



**Fredico Investments Limited v Graphic Investments Limited (Environment & Land Case 72 of 2019) [2024] KEELC 200 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 200 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 72 OF 2019  
JO MBOYA, J  
JANUARY 25, 2024  
[FORMERLY HCC NO. 880 OF 2009]**

**BETWEEN**

**FREDICO INVESTMENTS LIMITED ..... PLAINTIFF**

**AND**

**GRAPHIC INVESTMENTS LIMITED ..... DEFENDANT**

**JUDGMENT**

**Introduction And Background:**

1. The Plaintiff herein filed and/or commenced the instant suit vide Plaintiff dated the 2<sup>nd</sup> December 2009 and which Plaintiff was subsequently amended and thereafter Further amended with leave of the Honourable court. For coherence, the current proceedings are predicated and/or premised on the Further Amended Plaintiff dated the 28<sup>th</sup> January 2011, and in respect of which the Plaintiff herein has sought for the following reliefs;
  - i. Special damages for Kes.26, 501, 880/=Only.
  - ii. General damages for breach of the Agreement and illegal and wrongful Eviction.
  - iii. Aggravated damages for malicious damage to the Plaintiff's property known as Skymart Exhibition.
  - iv. Any other or further relief that the Honourable Court consider just and equitable.
  - v. Costs and interest.
2. Upon being served with the Further amended Plaintiff, [details in terms of the preceding paragraph], the Defendant herein filed a Statement of Defense dated the 18<sup>th</sup> February 2011; and wherein same denied the averments contained at the foot of the Further amended Plaintiff.



3. Be that as it may, even though the instant suit was filed and or commenced way back in the year 2009, the substantive hearing thereof did not commence up to and including the 4<sup>th</sup> November 2021; when the Plaintiff summoned and called her first witness. Quiet clearly, this is yet another of the many instances where the hearing of the suits before the court take along time before coming to fruition.
4. Nevertheless, it is imperative to underscore that when the hearing finally commenced, the Plaintiff called five [5] witnesses, whereas the Defendant summoned and/or called two[2] witnesses.

### **Evidence By The Parties:**

#### **A. Plaintiff's Case:**

5. The Plaintiff's case revolves around the evidence of five witnesses, namely, Fredrick Gathungu Kiige, Joseph Mugambi, Fredrick Oloo, John Thimba and Stanley Atonga Ondego, respectively. For coherence, same testified as PW1, PW2, PW3, PW4 and PW5, respectively.
6. It was the testimony of PW1, that same is a Director of the Plaintiff company alongside one, namely, Maria Josephine Nduma. In any event, the witness added that the said Maria Josephine Nduma is his wife [Spouse].
7. Furthermore, the witness testified that the Plaintiff company entered into a Lease agreement with the Defendant company which was dated the 27<sup>th</sup> February 2006; and same was to subsist for a period of 5 years and 6 months w.e.f 1<sup>st</sup> June 2004, which date was already pass.
8. It was the further testimony of the witness that the Plaintiff company took up the demised premises and initially operated a Restaurant therein, but subsequently converted same into stalls, which were thereafter leased out to various sub-tenants.
9. Additionally, it was the testimony of the witness that the Lease in question was to expire on the 30<sup>th</sup> November 2009. However, the witness added that on or about the 1<sup>st</sup> September 2009, the Plaintiff herein received a Letter of even date from the firm of M/s Kivuva Omuga & Co Advocates, who were (sic) acting for the Defendant/landlord and that the letter intimated to the Plaintiff to move out of the premises or in the alternative, if the Plaintiff was keen to renew the terms of the lease, then the Plaintiff was to comply with or abide by the terms which were enumerated in the body of the said Letter.
10. Furthermore, the witness also averred that on the 7<sup>th</sup> September 2009, the Plaintiff yet again received another Letter of even date from the firm of M/s Kivuva Omuga & Company Advocate who were acting for the Defendant/Landlord and wherein the Defendant intimated to the Plaintiff that same (Defendant) had agreed to renew the lease in favor of the Plaintiff with effect from the 1<sup>st</sup> December 2009.
11. In any event, the witness added that the Defendant also indicated that the new terms/details of the Lease would be disseminated shortly.
12. Other than the foregoing, it was the testimony of the witness that on the 23<sup>rd</sup> November 2009, the Plaintiff company indicated her willingness to renew the lease and ventured forward to intimate to the Defendant that same (Plaintiff) has raised the sum of Kes.4, 000, 000/= only towards and on account of the goodwill which the Defendant had intimated as one of the conditions towards renewal.
13. Other than the foregoing, it was the testimony of the witness that on the same date, namely, the 23<sup>rd</sup> November 2009 the Defendant through the firm of M/s Kivuva Omuga & Co Advocate wrote to the Plaintiff vide Letter dated the 23<sup>rd</sup> November 2009; and wherein the Defendant was now indicating



- that same was not willing to renew the lease. Furthermore, the witness averred that at the foot of the said letter, the Defendant also intimated that same had given the premises to a new tenant.
14. It was the further testimony of the witness that despite the surprising turns of events espoused vide the Letter dated the 23<sup>rd</sup> November 2009, both himself (witness) and Maria Josephine Nduma [his wife/co-director] held several meetings with Mr. and Mrs. Martin Muthama, who are the Directors of the Defendant company.
  15. Nevertheless, it was the further testimony of the witness that despite holding several meetings with the Directors of the Defendant company, the Plaintiff herein out of abundant caution decided to file and or lodge the instant suit with a view to protecting her interests over and in respect of the demised premises.
  16. Further and in addition, it was the testimony of the witness that upon the filing of the instant suit, the Plaintiff also mounted an application for temporary injunction under certificate of urgency, which application was duly certified as urgent and thereafter placed before the Duty Judge on the 31<sup>st</sup> December 2009.
  17. Moreover, the witness testified that the application for temporary injunction was indeed canvassed before the Duty Judge, who thereafter reserved the Ruling for delivery on the 4<sup>th</sup> January 2010. Nevertheless, the witness added that the Duty Judge proceeded to and granted an order of status quo as pertains to the demised premises.
  18. On the other hand, the witness testified that on the 4<sup>th</sup> January 2010, the Ruling pertaining to the Application for temporary injunction was indeed delivered and the orders of temporary injunction were duly granted albeit in the presence of Maria Josephine Nduma, as well as Martin Muthama, one of the Directors of the Defendant company.
  19. However, the witness testified that even though the Duty Judge had proceeded to and granted an order of temporary injunction which was in the knowledge of Martin Mmutham, Director of the Defendant company, same [Martin Muthama] proceeded to and hired goons and hoodlums, who proceeded to the demised premises and destroyed the partitions which had been erected and/or mounted by the Plaintiff and which forms the basis of the suit by the Plaintiff.,
  20. Arising from the foregoing, the witness averred that same was thereafter constrained to and indeed mounted a report with Central Police Station, to see whether the Police would be of any assistance.
  21. Furthermore, the witness testified that despite having reported the incident to Central police Station, the efforts to have the Police intervene were not fruitful and in any event, were thwarted by the Defendant herein.
  22. It was the further testimony of the witness that arising from the malicious actions by and on behalf of the Defendant, same instructed the Plaintiff's advocates to proceed and re-amend the claim before the Honourable court with a view to claiming compensation for the loss and damages that had been occasioned by the Defendant and/or her agents.
  23. On the other hand, the witness testified that same also proceeded to and procured the services of M/s Cunningham and Lindsey Loss Adjusters to help in the assessment of the loss relating to the damaged partitions and Electrical Equipment's. To this end, the witness added that a loss adjuster was thereafter disputed by M/s Cunningham and Lindsey, who prepared a report attendant to the loss suffered.
  24. Further and in addition, the witness also testified that same also engaged and/or instructed the Plaintiff's Accountant/Auditors to prepare the requisite Books of Accounts showing the status of the



- Plaintiff's affairs. In this respect, the witness averred that an Auditor indeed undertook the audit and prepared the relevant Books of account, which according to the witness demonstrated that the Plaintiff was making good profits and was a going concern.
25. Other than the foregoing, it was the testimony of the witness that the Plaintiff herein indeed paid the rents for the month of November 2009; as well as the rents for December 2009, respectively.
  26. Additionally, it was the testimony of the witness that as pertains to the subject matter, same had recorded a witness statement dated the 8<sup>th</sup> February 2018, [whose details have been reproduced herein before], and same sought to adopt the said witness statement as his Evidence in chief.
  27. For coherence, the witness statement dated the 8<sup>th</sup> February 2018; was adopted and effectively constituted as the Evidence in chief.
  28. On the other hand, the witness alluded to the List and Bundle of Documents dated the 30<sup>th</sup> November 2011, containing 17 documents and which the witness sought to adopt and produce in Evidence/ Exhibits before the Honourable court.
  29. Suffice it to point out that save for document number sixteen [16], namely, the Loss Adjustment Report, which was marked, the rest of the documents were duly produced and admitted as Exhibits P1 to P16.
  30. Furthermore, the witness also alluded to a Further List and Bundle of Documents dated the 17<sup>th</sup> December 2012, containing Four (4) documents. For good measure, save for document number one [1], the rest of the documents were admitted as Exhibits P17 to P19, respectively.
  31. Besides, the witness also adverted to a Further/Supplementary List and Bundle of Documents dated the 24<sup>th</sup> November 2014; containing Three [3] documents and which the witness sought to produce before the Honourable court. In the absence of any objection, the documents at the foot of the List dated the 24<sup>th</sup> November 2014; were introduced and admitted as Exhibits P21 to P23, respectively.
  32. Finally, the witness alluded to the Further amended Plaint dated the 28<sup>th</sup> January 2011; and implored the Honourable court to proceed and grant the reliefs sought at the foot thereof.
  33. On cross examination by Learned counsel for the Defendant, the witness stated that the Plaintiff herein had entered into and executed a Lease agreement dated the 27<sup>th</sup> February 2006. Further, the witness averred that the lease in question had a renewal clause.
  34. Whilst under further cross examination, the witness averred that he (witness) did not apply for renewal of the lease. Nevertheless, it was the testimony of the witness that the Plaintiff received a letter from the Landlord's advocate dated the 1<sup>st</sup> September 2009, which related to and/or concerned the question of renewal of the Lease.
  35. On further cross examination, the witness averred that upon receipt of the Letter dated the 1<sup>st</sup> September 2009, the Plaintiff did not write back to the landlord. However, the witness added that what the Plaintiff did was to approach the landlord/Defendant directly and same engaged on the question of renewal.
  36. Other than the foregoing, the witness testified that on the 7<sup>th</sup> September 2009, same (witness) indicated that the Defendant generated and issued a Letter of even date whose terms were to the effect that the Defendant had agreed to renew the Lease in favor of the Plaintiff.



