defendant. The Defendant would then be required to prove the Plaintiffs’ evidence is false. The Plaintiffs testified on their relationship with the Defendant. PW1 testified that there was a default in terms of rent and parking charged amounting to 9,232,492.50 for rent and Kshs. 1,156,320 for parking and that the Defendant left their property in the premises. The Plaintiffs also produced the two schedules elaborating the unpaid rent and parking charges that they plead to be entitled to. I have carefully considered the Plaintiffs case. Based on the oral and documentary evidence on record, I find that on a balance of probability, there is prima facie evidence that the Defendant stayed on the suit premises. The Plaintiffs therefore discharged the evidential burden.

72. As a tenant, the Defendant was required to pay rent to the Plaintiffs. It is not contested that the Defendant paid rent dutifully from 11/10/2015 until 10/10/2016. What emerges from the evidence presented to the court is that the Defendant was unable to continue paying rent as its business was



frustrated by an abrupt withdrawal of one of its main funding partner thus straining its liquidity. That the Defendant returned the keys to the suit premises to the Plaintiffs on 31/07/2018 after being confronted on the subject of rent arrears, leaving behind its furniture. Section 112 of the Evidence Act provides that “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.” The Defendant did not avail evidence to counter the plaintiffs’ tabulation of rent due them. To this end, I find and hold that the Defendant failed to discharged the evidential burden on their part.

73. In light of the above, the Court finds that the Defendant acted unlawfully and in breach of the existing periodic tenancy by failing to pay rent and parking charges to the Plaintiffs from 11/10/2016 to 11/07/2018. It is my considered view that the Plaintiffs evidence is sufficient and it therefore follows that the Defendant is liable to the Plaintiffs with regard to payment of rent arrears and parking charges arrears from 11/10/2016 to 11/07/2018. I therefore grant prayers (i) and (ii) in the Plaint dated 18/01/2019.
74. Prayer (iii) and (iv) is on compensation for office rent and parking charges lost due to early termination i.e. monies payable for the period 11/07/2018 to 10/04/2026. The Plaintiffs’ submitted that the lease agreement was a fixed term of 10 years and 6 months. That the lease did not provide for an exit clause and it thus follows that the Defendant’s act of unilaterally purporting to terminate its tenancy by surrendering the keys was in breach of the parties’ agreement and accordingly, the Plaintiffs are entitled to damages in terms of office rent and parking charges as provided in the lease agreement from 11/07/2018 when the Defendant surrendered its keys to the Plaintiffs and 10/04/2026 when the lease is to lapse. They relied on the following cases; Chimanlal Meghji Nay Shah & Another vs Oxford University Press (EA) Limited [2007] eKLR and Kenya Commercial Bank Limited v Popatlal Madhavji & another [2019] eKLR.
75. If the lease agreement dated 11/10/2015 was enforceable, the events that resulted in economic hardship to the Defendant could not be a reason to excuse any party from further performance of their obligations under the lease as it is settled law that parties are bound by the terms of their contracts and that it is not the business of courts to rewrite contracts between parties. See Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd [2017] eKLR. Further, parties should be ready to live with the consequences of agreements that they enter into since equity does not ordinarily allow a party to escape from a bad bargain. See National Bank of Kenya Ltd versus Pipe Plastic Samkolit (K) Ltd & another [2011] eKLR. However, this is not the case in the present matter. The Court found that the Lease agreement dated 11/10/2015 is an unenforceable agreement between the parties and therefore the case of Kenya Commercial Bank Limited v Popatlal Madhavji & another (supra) cannot be applied in this matter.
76. Once again, where there is no written agreement between the parties such as in this case, Section 57 of the Land Act provides for a periodic tenancy. According to Blacks’ Law Dictionary; ‘periodic tenancy’ means: “A tenancy that automatically continues for successive period usually month to month or year to year unless terminated at the end of a period by notice...”
77. From a perusal of the record, there is no evidence of any notice of termination of tenancy. I note that the parties herein both admit that the Defendant surrendered the keys to the suit premises back to the Plaintiffs on 31/07/2018. The Defendant’s action intimated that the Defendant is no longer in possession of the suit premises. I find that henceforth there existed no landlord and tenant relationship between the Plaintiffs and the Defendant. The Defendant’s actions terminated the periodic tenancy between the Plaintiffs and the Defendant. It follows then that the Plaintiffs’ prayers (iii) and (iv) fail. Nothing stopped the Plaintiffs from removing the Defendant’s furniture and placing it on storage or



asking the Defendant to come and collect its belongings. I am not satisfied that the Plaintiffs are entitled to prayers (iii) and (iv) as prayed for.

