



**Mohamed Godana Jarso t/a Dal International Hotel v Odongo (Environment and Land Case Civil Suit 106 of 2017) [2024] KEELC 10 (KLR) (18 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 10 (KLR)

*(FORMERLY NAIROBI HCC NO. 345 OF 2007)*

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ENVIRONMENT AND LAND CASE CIVIL SUIT 106 OF 2017**  
**SO OKONG'O, J**  
**JANUARY 18, 2024**

**BETWEEN**

**MOHAMED GODANA JARSO T/A DAL INTERNATIONAL HOTEL ..... PLAINTIFF**

**AND**

**MAXWELL OTIENO ODONGO ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff brought this suit against the Defendant in the High Court at Nairobi on July 20, 2007 through a plaint of the same date. The suit was subsequently transferred to this court and given its current case number. The plaint was amended on 28<sup>th</sup> August 2017. In its amended plaint, the Plaintiff averred that the Defendant was the registered proprietor of the parcel of land known as Kisumu Municipality/Block 7/294(hereinafter referred to only as “the suit property”).
2. The Plaintiff averred that on or about April 24, 2005, the Plaintiff and the Defendant entered into a three-year lease agreement in respect of the suit property. The Plaintiff averred that it was a term of the said agreement that the Plaintiff would pay a deposit of Kshs. 300,000/- and would carry out any necessary repairs, renovations and/or improvements on the suit property before occupation. The Plaintiff averred that the said repairs and renovations were to be carried out within three months after which the same were to be inspected and approved by the Defendant before occupation of the property. The Plaintiff averred that it complied with all these requirements after which he was allowed to take possession of the suit property by the Defendant.
3. The Plaintiff averred that he was carrying out the business of hotel and catering on the suit property. The Plaintiff averred that the lease agreement between the Plaintiff and the Defendant did not provide for payment of rent, and in the alternative that the rent payable under the lease for the suit property



was uncertain. The Plaintiff averred that it was the understanding of the parties that in consideration of the Plaintiff undertaking major renovation works and paying outstanding utility bills and rates, the Plaintiff would recover the expense from the use and occupation of the premises or would set off the same against the rent payable in the course of the tenancy.

4. The Plaintiff averred that the Plaintiff and the Defendant were yet to agree on the amount that was spent by the Plaintiff in renovating and repairing the premises, and in settling the outstanding utility bills. The Plaintiff averred that the Defendant had refused and/or neglected to have a meeting with the Plaintiff to sort out the issue.
5. The Plaintiff averred that its tenancy on the suit property was a controlled tenancy under the provisions of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Chapter 301 Laws of Kenya. The Plaintiff averred that on July 9, 2007, the Defendant instructed Jogi Auctioneers to levy distress for rent against the Plaintiff for the recovery of an alleged rent arrears of Kshs. 4,200,000/- at the rate of Kshs. 150,000/- per month. The Plaintiff averred that the said distress for rent was levied without leave of the Business Premises Rent Tribunal.
6. The Plaintiff sought judgment against the Defendant for;
  - a. An order directing the Defendant to pay to the Plaintiff necessary or appropriate monetary value of all the improvements, renovations, alterations and/or additions made by the Plaintiff on the suit property in accordance with clause 9 of the lease agreement dated 24<sup>th</sup> April 2005 at the current market value.
  - b. An order that the value in (a) above be ascertained by a court-appointed valuer.
  - c. An order that upon full payment of the amount ascertained pursuant to (a) and (b) above, the Plaintiff vacates the suit property within 90 days or such other period to be determined by the court.
  - d. Costs of the suit.