37. On the other hand, it was the testimony of the witness that upon the receipt of the Letters from the landlord/Defendant's advocate, same [witness] approached his bankers with a view to procuring a facility in the sum of Kes.4, 000, 000/= only which was to be paid and utilized for paying the goodwill.
38. Whilst under further cross examination, the witness averred that on the 23<sup>rd</sup> November 2009; his co-director, namely, Maria Josephine Nduma, wrote a letter to the Landlord's advocate intimating the Plaintiff's willingness to renew and take up the renewed Lease.
39. Additionally, it was the testimony of the witness that even though the Plaintiff herein made an application to her banker for banking facility, the purpose of the facility was not disclosed on the face of the Application. In any event, the witness averred that the bank did not require the Plaintiff to disclose the purpose of the banking facility.
40. As pertains to whether the rent for November and December 2009 were paid, the witness answered in the affirmative. For coherence, it was the further testimony of the witness that the rent for November 2009 was paid vide cheque, but which cheque was dishonored, culminating into the issuance of a replacement cheque.
41. In respect of the destruction of the partitions at the demised premises, the witness pointed out that the destruction was carried out and/or undertaken on the 4<sup>th</sup> January 2010, shortly after the delivery of the Ruling on temporary injunction.
42. Furthermore, the witness testified that arising from the demolition, same caused a complaint and/or a report to be lodged with Central Police Station culminating to the issuance of an OB No. However, the witness added that the OB No. was erroneous insofar as same referred to the year 2009, yet same should have reflected the year 2010. Nevertheless, the witness clarified that the issues as pertains to the year was an error on the part of the Police.
43. On further cross examination, the witness testified that at the onset the Plaintiff was carrying out a Food Restaurant, but because the Restaurant was not making any profits, the Plaintiff decided to convert the premises into stalls, which were thereafter leased out and was rented to various sub-tenant. For coherence, it was the testimony of the witness that the conversion of the Restaurant/Hotels into stalls and exhibitions took place on or around June 2008.
44. Other than the foregoing, it was the Evidence of the witness that for the year 2007, the Plaintiff's business made a profit which position was similarly witnessed in the year 2008. However, the witness admitted that the Plaintiff company made losses for the years 2006/2007.
45. The second witness who testified on behalf of the Plaintiff was Joseph Mugambi. Same testified as PW2.
46. It was the testimony of the witness that same is a Certified Public Accountant [CPA-K]. In any event, the witness added that same works with the firm of M/s Muinde & Associates Accountants.
47. Furthermore, the witness herein averred that same is conversant and/or familiar with the Plaintiff company, insofar as same has been the auditors for the Plaintiff company between the years 2005 to 2008.
48. Moreover, it was the testimony of the witness that the firm of M/s Muinde & Associates; prepared various Books of accounts for and on behalf of the Plaintiff company and that the Books of accounts/ reports are before the court.



49. Other than the foregoing, the witness thereafter proceeded to and tendered in Evidence the various Books of Accounts/Report which were produced and marked as Exhibit P20.
50. On cross examination, the witness pointed out that same had undertaken the preparation of the books of accounts for the Plaintiff between the years 2005 to 2009. However, the witness added that in 2009, no Statement of Account/Report were prepared because the Plaintiff company had been evicted from the premises.
51. Whilst under further cross examination, the witness stated that page 151 of the Audit Report tendered and produced before the Honourable court relates to Plant and Machineries. Furthermore, the witness averred that the said Plant and Machineries have been provided for.
52. Moreover, the witness averred that the Audit Report has also provided for the depreciation of the Plants and Machineries at the rate of 12.5%.
53. It was the further testimony of the witness that from the Financial Statements which had been tendered and produced before the Honourable court, there is no evidence that the company spent and/or expended the sum of kes.2, 000, 000/= Only, on Plant and Machinery.
54. Be that as it may, the witness testified that the Plaintiff company was however paying taxes to Kenya Revenue Authority (KRA). Nevertheless, when pressed further, the witness admitted that the bank statement tendered and adduced before the court do not show any evidence of any payment from the Plaintiff's bank account to KRA.
55. As pertains to the financial standing of the Plaintiff company, the witness testified that between the years 2005/2006 and 2006/2007, the Plaintiff company declared losses. However, it was the further testimony of the witness that between the years 2007 to 2008; the Plaintiff Company made and declared Profits.
56. The third witness who testified on behalf of the Plaintiff was Fredrick Oloo. Same testified as PW3.
57. It was the testimony of the witness that same is a Loss adjuster currently employed by M/s Cunningham & Lindsey Loss Adjusters. In any event, the witness added that same had attended court, with a view to testify pursuant to and as a result of witness summons issued by the Honourable court.
58. Other than the foregoing, the witness averred that the firm, of M/s Cunningham & Lindsey Loss Adjusters, had been instructed and/or engaged by the Plaintiff herein for purposes of undertaking the loss adjustment in the demised premises and thereafter the said firm [Cunningham & Lindsey], prepared a Report dated the 28<sup>th</sup> January 2010.
59. Furthermore, the witness herein thereafter sought to produce and/or tender before the Honourable Court the Report dated the 28<sup>th</sup> January 2010; and which report was duly admitted and marked as Exhibit P17.
60. Other than the foregoing, the witness averred that the report in question relates to two aspect of losses, which were ascertained and captured in the body thereof. In particular, the witness alluded to the actual loss of Kes.2, 000, 000/= relative to the damaged partitions.
61. Additionally, the witness also alluded to the assessment to the loss relative to Electrical fittings and appliances.
62. Thereafter, the witness intimated to the Honourable court that there was an element of depreciation which was factored in at 10%; thereby giving the net loss in the sum of Kes.1, 980, 000/= only.



63. On further cross examination, the witness herein testified that same joined M/s Cunningham & Lindsey Loss Adjusters in the year 2022; and in any event, that the loss adjustment report was not prepared by himself.
64. Whilst under further cross examination, the witness testified that the loss adjustment report, namely, Exhibit P17 was prepared by one Mr. Muchoki. However, the witness added that same was not conversant with the signature of Mr. Muchoki.
65. Other than the foregoing, the witness testified that same was neither privy to nor knowledgeable of when and how Mr. Muchoki visited the locus in quo.
66. Moreover, it was the evidence of the witness that from the Report, which has been adduced/ produced before the court, it is the evident that Mr. Muchoki, took various photographs of the premises.
67. Furthermore, the witness herein averred that same was privy to and knowledgeable of the fact that the demised premises had been sublet to various tenants. Nevertheless, the witness clarified that same had no copies of the Lease[s] in respect of the subtenants.
68. The Fourth witness who testified on behalf of the Plaintiff was John Thimba. Same testified as PW4.
69. It was the evidence of the said witness that same is an Advocate of the High Court of Kenya; and that at the commencement of the suit, same was employed by the firm of M/s Kibatia & Company Advocates.
70. Furthermore, the witness herein averred that it is same [witness] who crafted and prepared the pleadings and witness statement in respect of the subject matter. In addition, the witness averred that it is also him who attended court to prosecute the application for temporary injunction on the 31<sup>st</sup> December 2009, when the court issued an order of Status Quo; as well as on the 4<sup>th</sup> January 2010, when the court delivered the Ruling in respect of the application for temporary injunction.
71. On cross examination by Learned counsel for the Defendant, the witness herein pointed out that same is conversant with the facts pertaining to the subject matter, as well as the orders which were issued by the Honourable Court.
72. In addition, the witness also averred that on the 31<sup>st</sup> December 2009, as well as on the 4<sup>th</sup> January 2010, one of the directors of the Defendant company, namely, Mr. Muthama was present in court.
73. Whilst under further cross examination, the witness avers that upon the delivery of the ruling, same gathered and/or established that the demised premises had been attacked and destroyed. In any event, the witness added that as a result of the destruction, same (witness) advised the directors of the Plaintiff company to make a report to the Police.
74. Other than the foregoing, the witness also testified that same also advised the Directors of the Plaintiff company to go to the site/locus in quo and to salvage anything on the site. Nevertheless, the witness added that he was not aware whether the Directors of the Plaintiff indeed went to the locus in quo to salvage any properties.
75. The fifth witness who testified on behalf of the Plaintiff was Stanley Atonya Ondego. Same testified as PW5.
76. It was the testimony of the said witness that same (witness) used to work with the Plaintiff company as a caretaker of the Plaintiff's premises. However, the witness added that currently same deals in spares within Huruma Area, in the City of Nairobi.