78. Prayer (v) is on interest on the outstanding amount owed until date of payment. Section 26 (1) of the *Civil Procedure Act* gives the court discretion to order interest at such rate as the court deems reasonable. In the case of *National Bank of Kenya Ltd v Peter Nyakundi & Another* [2006] eKLR the Court of Appeal held;

...This provision [section 26] is understood to be applicable only where the parties to the dispute have not by their agreement, fixed the rate of interest payable. If by their agreement parties have fixed the rate of interest payable, then the court has no discretion in the matter and must enforce the agreed rate unless it is shown in the usual way either that the agreed rate is illegal or unconscionable or fraudulent...”

79. The Lease agreement dated 11/10/2015 is unenforceable. It therefore follows that there is no fixed rate of interest that has been agreed upon by the parties for the Court to enforce. Pursuant to Section 26 (1) of the *Civil Procedure Act* and having found that the tenancy was a periodic tenancy, it is my considered view that the said interest cannot apply. I therefore decline to grant Prayer (v).
80. All in all, I have perused the Court record and I am satisfied that the Plaintiffs have established that the Defendant owes them Kshs. 9,232,492.50 in office rent arrears as seen on schedule 1, part 1 at page 20 of the Plaintiffs’ bundle and the Defendant owes them Kshs. 1,156,320.00 in parking charges fees arrears as seen on schedule 2, part 1 at page 22 of the Plaintiffs’ bundle.
81. In light of the foregoing, it is my finding that the Plaintiffs have proved their case to the required standard and it would therefore mean that they are entitled to some of the reliefs sought in the Plaintiff limited to Prayers (i), (ii) and (vi).

Whether the Defendant is entitled to the orders sought in the counterclaim.

82. The Defendant filed a counterclaim wherein it asserted that the action by the Plaintiffs to detain its tools of trade and other office equipment to date is unlawful and has caused it immense financial loss as it could no longer conduct its business. The Plaintiffs deny the allegations on the counterclaim. It is the Plaintiffs’ claim that it is the Defendant who handed over possession whilst the equipment was in the premises and that they did not detain the Defendant’s tools of trade and office equipment.
83. Having perused the Court record, it is my considered view that the Defendant failed to prove that the Plaintiffs locked the premises and detained its tool of trade thereby causing it immense financial loss. It is not in dispute that the Defendant voluntarily surrendered the key to the premises to the Plaintiffs leaving its belonging therein. The only material before the Court is a WhatsApp message sent on 10/09/2018 at page 10 of the Defendant’s bundle wherein DW1 was requesting for her personal belongings like pictures and awards. The Defendant has not shown that DW1 attempted to reach out to the Plaintiffs to get the furniture and/ or that the Plaintiffs denied the Defendant access and/ or refused to give the Defendant its belonging. He who alleges must prove. The list of office items that appears on page 13 and 15 of the Defendant’s bundle is insufficient as it does not prove anything. The Defendant has also failed to provide material demonstrating that the Plaintiffs were exercising their right to lien by detaining the Defendant’s furniture and other valuables.
84. Consequently, I find that the Defendant’s counterclaim totally fails. The Defendant is not entitled to any of the reliefs that it has sought. It also follows that the Counterclaim dated 1/03/2019 lacks merit and is hereby dismissed with costs.



Who should bear the Costs of this Suit and the Counterclaim?

85. It is trite law that costs follow the event. Section 27 of the *Civil Procedure Act* gives the Court discretion to grant costs. As the successful party is always entitled to costs except in exceptional circumstances, no exceptional circumstance exists in this suit, and thus the Court finds that the Plaintiffs being the successful litigants are entitled to the costs of the suit and the counterclaim.

Disposal orders

86. Accordingly, having been satisfied that the Plaintiffs have proved their claim to the required standards, I enter judgment for the Plaintiffs against the Defendant herein in the following terms: -

- i. Kshs. 9,232,492.50 on account of rent arrears for the period 11/10/2016 to 11/07/2018.
- ii. Kshs. 1,156,320 on account of parking charges arrears for the period 11/10/2016 to 11/07/2018.
- iii. The Plaintiffs are awarded the costs of the suit and the counterclaim.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JANUARY 2024.

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MOGENI J

JUDGE

In the virtual presence of:

Mr. Waiyaki holding brief for Mr. Muumbi for the Plaintiffs

Mr Ochieng holding brief for Mr. Oyatta for the Defendant

Caroline Sagina: Court Assistant

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MOGENI J

JUDGE