### **The Defence**

7. The Defendant filed a statement of defence on 15<sup>th</sup> March 2010. The defence was amended on August 24, 2017 following the amendment of the plaint. The Defendant admitted that he was the registered proprietor of the suit property. The Defendant averred that the suit property was at all material times being used as a hotel and restaurant under the name Lagoon Motel. The Defendant averred that in July 2004 or thereabouts, he decided to convert the premises into a shopping mall.
8. The Defendant averred that he applied to the Municipal Council of Kisumu for the necessary approval which he obtained after which he purchased and delivered to the suit property all the required materials for the intended works. The Defendant averred that he thereafter engaged a contractor who commenced the work in August 2004. The Defendant admitted that he entered into a three-year lease agreement with the Plaintiff in respect of the suit property. The Defendant averred that at the time the Plaintiff took possession of the suit property, the works that he had commenced were 75% completed, and that the Plaintiff took over the building materials that were on site which were sufficient to complete all the repairs and renovations that were to be undertaken on the suit property.
9. The Defendant denied that the Plaintiff paid to him Kshs.300,000/- as rent deposit. The Defendant averred that the sum of Kshs. 300,000/- that was to be paid by the Plaintiff to the Defendant was on account of goodwill and the same was not paid by the Plaintiff.



10. The Defendant averred that the agreed rent for the suit property was Kshs. 150,000/-. The Defendant averred that if there was no agreement on the rent payable as claimed by the Plaintiff then the lease agreement between the parties was invalid and could not form a basis for the present suit.
11. The Defendant denied that the Plaintiff and the Defendant had agreed that the costs of renovations and repairs were to be offset from the rent due to the Defendant from the Plaintiff. The Defendant averred that the Plaintiff's lease was for a term of 3 years and the same had lapsed by effluxion of time. The Defendant averred that the repairs and renovations that the Plaintiff carried out on the suit property were for his purposes and as such, the Defendant was not liable to meet the costs thereof. The Defendant averred further that the Plaintiff used the materials that the Defendant had assembled on the suit property to carry out the said renovations and repairs on the understanding that the costs of the same would not be offset against the rent. The Defendant averred that in any event, the Plaintiff had falsified and exaggerated the cost of renovation works.
12. The Defendant averred that the Plaintiff was not to occupy the suit property rent free. The Defendant averred that the inspection and valuation that the Defendant was to undertake after the renovations and repairs were completed were for insurance purposes and to ensure that the work was carried out to the required standard.
13. The Defendant averred that clause 4(v) of the lease expressly allowed him to distress for rent if the rent was in arrears for 21 days. The Defendant averred that the distress that was levied against the Plaintiff was lawful and that he did not require leave of the Business Premises Rent Tribunal to levy distress.
14. The Defendant averred that the Plaintiff had failed and/or refused to pay rent from 1<sup>st</sup> April 2005 and as such the distress levied against him was justified. The Defendant averred further that after the filing of this suit, the Plaintiff paid part of the rent arrears in the sum of Kshs. 1,000,000/- and had continued to pay a monthly rent of Kshs. 100,000/- from November 2007. The Defendant urged the court to dismiss the Plaintiff's suit with costs.

#### **The evidence tendered by the parties**

15. The Plaintiff gave evidence and called one witness. The Plaintiff adopted his witness statement dated 25<sup>th</sup> April 2013 filed on 21<sup>st</sup> October 2014 and further witness statement filed on 18<sup>th</sup> January 2018 as is evidence in chief. The Plaintiff produced as PEXH.1 the documents in his comprehensive list of documents filed on 28<sup>th</sup> September 2017 except the valuation report by Highland Valuers Limited.
16. On cross-examination, the Plaintiff stated as follows: He entered into a three-year lease agreement with the Defendant on 24<sup>th</sup> April 2005. Under the lease, he was given three months to carry out repairs and renovation on the suit property during which period he was not supposed to pay rent to the Defendant. He was also allowed under the lease to settle pending bills and to recover the same from the rent payable to the Defendant. He stated that although his lease expired in 2008, he was still in possession of the suit property. He denied that it was Eng. Okwomi who carried out renovations and repairs for him on the suit property. He stated that he could not recall the particulars of the contractor who carried out the repairs and renovations for him on the suit property.
17. He stated that he wanted to run hotel and restaurant business on the suit property and that he was granted permission to carry out renovations that would suit the type of business he wished to carry out on the property save that he was not supposed to interfere with the structure of the building. He stated that he was to leave the premises as they were upon the expiry of his lease. He reiterated that Eng. Okwomi never carried out the renovations on his behalf neither was his bill of quantities used in the exercise.