77. Furthermore, the witness averred that same is conversant with the facts pertaining to the subject matter and in any event, that same [witness] has since recorded a witness dated the 17<sup>th</sup> November 2011, which the witness sought to adopt as his Evidence in chief.
78. Suffice it to point out that the witness statement dated the 17<sup>th</sup> November 2011; was duly admitted and constituted as the Evidence in chief of the witness.
79. On cross examination, the witness averred that same attended court on the 4<sup>th</sup> January 2010; when the Ruling as pertains to the application for temporary injunction was to be delivered. However, the witness clarified that when he attended court he went to a different court, whilst the proceedings were being undertaken elsewhere.
80. Whist under further cross examination, the witness averred that on the 4<sup>th</sup> January 2010; when he attended court he [Witness], saw Mr. Muthama, who is one of the Directors of the Defendant company.
81. Nevertheless, it was the further testimony of the witness that same (witness) left court earlier than Mr. Muthama. Finally, the witness averred that the premises, wherein he (witness) was a caretaker, were invaded on the 4<sup>th</sup> January 2010, being the same date when he had attended court.
82. With the foregoing testimony the Plaintiff's case was duly closed.

#### **B Evidence By The Defendant:**

83. The Defendant's case revolves and gravitates around the Evidence of two [2] witnesses, namely, Martin Ngau Muthama and Harrison Muyau Kinyesi, who testified as DW1 and DW2, respectively.
84. It was the evidence of DW1, that same is one of the Directors of the Defendant company alongside one Sarah Ngatia Ngau. Furthermore, the witness added that Sarah Ngatia Ngau, who is the co-director, is his wife [Spouse].
85. It was the further testimony of the witness that same is conversant with the facts of the instant matter and in any event, that the Defendant company is the owner and/or proprietor of the suit property.
86. Moreover, the witness herein stated that same [DW1], had recorded a witness statement dated the 22<sup>nd</sup> February 2018; and which statement the witness sought to adopt and to rely on as his Evidence in chief.
87. Suffice it to point out that the witness statement dated the 22<sup>nd</sup> February 2018; was thereafter admitted and constituted as the Evidence in chief of the witness.
88. Other than the foregoing, the witness herein alluded to the List and Bundle of documents dated the 16<sup>th</sup> June 2014, containing a total of five [5] documents, which the witness sought to adopt and to rely on. For coherence, there being no objection, the documents at the foot of the List and Bundle of documents were thereafter remitted and produced as Exhibits D1 to D5, respectively on behalf of the Defendant.
89. Moreover, it was the testimony of the witness that same did not attend court on the 4<sup>th</sup> October 2010. In any event, the witness averred that his court attendance today, is the first time he [witness], is attending court as pertains to the hearing of the instant matter.
90. Furthermore, the witness averred that same did not hire and/or lead any goons to destroy the Demised premises or at all. In any event, the witness testified that subsequently, same [witness] was summoned to the Police over the issue pertaining to the alleged destruction of the demised premises.



91. It was the further testimony of the witness that the Defendant herein has not been able to refund the deposit to the tenant (Plaintiff) because the Tenant damaged the premises prior to her departure thereof.
92. Additionally, the witness[ DW1], averred that subsequent to the departure of the tenant (Plaintiff) from the premises, the Defendant herein spent a total of kes.600, 000/= only, to repair the demised premises.
93. On cross examination by Learned counsel for the Plaintiff, the witness herein averred that same bought and acquired the suit property when the Plaintiff was already a Tenant therein. Furthermore, the witness averred that latter on, namely, on the 1<sup>st</sup> September 2009, the Defendant's advocate wrote to the Plaintiff herein, when it was apparent that the Plaintiff's lease was about to expire.
94. Whilst under further cross examination, the witness avers that the purpose of the letter[s] which were written to the Plaintiff, were to ascertain whether the Plaintiff would be ready and/or willing to renew the lease.
95. Be that as it may, the witness averred that same did not meet the directors of the Plaintiff company on the 7<sup>th</sup> September 2009 or at all.
96. It was the further testimony of the witness that the Defendant herein intimated to the Plaintiff that same was ready and willing to renew the lease and in any event, that the terms of the renewal were duly communicated to the Plaintiff. In addition, the witness averred that the terms were communicated through the Defendant's advocates on record.
97. On further cross examination and upon being referred to the document at page 4 of the Defendant's bundle of documents, the witness averred that same did not meet the Directors of the Plaintiff Company to discuss the question of the renewal of the lease.
98. Other than the foregoing, the witness averred that same (witness) also wrote to the Plaintiff and informed same that the premises in question were being given to another tenant. In any event, the witness averred that the Plaintiff's tenancy lapsed in November 2009.
99. In respect of the orders of the court, issued on the 31<sup>st</sup> December 2009, the witness pointed out that same were issued long after the Plaintiff had vacated and left premises. Further and in any event, it was the further testimony of the witness that the rent for December 2009, was paid by the Plaintiff's sub-tenants and not by the Plaintiff herein. Furthermore, the witness added that same would be calling the sub tenants who were in the premises to confirm the payments of the rent for the month of December 2009.
100. Similarly, it was the evidence of the witness that the Police came to the suit property/demised premises on the 31<sup>st</sup> December 2009. In any event, the witness averred that same was informed of the presence of the Police officers on the suit property by his manager, namely, Mr. Harrison Munyau.
101. Whilst under further cross examination, the witness averred that the Plaintiff herein had vacated and left the premises by the time same were damaged. In any event, the witness averred that the premises were damaged between the years 2009 to 2010.
102. Moreover, it was the testimony of the witness that the premises were damaged by the Plaintiff's sub-tenants. Nevertheless, the witness averred that same did not report the damage by the sub-tenants to any State Agency or at all.



103. Finally, it was the testimony of the witness that the Defendant herein did not refund the deposit of rents to the Plaintiff. Additionally, the witness averred that the deposit in question was to take care of any default and/or damages to the demised premises.
104. The second witness who testified on behalf of the Defendant was Harrison Munyau Kinyesi. Same testified as DW2.
105. It was the testimony of the witness [DW2] that between the years 2009 to 2012, same was a manager of the Defendant at the Defendant's premises situated within the city of Nairobi.
106. Moreover, the witness averred that by virtue of having been the Defendant's manager on the suit property, same is there for conversant/ familiar with the facts pertaining to the subject matter.
107. Additionally, the witness averred that as concerns the subject matter, same recorded a witness statement which he (witness) said was undated. Nevertheless, the witness sought to adopt and rely on the contents of the undated witness statement.
108. Suffice it to point out that the undated witness statement was thereafter admitted and constituted as the Evidence in chief of the witness.
109. Furthermore, it was the testimony of the witness that on the 4<sup>th</sup> January 2010, same (witness) was present at the premises when the Plaintiff's sub-tenants vacated and left the premises.
110. On cross examination by Learned counsel for the Plaintiff, the witness pointed out that same was employed as a manager in the year 2002, long before the current Defendant bought and acquired the suit property.
111. In any event, the witness averred that by virtue of being the manager of the suit property his [DW2], main obligation was to collect rents on behalf of the Defendant from the various tenants in the suit property. Furthermore, the witness averred that same was conversant with the Directors of the Plaintiff company.
112. Whilst under further cross examination, the witness avers that the Plaintiff company would ordinarily pay her monthly rent vide cheque, which would be delivered to his (witness) offices and which the witness thereafter would remit to the Defendant.
113. Other than the foregoing, the witness testified that the Plaintiff herein vacated the premises on the 30<sup>th</sup> November 2009. However, the witness added that the Plaintiff did not intimate to him (witness) that same was vacating the premises.
114. It was the further testimony of the witness that the Plaintiff herein had various sub-tenants in the premises and it was the sub-tenants who paid the rents for the month of December 2009.
115. On further cross examination, the witness averred that same was not aware whether the Police visited the suit property on the 31<sup>st</sup> December 2009. In any event, the witness added that he [Witness], would also not be aware of the reasons for such visitation by the Police.
116. Finally, the witness averred that as at the 4<sup>th</sup> January 2010, the Plaintiff herein had vacated the suit premises and furthermore, there was already a new tenant in the premises. However, the witness averred that same was not familiar with the details of the tenants nor was he (witness) aware whether the new tenant had a lease in respect of the premises in question.
117. In any event, it was the testimony of the witness that the issue of lease was within the mandate of the Defendant's Directors; and therefore he (witness) would not know whether a lease had been issued.



118. With the foregoing testimony, the Defendant's case was duly closed.

### **Parties' Submissions:**

#### **A. Plaintiff's Submissions:**

119. The Plaintiff herein filed written submissions dated the 17<sup>th</sup> November 2023; and in respect of which same sought to undertake (sic) analysis of the Evidence that was tendered before the Honourable court.
120. Having undertaken what is called analysis of the Evidence tendered, Learned counsel for the Plaintiff essentially reproduced the Evidence that was tendered before the court and thereafter implored the Honourable court to grant the various reliefs sought at the foot of the Further amended Plaint dated the 28<sup>th</sup> January 2011.
121. Furthermore, it was the submissions of Learned counsel for the Plaintiff that the Plaintiff had proved and established that the Defendant herein had agreed to renew the lease in favor of the Plaintiff for a duration of 5 years 3 months; and hence the impugned actions by and on behalf of the Defendant, constituted breach of the agreement to renew the lease.
122. Additionally, Learned counsel for the Plaintiff submitted that the Plaintiff has placed before the Honourable court evidence to show that the Plaintiff company was a profit-making company and same was deriving monthly profit/income of Kes.400, 000/= per month.
123. Thirdly, Learned counsel for the Plaintiff also submitted that arising from the actions by and on behalf of the Defendant herein, the Plaintiff lost the various stalls and partitions which had been erected in the demised premises. To this end, Learned counsel for the Plaintiff invited the court to find and hold that the Plaintiff was therefore entitled to recompense on the basis on the monies spent on the erection of the partitions, less 10% depreciation.
124. Fourthly, Learned counsel also invited the Honourable court to find and hold that the Plaintiff herein was entitled to refund of the deposited of rent, which had been paid at the onset of the tenancy, but which Deposit had not been refunded. In this respect, Learned counsel for the Plaintiff invited the attention of the Honourable court to clause 3.1.3 of the Lease agreement, which underscored the repayment of the refund.
125. Finally, Learned counsel for the Plaintiff implored the Honourable court to find and hold that the Plaintiff was also entitled to General damages for breach of agreement and wrongful Eviction; and thereafter proposed an award/recompense in the sum of kes.5, 000, 000/= Only, as General damages.
126. In a nutshell, Learned counsel for the Plaintiff contended that the Plaintiff has been able to place before the Honorable court sufficient and credible evidence to prove the claims at the foot at the Further amended Plaint. In a nutshell, Learned counsel has therefore implored the Honourable court to grant the reliefs as sought at the foot of the Further Amended Plaint.

#### **B. Defendnt's Submissions:**

127. The Defendant herein filed written submissions dated the 15<sup>th</sup> November 2023; and similarly, ventured forward by reproducing the totality of the Evidence that was tendered by and on behalf of the Parties. Thereafter, the Defendant highlighted and canvassed three [3] issues for consideration by the Honourable court.



128. Firstly, Learned counsel for the Defendant submitted that the lease which had been entered into and executed between the Plaintiff and the Defendant and which was dated the 27<sup>th</sup> February 2006, had a fixed term lease, devoid of any clause pertaining to renewal.
129. Furthermore, Learned counsel for the Defendant submitted that where a Lease is a fixed term Lease, [which does not contain any renewal clause], then such a Lease determines and terminates by effluxion of time.
130. In support of the foregoing submissions, Learned counsel for the Defendant has cited and quoted various decisions, inter-alia, Margaret A Ochieng vs Nairobi Water Conservation & Pipeline Corporation (2014)eKLR, George Onyango vs Board of Directors, Numerical Machining Complex Ltd & Others (2014)eKLR, Bernard Wanjoi Murioki vs Kirinyaga Water & Sanitation Company Ltd & Another (2012)eKLR, respectively.
131. Based on the foregoing, Learned counsel for the Defendant has therefore invited the court to find and hold that the Lease agreement between the Plaintiff and the Defendant, which was in respect of an immovable property was neither renewed or at all.
132. Additionally, Learned counsel for the Defendant has submitted that the renewal of the lease to and in favor of the Plaintiff would have required the lease to be reduced in writing and executed by both Parties in accordance with the provisions of Section 3(3) of the Law of Contracts Act, Chapter 23 Laws of Kenya.
133. In a nutshell, Learned counsel for the Defendant has invited the Honourable court to find and hold that the Lease in question was never renewed.
134. Secondly, Learned counsel for the Defendant has also submitted that the contention by and on behalf of the Plaintiff that the Defendant herein had agreed to renew the lease is predicated on the basis of the Letter dated the 7<sup>th</sup> September 2009. However, Learned counsel for the Defendant has contended that the impugned letter which is relied upon by the Plaintiff was written on a without prejudice basis.
135. Accordingly, Learned counsel for the Defendant has contended that the court should not take cognizance of the said document which was issued on [sic] a without prejudice basis.
136. In support of the submissions pertaining to the import and tenor on a document issued on a without prejudice basis, Learned counsel for the Defendant has cited and relied on, inter-alia, the holding in the case of Guardian Bank Ltd vs Jambo Biscuits Ltd (2014)eKLR as well as the provisions of Section 23(1) of the *evidence Act*, Chapter 80 Laws of Kenya.
137. Thirdly, Learned counsel for the Defendant has submitted that the Plaintiff herein has not been able to prove and or demonstrate that there were any properties that were damaged or at all. In any event, Learned counsel has invited the court to take cognizance of the various discrepancies attendant to the date[s] when the complaints were made to the Police station, as pertains to (sic) the damages complained of.
138. Moreover, Learned counsel for the Defendant has added that in the absence cogent, plausible and credible evidence, it is impossible for the court to ascertain even the identity of the person[s] who allegedly damaged the Plaintiff's property.
139. In respect of the claim for General damages for breach of agreement and wrongful eviction, Learned counsel for the Defendant has submitted that breach of agreement and/or contract, cannot culminate into an award of General damages either as sought by the Plaintiff or at all.



140. To the contrary, Learned counsel for the Defendant has submitted that breach of Contract and/or agreement can only yielded recompense on Special damages, which must not doubt be pleaded and specifically proved.
141. In support of the foregoing submissions, Learned counsel for the Defendant has cited and relied in the case of Kenya Tourist Corporation vs Sandowner Lodge Ltd (2018)eKLR, Securicur Kenya Ltd vs Davidson Benson Onyango & Another (2008)eKLR and Dharamsi vs Karsang (1974)EA 41, respectively.
142. Lastly, Learned counsel for the Defendant has submitted that the Plaintiff is not entitled to payment for loss of business insofar as the accounts being relied upon by the Plaintiff, were wrought with errors and in any event, appear to have been clearly manufactured to attract unjust enrichment on the part of Plaintiff.
143. In a nutshell, it was the submissions by Learned counsel for the Defendant that Plaintiff herein has neither established nor demonstrated entitlement to any iota of claims that have been enumerated at the foot of the Further amended Plaint dated the 28<sup>th</sup> January 2011 or at all.
144. Consequently, Learned counsel for the Defendant has implored the Honourable court to find and hold that the Plaintiff has not proved her claim to the requisite standard and thus same ought to be dismissed with costs to the Defendant.

#### **Issues For Determination:**

145. Having reviewed the Pleadings filed by and on behalf of the respective Parties and upon taking into account the Evidence tendered (both oral and documentary) and finally upon consideration of the written submissions on behalf of both Parties, the following issues do emerge and are thus worthy of determination;
  - i. Whether the Defendant herein intimated and confirmed to the Plaintiff that same had agreed to renew the Lease; and if so, Whether the subsequent turn around constituted and amounted to breach the promise/ Agreement.
  - ii. Whether the Plaintiff herein suffered any loss as a result of breach of the Agreement to renew the Lease; and if so, the nature and quantum of such loss, if any.
  - iii. Whether the Letter dated the 7<sup>th</sup> September 2009, which was issued on a without prejudice basis but ultimately admitted in evidence with the concurrence of the Defendant can be relied upon or otherwise.
  - iv. What reliefs, if any, ought to be granted.

#### **Analysis And Determination:**

##### **Issue Number 1 Whether the Defendant herein intimated and confirmed to the Plaintiff that same had agreed to renew the lease and if so, whether the subsequent turn around constituted and amounted to breach of the promise/ Agreement.**

146. It is common ground that the Plaintiff herein had hitherto entered into and executed a Lease agreement with the Defendant, which lease agreement was dated the 27<sup>th</sup> February 2006, but which lease agreement was to commence and/or run w.e.f the 1<sup>st</sup> June 2004. For coherence, it is evident that by the time the lease in question was being executed, the term at the foot thereof had commenced to run.



147. Furthermore, there is no gainsaying that the lease dated the 27<sup>th</sup> February 2006, was to subsist for a duration of 5 years and 6 months and in any event, same was bound to lapse and/or expire on the 30<sup>th</sup> November 2009.
148. Cognizant of the fact that the term of the Lease in favor of the Plaintiff was about to expire, the Defendant herein through her advocates, namely, M/s Kivuva Omuga & Company Advocates generated and wrote a Letter dated the 1<sup>st</sup> September 2009; and which was addressed to the Plaintiff herein.
149. It is evident from the face of the letter in question that the Defendant was intimating to the Plaintiff that her lease in respect of the demised premises would be coming to a close and hence the Plaintiff was obliged to vacate and hand over vacant possession by the 30<sup>th</sup> November 2009.
150. In the alternative, the Defendant intimated to the Plaintiff that in the event that same (Plaintiff) was keen/desirous to renew the lease then the Plaintiff was obligated to comply with and/or abide by the new terms, whose details were similarly enumerated at the foot of the Letter dated the 1<sup>st</sup> September 2009.
151. Additionally, the Defendant also intimated to the Plaintiff that in the event that same (Plaintiff) was desirous to renew the terms of the lease and in any event acceptable to the proposed/revised terms, same (Plaintiff) was to communicate her acceptance within 14 days from the date of issuance of the Letter under reference.
152. Instructively, it is the Defendant who wrote to and in favor of the Plaintiff and thereby put in motion the process towards the renewal of the terms of the lease, which was bound to lapse on the 30<sup>th</sup> November 2009.
153. Subsequently, the Defendant through her advocates again wrote to the Plaintiff vide Letter dated the 7<sup>th</sup> September 2009 and wherein same expressly and unequivocally intimated to the Plaintiff that the Defendant had agreed to renew the lease for a duration of 5 years and 3 months. For clarity, it was intimated that the renewed lease would commence from the 1<sup>st</sup> December 2009 to the 28<sup>th</sup> February 2014.
154. For brevity, it is important to reproduce the contents of the Letter dated 7<sup>th</sup> September 2009. Consequently, same are reproduced as hereunder;

“RE: Lease over L.R No. 209/1913/1 – Nairobi

We act for Graphic investment Limited, who are your Landlord in the above mentioned property.