18. On examination by the court, he stated that apart from the lease agreement, he did not enter into any other written agreement with the Defendant in relation to the suit property. He stated that the agreement that the premises would be valued after the renovations and rent agreed upon thereafter was verbal. He stated that he never agreed on rent with the Defendant because the Defendant did not come to inspect the premises after the renovations and the repairs. He stated that the rent of Kshs. 100,000/- per month that he was paying was ordered by the court. He stated that what he was seeking was a refund of the money that he used to carry out renovations and repairs on the suit property. He stated that he was not seeking to remain in occupation of the suit property. He stated that his claim was based on the lease and the verbal agreement that he entered into with the Defendant.
19. The Plaintiff's witness was Gerald Kiptoo Ruto(PW2). PW2 was a valuer with Highland Valuers Limited. He stated that the valuation report dated 13<sup>th</sup> December 2011 at page 172 of the Plaintiff's comprehensive list of documents was prepared by Simon Kimisoi, deceased who was also working with Highland Valuers Limited as a valuer. He stated that their instruction was to assess the market value of the suit property. He stated that as at 2011, the value of the suit property was Kshs. 32 million. He stated that the rent that was agreed upon between the Plaintiff and the Defendant was Kshs. 100,000/- per month and that they assessed the market rent at Kshs. 240,000/- per month. He stated that the Plaintiff informed them that he had done renovations to the suit property at a cost of Kshs. 10,383,782/- and that as at 2011, the renovations were valued at Kshs. 23 million. He stated that the total value of the improvements to the suit property by the Plaintiff was assessed at Kshs. 34,800,000/-. He stated that the amount due to the Plaintiff from the Defendant was Kshs. 22,283,520/-. He produced the valuation report dated 13<sup>th</sup> December 2011 as PEXH.2.
20. On cross-examination, PW2 stated that their instructions were to value the renovations and to assess the rent payable. He stated that for the renovations, they relied on the bill of quantities that was supplied to them by the Plaintiff. He stated that they were not supposed to carry out independent valuation of the renovation works. He stated that they did not assess the value of the suit property prior to the renovations. He stated that he neither visited the site nor signed the valuation report. He stated further that Simon Kimisoi who prepared the valuation report did not also sign it.
21. After the close of the Plaintiff's case, the Defendant gave evidence and called one witness. The Defendant adopted his statement dated 24<sup>th</sup> April 2013 and further statement dated 18<sup>th</sup> January 2018 (not on record) as part of his evidence in chief. The Defendant produced his list and bundle of documents filed in court on 25<sup>th</sup> April 2013 as DEXH.1. The Defendant stated that before he leased the suit property to the Plaintiff he had started renovating the same and that he had engaged one, Eng. Paul Okwomi to carry out the renovation works. He stated that the renovations involved creating stalls for traders. He stated that when the Plaintiff came to the picture, he had completed the renovations. He stated that after the Plaintiff took possession of the suit property, the Plaintiff continued to engage Eng. Paul Okwomi to carry out for him the works he wanted done on the property. He stated that Eng. Paul Okwomi prepared a bill of quantities for that purpose in the sum of Kshs. 2,287,264/-.
22. The Defendant stated that the lease that he had with the Plaintiff expired and the Plaintiff was paying rent with difficulties. The Defendant stated that for him to get rent paid, he had to levy distress.
23. On cross-examination, the Defendant reiterated that he had finished renovating the suit property as at the time he leased the property to the Plaintiff. On further cross-examination on the issue, he stated that the renovations were 75% complete. He stated that he left some materials on the site for the Plaintiff. The Defendant stated that the agreed rent was Kshs. 150,000/- per month and that the rent of Kshs.100,000/- per month was a creation of the Plaintiff and his advocates. He stated that he later accepted the said rent of Kshs. 100,000/- per month. The Defendant stated further that the Plaintiff



- was permitted to renovate and make alterations to the suit property to suit his needs. He stated that the premises were to be inspected after the renovations for insurance purposes and that he could not remember inspecting or taking insurance for the premises.
24. He stated that the Plaintiff had been paying a monthly rent of Kshs. 100,000/- per month from November 2007. He stated that the Plaintiff had not paid rent from February 2023. He stated that the rent for the suit property should be Kshs. 240,000/- per month. He stated that the renovations carried out by the Plaintiff on the suit property were for his own convenience and that the same were of no structural value to him. He stated that he was not liable to compensate the Plaintiff for the same.
25. The Defendant's witness was Paul Magwa Okwomi(DW2). DW2 told the court that he was a civil engineer and that he knew both the Plaintiff and the Defendant. He stated that he was the one who prepared a bill of quantities in the Defendant's Further List of Documents dated 13<sup>th</sup> February 2018. He stated that he was approached by the Plaintiff to do certain works on the suit property. He stated that he prepared the designs for the works, and carried out the construction and supervision of the project for the Plaintiff. He stated that he raised an invoice of about Kshs. 1,300,000/- for the entire work. He stated that he prepared a bill of quantities for the works in the sum of Kshs. 2,287,264/- which included construction and material. He stated that he had not been paid by the Plaintiff for the services rendered. He produced the bill of quantities as DEXH. 2.
26. On cross-examination, he stated that the costs of Kshs. 2,287,264/- included his professional fees. He stated that the material for the construction was purchased by the Plaintiff on whose behalf the works were being done. He stated that he did not carry out any works for the Defendant.

#### **The submissions:**

27. After the close of evidence, the court directed the parties to make closing submissions in writing. The Plaintiff filed its submissions dated 4<sup>th</sup> September 2023. The Plaintiff framed two issues for determination by the court. The Plaintiff submitted that he was ready and willing to vacate and hand over possession of the suit property to the Defendant on condition that the Defendant pays the costs that he incurred in renovating the suit property. The Plaintiff submitted that he took possession of the suit property in a dilapidated state and that in addition to repairing the premises, he also settled outstanding utility bills and insurance premium which was payable by the Defendant under the lease agreement. The Plaintiff cited clauses 2, 4, 5 and 9 of the lease as supporting his claim for a refund of the expenses incurred in the renovation of the suit property. The Plaintiff submitted that the Defendant's claim that the Plaintiff carried out renovation and repairs to the suit property to suit his own requirements was not true. The Plaintiff submitted that the Defendant did not prove his claim that the Plaintiff used his materials in the renovations and repairs of the suit property. The Plaintiff submitted that it would not be in the interest of justice for the Defendant to benefit from all the improvements undertaken by the Plaintiff on the suit property without compensation being made to the Plaintiff. The Plaintiff cited *Nassor Mohamed Nahdy v. Abdalla Ahmed Omar*[2020] eKLR, *Veronicah Wanjiru v. Samuel Ikumbu & 2 others*[2014]eKLR, and Mombasa Tribunal Cases Nos. 72 of 2020 and E057 of 2021(consolidated) in support of his submissions. The Plaintiff submitted that he had proved that he spent about Kshs. 10,000,000/- in renovating the suit property.
28. The Plaintiff submitted that after he completed renovation of the suit property, he submitted to the Defendant the breakdown of the costs that he had incurred in renovation. The Plaintiff submitted that the Plaintiff and the Defendant failed to agree on the mode of offsetting the said costs. The Plaintiff submitted that the rent of Kshs. 150,000/- per month that was claimed by the Defendant had no basis. The Plaintiff submitted that the lease provided for a three months' rent deposit of Kshs. 300,000/-



which meant that the monthly rent was Kshs. 100,000/-. The Plaintiff urged the court to grant the orders sought in the amended plaint.