We are glad to inform you that our client has agreed to renew your lease for 5 years and 3 months. The lease will commence from the 1<sup>st</sup> December 2009 to the 28<sup>th</sup> February 2014.

We shall revert to you on the new conditions and details of the lease.

Yours faithfully

M/s Kivuva Omuga & Waweru Co Advocates.

155. On the face of the Letter under reference, it is indicated that same was issued on a without prejudice basis. Nevertheless, it is important to point out and underscore that the letter dated the 7<sup>th</sup> September 2009; was discovered and filed by both the Plaintiff and the Defendant, respectively.



156. Moreover, on the 4<sup>th</sup> November 2021, when the Plaintiff's first witness [PW1], testified and sought to produce the various documents alluded to at the foot of the List and bundle of documents dated the 30<sup>th</sup> November 2011, Learned counsel for the Defendant intimidated to the court same would only be objecting to the production of document number Sixteen [16], namely, the loss assessment report by M/s Cunningham & Lindsey Loss Adjusters, dated the 18<sup>th</sup> January 2010. To the contrary, learned counsel for the Defendant was amenable to the production and admission of the letter dated the 7<sup>th</sup> September 2009.
157. On the other hand, it is also not lost on this court that when the 1<sup>st</sup> Defendant's witness, namely, Martin Ngau Muthama testified on the 2<sup>nd</sup> November 2023, same sought the liberty of the court to adopt and rely on the List and Bundle of documents dated the 16<sup>th</sup> June 2014, inter-alia, the Letter dated 7<sup>th</sup> September 2009. Instructively, the admissibility of the letter in question was not contested and hence the court proceeded to and admitted same as Exhibit D3.
158. It has been necessary to provide the foregoing background, because the letter in question was authored on a without prejudice basis and both Parties tendered same in evidence without objecting same or otherwise.
159. To my mind, the Letter dated the 7<sup>th</sup> September 2009, having been tendered and produced before the court as mutual Exhibit by both Parties, the court is under obligation to review the contents thereof and to interpret same within the four corners of same, albeit taking into account the import and tenor of the provisions of Section 97 and 98 of the Evidence Act, Chapter 80 Laws of Kenya.
160. In my humble understanding, vide the contents of the Letter dated the 7<sup>th</sup> September 2009, the Defendant herein was committing [indeed committed], herself to renewing the lease to and in favor of the Plaintiff and by extension same signified that the renewed lease would commence w.e.f 1<sup>st</sup> December 2009.
161. Furthermore, evidence was also tendered that the Plaintiff herein proceeded to and indeed paid rents for the month of December 2009, which rents were duly accepted and acknowledged by the Defendant.
162. Be that as it may, it is not lost on the court that the Defendant witness, namely, DW1 contended that the rent for the December 2009 was paid by the Plaintiff's sub-tenants and not the Plaintiff herein. In any event, DW1 thereafter ventured forward and stated that same would be calling the sub-tenants who were in the premises to prove that same were the ones who paid the rent for December 2009.
163. Nevertheless, the record is explicit that by the time the Defendant's case was closed, none of the sub-tenants, whom DW1 had intimated would be called, was ever called at all.
164. Additionally, it is worth recalling that the Defendant herein did not have any nexus with the Plaintiff's sub-tenants, because same [sub-tenants], were put in the premises by the Plaintiff and it is the Plaintiff who had contractual relationship with the Defendant as pertains to, inter-alia, payments of rents.
165. Arising from the foregoing, I come to the conclusion that it is indeed the Plaintiff who paid the rents for the months of December 2009 and apparently, the said payments was anchored on and informed by the agreement to renew the terms of the Lease with effect from 1<sup>st</sup> December 2009.
166. Further and in addition, having taken into consideration the terms of the Letter dated the 7<sup>th</sup> September 2009, which was mutually produced by both Parties and having juxtaposed the contents of the said Letter against the Evidence pertaining to the payment and receipt of the rent for the month of



December 2009, it is my finding and holding that indeed the Defendant herein gave unto and in favor of the Plaintiff a promise and intimation that the lease was renewed.

167. Furthermore, the Defendant both in terms of the Letter dated the 7<sup>th</sup> September 2009 [Exhibit D3], and by receiving the rent for December 2009 therefore created a legitimate expectation upon the Plaintiff that truly the lease in question had been renewed.

168. On the other hand, it is also my humble view that by conduct and representation, taking into account the contents of the Letter dated the 1<sup>st</sup> December 2009, the Plaintiff's letter dated the 23<sup>rd</sup> November 2009 [exhibit P4] and coupled with the receipt of the rent for December 2009, the Defendant herein is estopped from endeavoring to renege/resile from the representation which was clearly made to and acted upon by the Plaintiff.

169. To this end, it is appropriate to take cognizance of Section 120 of the Evidence Act, Chapter 80 Laws of , which underpins the relevance and applicability of the Doctrine of Estoppel.

170. The said provisions are reproduced as hereunder;

120. General estoppel.

When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

171. Other than the provision (supra), which underpins the Doctrine of Estoppel, it is also worth stating that the import, tenor and scope of the Doctrine of Estoppel, has received legal elaboration and enunciation in various decisions by our courts, inter-alia, the Court of Appeal.

172. Notably, the Doctrine of Estoppel was elaborated upon and expounded by the Court of Appeal in the case of Serah Njeri Mwobi versus John Kimani Njoroge [2013] eKLR, where the court held thus;

“The words waiver, estoppel and acquiescence have also been defined by the Halsbury's Laws of England, 4th Edition, Volume 16. At page 992 waiver has been defined as follows:-

“Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct.

It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel, although, unlike estoppel, waiver must always be an intentional act with knowledge. A person who is entitled to rely on a stipulation existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration. Where the waiver is not express it may be implied from conduct which is inconsistent with the continuance of the right... The waiver may be terminated by reasonable but not necessarily formal notice unless the party who benefits by the waiver cannot resume his position, or termination would cause injustice to him.”

173. Furthermore, the Honourable Court proceeded to and stated as hereunder;

“It therefore follows that where one party by his words or conduct, made to the other party a promise or assurance which was intended or affect the legal relations between them



and to be acted on, the other party has taken his word and acted upon it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him but he must accept their legal relations subject to the qualification which he has himself introduced. “

174. Arising from the foregoing, it is my finding and holding that the totality of representations and the actions (conduct) by and on behalf of the Defendant herein created an impression that indeed the Lease in favour of the Plaintiff, was to be renewed and in any event, was renewed.
175. Additionally, it is important to underscore that whereas a Lease over and in respect of an immovable property, like the one beforehand must be reduced into writing in compliance with the Provisions of Section 3(3) of the *Law of Contract Act*, Chapter 23, Laws of Kenya, however, an Agreement to renew, which is precursor to renewal does not of necessity require to comply with the said provisions of the law.
176. Pertinently, the contents of the Letter dated the 7<sup>th</sup> September 2009; and the subsequent actions by and on behalf of the Defendant herein, in my humble view operate to create an Agreement to renew which thus denotes the existence of a Lease between the Parties.
177. To buttress the foregoing exposition, it suffices to take cognizance of the holding of the Court of Appeal in the case of Kenya Commercial Bank Limited versus Popatlal Madhavji & another [2019] eKLR, where the Court stated and observed as hereunder;

“In the case of Mega Garment Limited vs Mistry Jadva Parbat & Co. (Epz) Limited [2016] eKLR succinctly put it thus;

“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.”

Therefore, by virtue of the existence of the agreement to lease in the terms spelt out in the letter of 23<sup>rd</sup> December 1998, a valid, binding and enforceable agreement for a fixed term period of 5 years and 3 months came into existence as between the parties, and we so find.”

178. In my humble view, the ratio decidendi by the Court of Appeal in the decision (supra), which found and held that the agreement to lease, [in terms of the contents of a letter which had been generated by the landlord], would suffice to constitute a binding and enforceable agreement, applies to the instant matter.
179. In a nutshell and duly persuaded by the foregoing exposition, I find and hold that a binding and enforceable agreement pertaining to the renewal of the lease existed between the Plaintiff and the Defendant.
180. Lastly, it is now appropriate to turn to the question as to whether the Defendant herein could unilaterally and with due regard to the rights and interests, including the legitimate expectations of the Plaintiff, turn around and evict the Plaintiff from the suit premises.