29. The Defendant filed submissions dated August 31, 2023. The Defendant framed five issues for determination by the court. The first issue framed by the Defendant was whether the Plaintiff was to recover the cost of repairs and renovations of the suit property from the rent due to the Defendant from the Plaintiff in the course of the tenancy. The Defendant submitted that there was no agreement between the Defendant and the Plaintiff that the Plaintiff would offset the cost of repairs and renovations to the suit property from the rent due to the Defendant from the Plaintiff. The Defendant submitted that the alterations that were being made by the Plaintiff to the suit property were to be at his cost as he wished to make the premises suitable for his business needs. The Defendant cited clauses 9, 17 and 18(4) of the lease in support of this submission. The Defendant reiterated that the purpose of inspecting the suit property and valuing it after the renovations was to confirm that the work was carried out to the required standard and for insurance purposes. The Defendant submitted that no clause in the agreement provided that the Plaintiff was entitled to compensation from the Defendant for the repairs and renovations done to the suit property.
30. The Defendant submitted that in any event, the Plaintiff did not incur the sum of Kshs. 10,000,000/- claimed by him in the renovation and repairing of the suit property and that the documents submitted to court in support of the claim were meant to mislead the court. The Defendant submitted that according to Eng. Okwomi (DW2) who carried out the renovation works for the Plaintiff, the repair and renovation works costed Kshs. 2,287,264/-. The Defendant submitted that the bill of quantities by Quanti-Bill Consult relied on by the Plaintiff was a mere proposal.
31. The Defendant submitted that the agreed rent of Kshs. 100,000/- per month was low for similar premises and that the parties agreed on the same to enable the Plaintiff to recover the costs of repairs and renovation within the initial lease period of 3 years. The Defendant submitted that according to the valuation report submitted in evidence by the Plaintiff, the market rent for the suit property as at 2011 was Kshs. 240,000/- per month. The Defendant submitted that the Plaintiff remained on the suit property beyond the lease period of 3 years and continued paying low rent of Kshs. 100,000/-. The Defendant submitted that the Plaintiff and the Defendant had agreed that if the rent remained in arrears for 21 days, the Defendant would be at liberty to levy distress. The Defendant submitted that the court cannot be called upon to rewrite the contract between the parties. The Defendant submitted that since the Plaintiff had failed to pay rent from 1<sup>st</sup> April 2005, the Defendant was entitled to levy distress for the recovery of the outstanding rent.
32. The Defendant urged the court to find that the Plaintiff's claim was not proved and to dismiss the same as prayed for by the Defendant in his defence.

### **Analysis of the issues arising and determination**

33. I have considered the pleadings and the evidence tendered by the parties herein in support of their respective cases. I have also considered the submissions by the advocates for the parties. The parties did not agree on the issues for determination by the court. Each party framed its issues. In my view, the following are the issues arising for determination in this suit;
  - a. What was the rent that was agreed upon between the Plaintiff and the Defendant in respect of the lease for the suit property by the Defendant to the Plaintiff?
  - b. Whether the distress for rent levied against the Plaintiff by Jogi Auctioneers on behalf of the Defendant on 9<sup>th</sup> July 2007 was lawful.



- c. Whether the Plaintiff is entitled to a refund of the money spent in the renovation, repairs and alteration of the suit property before he commenced business thereon.
- d. If the answer to (c) is in the affirmative, how much should be refunded?
- e. Who is liable for the costs of the suit?

**What was the rent that was agreed upon between the Plaintiff and the Defendant in respect of the lease for the suit property by the Defendant to the Plaintiff?**

34. From my reading of the lease dated April 24, 2005, I would describe it as a copy and paste job with not much thought going into the unique nature of the contract that the parties were entering into. To sum it up in one word; the lease was poorly drafted. The lease had no clause expressly providing for the rent payable. The agreed rent can only be inferred from a clause in the lease that provided for a rent deposit. The recital of the lease provided that the Plaintiff was to pay three months rent as a deposit which was agreed at Kshs. 300,000/-. This means that the rent payable was Kshs. 100,000/- per month. From the evidence on record and the submissions by both parties, there is a consensus that the Plaintiff was to pay a monthly rent of Kshs. 100,000/- for the 3-year lease that was to commence on March 30, 2005. This fact was also captured in the court order made on October 16, 2008 that was not challenged by any of the parties. It is therefore my finding that the rent payable by the Plaintiff to the Defendant was Kshs. 100,000/- per month.