181. Before endeavoring to answer the sub issue herein, it worthy to recall that the Plaintiff herein proceeded to and filed the instant suit and also mounted an application for Temporary injunction to avert any adverse actions by and on behalf of the Defendant.
182. Furthermore, it is worth stating that the application by and on behalf of the Plaintiff herein which sought for orders of temporary injunction was placed before the Duty Judge, namely, Lady justice Joyce Khaminwa, Judge (now deceased) who heard the application on the 31<sup>st</sup> December 2009 and thereafter reserved the ruling to the 4<sup>th</sup> January 2010. Nevertheless, the Learned Judge decreed an order of status quo to be maintained over and in respect of the demised premises.
183. First forward, on the 4<sup>th</sup> January 2010, the Learned Judge proceeded to and delivered a Ruling whereupon same indeed granted the orders of temporary injunction. For coherence, the import and tenor of the orders granted by the Learned Judge was to the effect that the Plaintiff was to remain as a Tenant in the demised premises.
184. Be that as it may, it is not lost on the Honourable court that the Plaintiff herein was removed and evicted from the demised premises on the 4<sup>th</sup> January 2010, shortly after the delivery of the Ruling.
185. Without belaboring the issues as pertains to the circumstances leading to the events of 4<sup>th</sup> January 2010; [which shall be dealt with shortly], it is my finding that the turn around by and on behalf of the Defendant and the subsequent eviction of the Plaintiff from the demised premises, constituted a breach and/or violation of the Agreement to renew the lease, which had actualized/materialized.
186. Consequently and in view of the foregoing, my answer to issue number one [1] is threefold. Firstly, the Defendant herein duly and unequivocally intimated to the Plaintiff that the lease in question stood renewed.
187. Secondly, the Defendant herein proceeded to and received the rents from the months of December 2009 from the Plaintiff and by so doing, created a legitimate expectation in favor of the Plaintiff and essentially on the renewal of the lease.
188. Thirdly, that having made the representations at the foot of the Letter dated the 7<sup>th</sup> September 2009, and thereafter received and acknowledged the rents for December 2009, the actions by the Defendant in evicting the Plaintiff without regard to the Due process, amounted to breach of agreement.

**Issue Number 2 Whether the Plaintiff herein suffered any loss as a result of breach of the Agreement to renew the Lease and if so; the nature and quantum of such loss, if any.**

189. Whilst discussing issue number one [1], herein before, the Honourable court has found and held that indeed there existed a valid, binding and enforceable agreement to renew the lease which was created by and at the instance of the Defendant.
190. Furthermore, the court has also found and held that despite the existence of the valid agreement to renew, the Defendant herein by herself, agents and/or servants proceeded to and evicted the Plaintiff from the demised premises. In any event, the Eviction was undertaken on the face of existing and lawful Court Orders.
191. Having found in terms of the foregoing paragraph, the question that does arise and which is now deserving of interrogation is whether the Plaintiff suffered any loss as a result of the impugned breach and if so, the nature and extent of the loss.
192. From the evidence tendered before the court, it is important to point out that the Plaintiff through PW1 averred that same was running a Restaurant within the demised premises. However, PW1



intimated that because of the competition arising from another Restaurant being operated in the premises, the Plaintiff's Restaurant was not doing well and in any event was making losses.

193. Additionally, it was the testimony of PW1 that on or about the year 2008, the Plaintiff made and/or took a decision to convert her business from Restaurant into stalls, which would be rented out to various sub-tenants.
194. For good measure, it was the evidence of PW1 that the conversion of business from the Restaurant into stalls was materialized and/or finalized in June 2008; and thereafter the Plaintiff rented out the stalls to various sub-tenants.
195. Moreover, PW1 testified that after converting the business from Restaurant to stalls, the Plaintiff herein started to make profits and was indeed deriving Profits of Kes.400, 000/= Only, per month.
196. Other than the foregoing, PW1 testified that as a result of the actions by and on behalf of the Defendant herein, the Plaintiff was denied and/or deprived of business and thus Profits in the sum of Kes.400, 000/=.
197. Instructively, the Plaintiff herein contracted and/or retained the firm of M/s Muinde and Associates Accountants to take audit of her financial status and inter-alia, Profits and loss attendant to the Plaintiff's business in respect of the year 2005 to 2009.
198. Pursuant to and upon the engagement of M/s Muinde & Associates, evidence was tendered that indeed an audit was carried out and undertaken as pertains to the financial affairs and in this regard, PW2 thereafter attended court, testified and ultimately produced the Financial Report as Exhibit P20.
199. Suffice it to point out that one of the salient features of Exhibit P20 and the testimony of PW2, was to the effect that the Plaintiff company was receiving income and making profit of Kes.400, 000/= only per month for the year 2008.
200. Nevertheless, it is not lost on this court that PW2 was extensively cross examined by Learned counsel for the Defendant, who thereafter suggested to the witness and has ventured forward to make submissions before the court that the Financial Report produced before the court was tailor-made to create an impression that the Plaintiff company was making profits.
201. Nevertheless, what I wish to state and point out at this juncture, is that the Financial Report by and on behalf of PW2 was tendered and produced before the court as an Exhibit and thereafter the Defendant herein did not procure the services of an equivalent Expert to review the Books of account and the financial report tendered, with a view to preferring a separate opinion.
202. To my mind, the Financial Report, namely, Exhibit P20, which was produced by PW2, being an Expert opinion could only be contradicted by another Expert opinion and not otherwise. However, it is common ground that the Defendant herein neither engaged nor contracted any accountant/auditor or at all.
203. In the absence of any rivaling Financial Report and/or opinion, this court has no alternative, but to adopt and rely on Exhibit P20; and by extension, to find and hold that the Plaintiff company was making Profit after the conversion of the business from restaurant to stalls.
204. To vindicate the foregoing position, namely, that an Expert opinion/report, like the one beforehand, could only be challenged vide another Expert report, it suffices to restate and reiterate the dictum of the Supreme Court of Kenya in the case of Attorney General vs Zinj Ltd (2021)eKLR, where the court held thus;



30. Having determined that the respondent's right to property had been violated by the Government, the trial court, and later the appellate court, made orders for compensation in favour of the respondent. Both courts granted special and general damages. As we have arrived at a similar conclusion, we see no reason to interfere with the findings of the two superior courts in this regard. We take note of the appellant's submission to the effect that in arriving at the quantum of special damages, the trial court placed reliance upon a Valuation Report by a private valuer.

Such Report, in the view of the appellant, was not only unreliable, but could very likely have been tailored to support the respondent's claim. However, in answer to this court's question as to whether, the appellant had tabled in court, a Government Valuation Report to counter the contents of the impugned one, counsel for the appellant stated that no such Report was ever tabled at the trial court. The main basis upon which special damages can be granted for the deprivation of property, is the market value of the said property. In case of general damages, a court of law exercises discretion guided by the circumstances of each case. In granting special damages, the trial judge was guided by the Valuation Report tabled by the respondent. In the absence of a contrary report on record, we have no basis upon which to interfere with the award. Even if there had been one such other report, our jurisdiction to interfere would still have been largely circumscribed, unless the award had clearly ignored the fundamental principles of valuation as demonstrated by the counter-report.

205. Furthermore, the position that an Expert Report could only be challengeable and/or challenged vide a contrary report, subject to limited exceptions, was also highlighted by the Court of Appeal in the case of *Criticos versus National Bank of Kenya Limited* (as the successor in Business to Kenya National Capital Corporation Limited "KENYAC") & another (Civil Appeal 80 of 2017) [2022] KECA 541 (KLR) (28 April 2022) (Judgment), where the court held as hereunder;

"As properly held in *Stephen Kinini Wang'ond* (*supra*), expert evidence can only be challenged by another expert. We also associate ourselves with the criteria for assessing an expert's evidence as outlined in the same decision, rehashed herein below for emphasis." A further criteria for assessing an expert's evidence focuses on the quality of the expert's reasoning. A court should examine each expert's testimony in terms of its rationality and internal consistency in relation to all the evidence presented. In *Routestone Ltd. v. Minorities Finance Ltd. and Another* [*Same v. Bird and others* [1997] B.C.C. 180] Jacob J. observed that what really mattered in most cases was the reasons given for an expert's opinion, noting that a well-constructed expert report containing opinion evidence sets out both the opinion and the reasons for it. The judge pithily commented "[i]f the reasons stand up the opinion does, if not, not." (Emphasis ours)

206. Arising from the foregoing, I come to the conclusion that the Plaintiff was indeed making Profits as at the time when the agreement to renew was breached and/or terminated by way Eviction at the instance of the Defendant herein.

207. Other than the foregoing, it is also my finding and holding that the quantum of profit amounted to Kes.400, 000/= per month, as elaborated and underscored by the Financial Report, which was tendered and produced as Exhibit P20.

208. Finally and on this issue, it is instructive to point out that arising from the Profits and/or earnings of the Plaintiff, same would be obliged and obligated to pay, inter-alia, the goodwill of Kes.4, 000, 000/= Only, which had been intimated by the Defendant; as well as the monthly rents of Kes.150, 000/= only.



209. Consequently and in view of the foregoing, there is no gainsaying that in endeavoring to arrive at the extent and quantum of loss suffered by the Plaintiff herein, the court would be alive to the fact that the Plaintiff was under obligation to pay the monthly rents, as and when same became due and payable; as well as the goodwill which had been prescribed.
210. Be that as it may, at this juncture the Honourable court shall not venture forward to undertake the mathematics pertaining to the quantum of loss due and payable in favor of the Plaintiff. For coherence, the quantum hereto shall be reverted to and addressed whilst dealing with the issue pertaining to what reliefs if any, are to be granted.
211. To surmise, my answer to issue number two [2], is to the effect that as a result of the breach of the agreement/promise to renew the lease, the Plaintiff herein was exposed to and indeed suffered loss.
212. Secondly, that the loss that was suffered by the Plaintiff was as pertains to loss of business, computed and reckoned on the basis of loss of Profits derivable from the demised premises.
213. Thirdly, that the extent and quantum of such loss is ascertainable by discerning the amounts alluded to at the foot of the Financial report [ Exhibit P20], whose contents were neither challenged nor negated in the manner established by the law.

**Issue Number 3 Whether the Letter dated the 7<sup>th</sup> September 2009, which was issued on a without prejudice basis but ultimately admitted in evidence with concurrence of the Defendant can be relied upon or otherwise.**

214. In the body of the submissions filed by and on behalf of the Defendant herein, Learned counsel for the Defendant has contended that the Letter dated the 7<sup>th</sup> September 2009; was made and uttered on a without prejudice basis and hence same was/is inadmissible in evidence.
215. Furthermore, Learned counsel has ventured forward and cited, inter-alia, the provisions of Section 23(1) of the *Evidence Act*, Chapter 80 Laws of Kenya, as well as the decision in the case of Guardian Bank Ltd vs Jambo Biscuit Kenya Ltd (2014)KLR, respectively, to canvass the position that the impugned letter is legally inadmissible.
216. Other than the foregoing, Learned counsel for the Defendant has thereafter ventured forward and submitted that the contents of the Letter dated the 7<sup>th</sup> September 2009, it is evident that the Defendant was not desirous to bind herself by the contents of the said letter. To the contrary, Learned counsel for the Defendant has submitted that the Letter in question was merely intended to assist the Plaintiff to raise capital to renew the lease.
217. Despite the contention by and on behalf of the Defendant and the legal arguments espoused by Learned counsel for the Defendant in terms of paragraphs 55, 56, 57, 58, 59 and 60 of the written submissions, it is important to point out that the question of admissibility of the Letter dated the 7<sup>th</sup> September 2009, cannot be gone into at this latter stage.
218. To start with, though the Letter dated the 7<sup>th</sup> September 2009; was clearly marked as having been issued on a without prejudice basis, both the Plaintiff and the Defendant, respectively tendered and produced same in evidence albeit without any objection.
219. Pertinently, Learned counsel for the Defendant had the opportunity to object to the production and thus admissibility of the Letter dated the 7<sup>th</sup> September 2009; on the 4<sup>th</sup> November 2021, when the Plaintiff sought to tender same in evidence.



220. However, despite having the opportunity, Learned counsel for the Defendant intimated to the Honourable court that same was not objecting to the production and thus admissibility of the said letter.
221. Arising from the consent and/or concurrent of the Defendant, the letter dated the 7<sup>th</sup> September 2009, was duly admitted.
222. Simply put, the admission of the letter in question was done with the concurrence of Learned counsel for the Defendant and by extension the Defendant herein and hence same cannot now be heard to cry wolf albeit in the wilderness.
223. Further and in any event, it is also not lost on this court that the Defendant himself without any reservation also tendered and produced before the court the same letter dated the 7<sup>th</sup> September 2009. Same was produced as Exhibit D3.
224. By producing the said letter in evidence and which production again was not objected to, the Defendant herein waived his legal rights to object to the admissibility of the impugned letter.
225. Consequently and at this juncture, the Defendant and his Legal counsel cannot now be heard to make submissions on account of the admissibility or otherwise of the letter dated the 7<sup>th</sup> September 2009. To do so would be tantamount to closing the staple long after the horse has bolted.
226. Notwithstanding the foregoing, having not objected to the production and having procured the said Letter as part of her own evidence, the Doctrine of waiver suffices and applies to the conduct of the Defendant.
227. Without belaboring the point, it suffices to cite and adopt the holding of the Court of Appeal in the case of 748 Air Services Limited versus Theuri Munyi [2017] eKLR, where the court stated as hereunder;

“Waiver is an intentional relinquishment or abandonment of a known right or privilege. In the case of *Banning vs Wright* (1972) 2 All ER 987, at page 998 the House of Lords stated thus:-

“The primary meaning of the word waiver in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted. A person who is entitled to a stipulation in a contract or of a statutory provision may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waivers are not always in writing. Sometimes a person's actions can be interpreted as a waiver - waiver by conduct”.

Closer home in the case of *Sita Steel Rolling Mills Ltd vs Jubilee Insurance Company Ltd* [2007] eKLR the Court stated thus:

“A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right.”

This Court also did explore at some length the issues of waiver, estoppel and acquiescence in the *Serah Njeri Mwobi* case (supra) and we adopt its analysis in respect of waiver and estoppel by conduct, thus:-



"The doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. See *Seascapes Limited vs Development Finance Company of Kenya Limited*, [2009] eKLR. The words waiver, estoppel and acquiescence have also been defined by the *Halsbury's Laws of England*, 4<sup>th</sup> Edition, Volume 16. At page 992 waiver has been defined as follows:-

„Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel, although, unlike estoppel, waiver must always be an intentional act with knowledge. A person who is entitled to rely on a stipulation existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration. Where the waiver is not express it may be implied from conduct which is inconsistent with the continuance of the right... The waiver may be terminated by reasonable but not necessarily formal notice unless the party who benefits by the waiver cannot resume his position, or termination would cause injustice to him?.”

228. Essentially, it is my finding and holding that by not taking the objection to the admissibility of the Letter dated the 7<sup>th</sup> September 2009, at the opportune time and by similarly introducing the same latter, albeit without reservation, the Defendant is deemed to have waived his legal rights attendant to and underpinned by the provisions of Section 23 of The *Evidence Act*, Chapter 80 Laws of Kenya.
229. Be that as it may, my answer to issue number three [3] is threefold. Firstly, that a letter/document marked without prejudice is legally inadmissible in evidence by virtue of Section 23(1) of The *Evidence Act*, Chapter 80 Laws of Kenya.
230. Secondly, that where the Party chargeable with such a document marked on a without prejudice basis tenders same in evidence and the production is consented to by the adverse Party, the adverse Party cannot ex-post facto revisit the question of admissibility.
231. Thirdly, that having conceded to the admissibility of the Letter in question and thereafter producing the said letter as part of her evidence, the Defendant herein waived any legal rights/ objections as pertains to the admissibility.
232. Consequently and arising from the foregoing, the submissions by and on behalf of the Defendant pertaining to the inadmissibility of the letter dated the 7<sup>th</sup> September 2009; at this juncture, amounts to approbating and reprobating; blowing hot and cold and/or fast and loose, at the same time, which is a legal anathema.

#### **ISSUE NUMBER 4 What reliefs, if any, ought to be granted.**

233. Having canvassed and dealt with the various issues, which were itemized in terms hereinbefore demonstrated, it is now appropriate to venture forward and consider the reliefs if any, that ought to be granted.
234. First and foremost, whilst dealing with issue number two [2], this court found and held that the Plaintiff had demonstrated that same suffered loss attendant to and arising from the breach of the agreement to renew the lease.



235. Additionally, the court also ventured forward and held that the extent of the loss suffered by and on behalf of the Plaintiff was measurable in terms of the Financial report tendered and produced in evidence by PW2. For coherence, it was highlighted that the loss was in the sum of Kes.400, 000/= per month.
236. Notwithstanding the foregoing, the court also proceeded to and observed that towards and in the course of carrying on the business in the demised premises, it was incumbent upon the Plaintiff to pay the goodwill of Kes.4, 000, 000/= only which had been agreed upon; as well as the monthly rent in the sum of Kes.150, 000/= per month.
237. Consequently, in ascertaining the loss suffered by and on behalf of the Plaintiff on account of loss of business, it shall suffice to apply the sum of Kes.400, 000/= only, per month, for the entire duration of the lease which was the subject of Agreement for renewal. For coherence, the agreement for renewal related to a duration of 5 years 3 months.
238. Consequently, the computation on account of loss of business works as hereunder; Kes 400, 000 x 63 months = 25, 200, 000/=
239. During the entire duration of the lease, the Plaintiff was obligated to pay monthly rents in the sum of Kes.150, 000/= Only, per month which would amount to; Kes 150, 000 x 63 months = 9, 450, 000/=
240. Other than the foregoing, the Plaintiff had conceded that same would pay goodwill to and in favor of the Defendant in the sum of kes.4, 000, 000/= only. In any event, evidence abound that the Plaintiff even took a step towards procuring a Banking facility towards paying the goodwill.
241. Arising from the foregoing, the amount due and payable on account of Loss of business would work as hereunder; Kes 25, 200, 000 – 9, 450, 000 – 4, 000, 000 = Kes 11, 750, 000/=
242. Other than the claim on account of loss of business, which has been addressed in terms of the preceding paragraphs, the Plaintiff herein also sought recompense on account to the damage to the partitions and the stalls, which had been erected in the demised premises and which were demolished on the 4<sup>th</sup> January 2010.
243. Before venturing to determine the quantum of loss attendant to the damaged/demolished partitions and the stalls in the demised premises, it is appropriate to highlight a few issues pertaining to the circumstances under which the destructions complained of arose and was taken.
244. To start with, it is worth recalling that upon the filing of the instant suit, the Plaintiff similarly filed an application for temporary injunction, which was canvassed before the Duty Judge on the 31<sup>st</sup> December 2009; by Learned counsel for the Respective parties.
245. After hearing the submissions by the advocates for the respective Parties, namely, Plaintiff and the Defendant, the Learned Duty Judge reserved the ruling to the 4<sup>th</sup> January 2010. However and for good measure, the court decreed status quo.
246. Suffice it to underscore that the order of status quo was made in the presence of the advocates for the respective Parties and its import and tenor, were well within the knowledge of not only the advocate for the Parties, but also the Parties themselves.
247. Moreover, on the 4<sup>th</sup> January 2010; the Learned Duty Judge proceeded to and delivered the ruling whereby same proceeded to and granted the order of temporary injunction, whose import and tenor was to protect the Plaintiff's occupation, possession and use of the demised premises pending hearing and determination of the suit.