**Whether the distress for rent levied against the Plaintiff by Jogi Auctioneers on behalf of the Defendant on 9<sup>th</sup> July 2007 was lawful.**

35. As I have mentioned above, the lease between the Plaintiff and the Defendant commenced on March 31, 2005. It was a term of the lease that the Plaintiff was to carry out the necessary repairs and renovation to the suit property before he occupied the same. The Plaintiff was given three months to undertake the said repairs which means that the repair and renovation works were to end on 30<sup>th</sup> June 2005. It was common ground that during these three months, the Plaintiff was not to pay any rent to the Defendant. This means that the Plaintiff was to start paying to the Defendant the monthly rent of Kshs. 100,000/- from 1<sup>st</sup> July 2005. The Plaintiff was however allowed to pay or settle previous outstanding or pending bills such as water bills, electricity bills, land rates and telephone bills and to recover the same from the rent that was payable to the Defendant.
36. According to the Defendant, as at the time he levied distress against the Plaintiff on July 9, 2007, the Plaintiff had not paid rent from April 2005. From the instruction that was given to Jogi Auctioneers by the Defendant's previous advocates to levy distress, the Defendant sought rent arrears of Kshs. 4,200,000/- as at July 1, 2007 at the rate of Kshs. 150,000/- per month from April 1, 2005. It was not disputed by the Plaintiff that as at 1<sup>st</sup> July 2007, he had not made any rent payment to the Defendant. The Plaintiff did not even dispute the fact that he did not even pay the rent deposit of Kshs. 300,000/-. The Plaintiff did not also tender any evidence that he had settled some outstanding bills that he had offset from the rent that was due to the Defendant. In the circumstances, there was rent due and payable by the Plaintiff to the Defendant and the Defendant was entitled to recover the said rent through distress for rent. I disagree with the contention by the Plaintiff that the Defendant required the leave of the Business Rent Tribunal before levying distress against the Plaintiff.
37. However, the Defendant could only recover rent that was lawfully due. The rent that was due to the Defendant from the Plaintiff was Kshs. 100,000/- per month and the same was payable with effect from 1<sup>st</sup> July 2005. The Defendant was not entitled to rent at the rate of Kshs. 150,000/- per month from April 1, 2005. To the extent that the Defendant sought to recover from the Plaintiff rent at the



rate that was not agreed upon and from the date when rent was not payable, the distress for rent levied against the Plaintiff by Jogi Auctioneers on July 9, 2007 was unlawful.

**Whether the Plaintiff is entitled to a refund of the money spent in the renovation, repairs and alteration of the suit property before he commenced business thereon.**

38. It is common ground that the Plaintiff was granted permission by the Defendant to carry out “necessary renovations and/or improvements” under clause 2 of the lease. Under clause 9 of the lease, the Plaintiff was permitted “to make alterations or additions”, “erect any fixture together with perimeter fencing”, “to rearrange and alter the interior” of the suit property to provide more convenient accommodation as deemed necessary by the Plaintiff provided that upon determination of the lease, the Plaintiff was not to remove any such alterations, additions, fixtures and any other improvement to the suit property.
39. It is also common ground that the Plaintiff carried out repairs, renovations, alterations and made additions to the suit property. I have however not come across any clause in the lease expressly providing for a refund to the Plaintiff of the costs incurred in repairing and renovating the suit property. There is also no clause in the lease from which it can be inferred that the parties had such intention. I have found nothing in clauses, 2, 4, 5 and 9 of the lease cited by the Plaintiff from which the court can infer that the parties had agreed that the Defendant would refund to the Plaintiff the cost of the said repairs and renovations. The Plaintiff has invited the court to invoke equity to compel the Defendant to compensate him for the said repairs and renovation works. As rightly submitted by both parties, the court cannot rewrite a contract for the parties. I cannot invoke the doctrines of equity to alter the parties’ contract or to import into it something which the parties never intended.
40. The rival arguments put forward by the parties for and against the refund sought by the Plaintiff are both appealing. According to the Plaintiff, it could not have been the intention of the parties that the Plaintiff would spend substantial amount of money in renovating and improving the suit property for the benefit of the Defendant without compensation. The Defendant has argued on the other hand that his intention was to convert the building on the suit property into a shopping mall and that continuing to run the hotel business on the premises was the Plaintiff’s idea. The renovations and the repairs that were carried out on the suit property by the Plaintiff were therefore to suit his own business needs. The Defendant argued further that the parties agreed on a fixed lower rent for the premises to enable the Plaintiff to recover the expenses that he was to incur in renovating and repairing the premises. The Defendant referred the court to the valuation report that was submitted in evidence by the Plaintiff in which the valuer stated that in 2005, the market rent for the suit property was Kshs. 108,480/- which rose to Kshs. 240,000/- as at 2011.
41. My view on this matter is that the parties agreed expressly in the lease that the Plaintiff would pay the previous outstanding utility bills and would recover the payment made from the rent payable to the Defendant. If it was the intention of the parties that the cost of repairs and renovations should also be recovered from the rent, then, nothing would have prevented the parties from expressly providing for the same in the lease. In the absence of such provision in the lease, there is no basis on which I can make a finding that the Plaintiff is entitled to a refund or compensation for the costs that he incurred in repairing and renovating the suit property. I have also noted that there was no way the Plaintiff could have recovered the cost of renovations and repairs that he has put at approximately Kshs. 10,000,000/- from the monthly rent of Kshs. 100,000/- within 3 years of the lease term. At the end of the 3 years, the Plaintiff would have recovered only a sum of Kshs. 3,600,000/-. It is therefore improbable that the parties had intended that the costs incurred by the Plaintiff in repairing and renovating the suit property be recovered from the rent payable to the Defendant. Looking at the evidence tendered in totality, I find it more probable that the repairs and renovations that were being carried out by the



Plaintiff to the suit property were for his convenience and that the cost thereof was not to be recovered from the Defendant but through the discounted rent.

42. Due to the foregoing, it is my finding that the Plaintiff is not entitled to a refund of the costs that he incurred in repairing and renovating the suit property.

**If the answer to (c) is in the affirmative, how much should be refunded?**

43. Having made a finding that the Plaintiff is not entitled to a refund of the cost of repairing and renovating the suit property, it is not necessary for me to determine this issue. I would say however that if I was to determine it, I would have held that the cost of repairs and renovations of the suit property incurred by the Plaintiff amounted to Kshs. 2,287,264/- in accordance with the bill of quantities that was prepared by DW2. I found no credible evidence to support the costs of construction of Kshs. 10,383,782/- claimed by the Plaintiff. The cost of construction claimed by the Plaintiff is said to have been based on a bill of quantities that was prepared for the Plaintiff by Quanti-Bill Consult. A copy of the said bill of quantities produced in evidence is dated March 2006. According to the evidence on record, the Plaintiff had already carried out renovations and repairs to the suit property by 22<sup>nd</sup> August 2005 and was already carrying out business on the suit property. I am unable to see therefore how the renovations and repairs carried out between March 2005 and August 2005 could have been carried out on the basis of a bill of quantities prepared in March 2006. I am agreement with the Defendant that some of the documents submitted to court by the Plaintiff were falsified and were intended to mislead the court.

**Who is liable for the costs of the suit?**

44. The Plaintiff has failed in his claim against the Defendant. I have however found that the distress that was levied by the Defendant against the Plaintiff was illegal. Costs normally follow the event and the same is at the discretion of the court. In the circumstances of this case, I am of the view that it would be just if each party bears its costs.

**Conclusion.**

45. In conclusion, I hereby make the following orders in the matter;
- a. The Plaintiff's suit is dismissed.
  - b. Each party shall bear its costs of the suit.

**DATED AND DELIVERED AT KISUMU ON THIS 18<sup>TH</sup> DAY OF JANUARY 2024.**

**S. OKONG'O**

**JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Koko for the Plaintiff

Mr. Yogo for the Defendant

Ms. J.Omondi-Court Assistant