248. Despite the terms of the ruling rendered by the Duty Judge on the 4<sup>th</sup> January 2010, the Plaintiff's properties (read the stalls and partitions) which had been erected in the demised premises were invaded and destroyed.
249. Following the invasion of the stalls and the destruction of the partitions, the Plaintiff herein through her director, namely, Mariah Josephine Nduma made a complaint to Central Police station pertaining to the malicious damage. For good measure, the report was duly booked in the occurrence book, but the concerned Police officer misquoted the year and instead indicated the year 2009, as opposed to the year 2010.
250. Arising from the error in the recording of the occurrence book which indicated that the Complaint was booked as OB No. 8/11/1/2009, Learned counsel for the Defendant has thereafter contended that there is confusion as to whether or not the impugned demolition occurred; same and if at all occurred, when same occurred.
251. Despite the confusion attendant to the recording of the OB No, which was extrapolated to the Letter dated the 20<sup>th</sup> January 2010; and which was produced as Exhibit P16, it is common knowledge that such errors are human and often do occur particularly, at the beginning of the year and hence the error of referring to the year 2009, in lieu of 2010, is in my view, excusable.
252. Further and in any event, it is also worthy to recall that no complaint would have been reported to Central Police station at 11<sup>th</sup> January 2009, insofar as the duration of the lease was still running.
253. Finally, it is also not lost on this court that all the Parties were in agreement that the partitions and/or stalls which are complained of were removed on the 4<sup>th</sup> January 2010. However, the only point of departure is the contention by DW1 that same were removed by the Plaintiff's sub-tenants, who even damaged the suit property.
254. Interestingly, DW1 also tendered evidence and contended that the Plaintiff herein vacated the demised premises by himself and that in any event, the Plaintiff ceased to be in occupation of the demised premises even before the orders of status quo were issued.
255. To my mind, DW1 did not strike me as honest and worthy of belief. Simply put, DW1 both in his utterances, representations and conduct created an impression of being deceitful and dishonest.
256. To anchor the foregoing observations, three things are pertinent and worthy of mention. Firstly, DW1 had sworn an affidavit during interlocutory hearing of the application of temporary injunction and at the foot of the said affidavit, same made certain averments which the Learned Judge found and held to have been intended to deceive the court.
257. For good measure, the Learned Judge stated as hereunder;
- “The Defendant (read DW1) has attempted to cheat the court in the replying affidavit paragraph 21.”
258. Secondly, the witness (DW1) at the foot of paragraph 5 of the witness statement dated the 22<sup>nd</sup> February 2018; and which was adopted as his Evidence in chief had intimated that one of the Plaintiff's directors, namely, Mariah Josephine Nduma, went to see him on the 7<sup>th</sup> September 2009; and requested him (DW1) to write a letter on a without prejudice basis to enable her Mariah Josephine Nduma to raise monies from her sub-tenants. Instructively, at the foot of paragraph 5 of the witness statement, DW1 is conceding that same had held a meeting with one of the Directors of the Plaintiff company.



259. However, during his cross examination, the witness herein took a diametric and opposed position and stated as hereunder;

“Referred to page 4 of the Defendant’s bundle of documents and the witness states that the Plaintiff did not approach me (witness) over the question of the extension of the lease. I did not meet the directors of the Plaintiff on the 7<sup>th</sup> September 2009.”

260. Surely, DW1 cannot adopt diametrically opposed positions and/or versions and still expect to attract the trust [confidence] of a court of law in terms of credibility and trust worthiness.

261. Thirdly, the same DW1 is on record has having testified that same is aware that Police officers from central police station visited the suit premises on the 31<sup>st</sup> December 2009. In fact, the witness (DW1) whilst under cross examination stated as hereunder;

“The Police came to the premises on the 31<sup>st</sup> December 2009. I was informed of the presence of the police officers on the suit property by the manager. The manager who was/is called Harrison Munyau.”

262. On his part, Harrison Munyau testified as DW2 and whilst under cross examination by Learned counsel for the Plaintiff testified as hereunder;

“On the 31<sup>st</sup> December 2009, I don’t know whether the Police came to the site/premises. I wish to state that I am not aware whether the Police came to the premises. I was not aware of the reason why the Police would come to the premises”.

263. Yet again, there is a contradiction between the evidence of DW1 and that of DW2 and the contradiction which has been highlighted hereinbefore exacerbates the doubts pertaining to the bona fides and honesty of DW1.

264. Having made the foregoing observation, I wish to point out that I am duly convinced that it is the Defendant who brazenly and without due regard to the terms of the ruling of the court, proceeded to and demolished the stalls which were erected by the Plaintiff in the demised premises.

265. Similarly, I find and hold that the loss assessment report dated the 18<sup>th</sup> January 2010; and which was prepared by M/s Cunningham & Lindsey Loss Adjusters and whose contents have not been impeached, reflect the extent of the loss attendant to the partitions.

266. In the premises, I find and hold that the Plaintiff has also demonstrated her entitlement to recompense in the sum of Kes.1, 980, 000/= only.

267. The other claim that was also mounted by and on behalf of the Plaintiff relates to refund of Deposit on account of rent amounting to Kes.472, 000/= only.

268. Before making a proclamation as pertains to the refund of the rent deposit, it is worthy to take cognizance of the evidence of DW1 as pertains to the rent deposit.

269. Same stated as hereunder;

“I did not refund the deposit of rents.”

270. Clearly the deposit in question was refundable at the determination of the lease dated 27<sup>th</sup> February 2006; and hence the Defendant herein has no lawful cause to refuse and/or decline to make the refund.



271. Additionally, the Plaintiff herein also sought an order for refund of the Professional fees paid to and in favor of M/s Cunningham & Lindsey Lost Adjusters in the sum of Kes.49, 880/= only. To my mind, the said monies are lawfully due and thus refundable by the Defendant.
272. Lastly, the Plaintiff herein made an omnibus claim and/or prayer for General damages for breach of Agreement and illegal and wrongful eviction. However, it is trite, hackneyed and established that no General damages can be awarded in instances of breach of contract and/or agreement.
273. To the contrary, it is common ground that any loss and/or damages arising from breach of contract and/or agreement are ascertainable and quantifiable beforehand and in any event, same can only be claimed as special/liquidated claims, which must be particularly pleaded and specifically proved.
274. To highlight the foregoing elementary position, it suffices to cite and adopt the erudite elaboration of the law by the Court of Appeal in the case of Kenya Tourist Development Corporation versus Sundowner Lodge Limited [2018] eKLR, where the court held thus;

“With the greatest respect to the learned Judge, we think that the reasoning is quite flawed. We are not persuaded that the authorities cited by the learned Judge support the proposition that in cases of breach of contract there does exist a large and wide-open discretion to the court to award any amount of damages. The opposite is in fact the case: as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In Dharamshi Vs. Karsan [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication. And so it would be. See also Securicor (K) vs. Benson David Onyango & Anor [2008] eKLR. The same situation applies to the case at bar in that the respondent having quantified what it considered to have been the loss it suffered, and gone on to particularize the same, there would be absolutely no basis upon which the learned Judge would go ahead to award the totally different, unrelated, unclaimed and unquantified sum of Kshs. 30 million merely because he believed that the respondent “had suffered serious damages” (sic). What was suffered or was believed to have been suffered, the damage that is, to be compensated by way of damages, could only be known by the respondent and it claimed it in specific terms which, in the event, it was unable to prove. To award it anything else would be to engage in sympathetic sentimentalism as opposed to proof-based judicial determination.

275. Other than the foregoing, the Plaintiff’s prayer for aggravated damages for malicious damage is similarly neither tenable nor awardable. [See the decision of the court of appeal in the case of Municipal Council of Eldoret v Titus Gatitu Njau [2020] eKLR]

### **Final Disposition:**

276. Arising from the foregoing discourse, it is apparent and evident that the Plaintiff herein, has been able to establish and prove his claim at the foot of the Further amended Plaintiff and hence same is entitled to recompense on terms.
277. Consequently and in view of the foregoing, I am disposed to and do hereby enter Judgment in favor of the Plaintiff in the following terms;
- i. Loss of business in the sum of Kes.11, 750, 000/= only
  - ii. Value of the damaged partitions/stalls in the sum of Kes.1, 980, 000/= only



- iii. Refund of 4 months rents deposit in the sum of Kes.472, 000/= only
- iv. Professional fees paid at the foot of the loss assessment report in the sum of Kes.49, 880/= only
- v. The sums awarded herein before [supra], shall attract Interests at court rate of 14% per annum w.e.f date of filing the Suit up to full payment.
- vi. The Plaintiff be and is hereby awarded costs of the suit to be taxed and certified by the taxing officer of the Court.
- vii. Any other relief not expressly granted is hereby Declined

278. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> \_ DAY OF JANUARY 2024.**

**OGUTTU MBOYA,**

**JUDGE.**

In the Presence of;

Benson - Court Assistant.

Ms Leno h/b for Mr. Karuga Maina for the Plaintiff.

Ms Mwikali h/b for Mr. Kivuva for the Defendant.

