Jomo Kenyatta University of Agriculture and Technology v Kwanza Estate Limited (Civil Appeal 64 of 2022) [2023] KECA 700 (KLR) (16 June 2023) (Judgment)

Neutral citation: [2023] KECA 700 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 64 OF 2022

F SICHALE, LA ACHODE & WK KORIR, JJA

JUNE 16, 2023

BETWEEN

JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY ..... APPELLANT

AND

KWANZA ESTATE LIMITED ..... RESPONDENT

(Being an appeal against the judgment and decree of the Environment and Lands Court in Nakuru delivered by D.O. Ohungo, J. on 27th April, 2022inELC No. E019 of 2020)

JUDGMENT

1. Jomo Kenyatta University of Agriculture and Technology (JKUAT) the appellant, has appealed against the judgment of the Environment and Land Court (ELC) at Nakuru (Ohungo J), delivered on 27th April 2022 in Nakuru ELC No E019 of 2020.

2. A summary of the litigation in the Environment and Land Court is necessary to properly contextualize the arguments in this appeal. Vide an amended plaint dated 28th May 2021, the appellant sued the respondent claiming that the respondent was unjustifiably and unlawfully intending to auction its movable property and was preventing the appellant from leaving the property known as Kwanza House Building Block 9/90 even though the lease between them had been frustrated.

3. The appellant averred that it entered into a lease agreement with the respondent for a term of 6 years running from 1st May 2016 to 30th April 2022. They agreed on an increasing annual rent being, Kenya shillings forty-five million five hundred and forty-three thousand (kshs. 45,543,000/=) for the period between 1st May 2016 to 30th April 2017, Kenya shillings forty-seven million eight hundred and twenty thousand one hundred and fifty (kshs. 47,820,150/=) for the period between 1st May 2017 to 30th April 2018, fifty million two hundred and eleven thousand one hundred and fifty-seven (kshs. 50,211,157/=) for the period between 1st May 2018 to 30th April 2019, fifty-two million seven hundred and twenty-

one thousand seven hundred and fourteen (kshs. 52,721,714/=) for the period between 1st May 2019 to 30th April 2020, fifty-five million three hundred and fifty-seven thousand seven hundred and ninety-nine (55,357,799/=) for the period between 1st May 2020 to 30th April 2021, and fifty-eight million one hundred twenty-five thousand six hundred and eighty-nine (kshs. 58,125,689/=) for the period between 1st May 2021 and 30th April 2022. The appellant also stated that it paid a security deposit of Kenya shillings eleven million three hundred and eighty-five thousand seven hundred and fifty (kshs. 11,385,750/=).

4. The appellant also contended that the suit premise was intended for self-sponsored students but due to financial constraints occasioned by reduced government support, reduction of self- sponsored students, removal of self-sponsorship programs, and the closure of schools due to the Covid-19 pandemic, the appellant was unable to honor the lease. Further that, the lease agreement allowed for the termination of the tenancy prior to the expiry of term, which the appellant sought to exercise vide a letter dated 10th July 2020.

5. In response to the letter dated 10th July 2020 the respondent served upon the appellant an invoice for Kenya shillings seventeen million three hundred and fifty-four thousand six hundred and seventy (kshs. 17,354,670/=) and confiscated their movable property. The appellant averred that despite vacating the suit premises on 31st January 2021 and paying the outstanding bill of kshs 17,354,670/=, the respondent instructed Messrs Pyramid auctioneers to auction the movable property for the sum of Kenya shillings sixteen million fifty-three thousand seven hundred and sixty-two (kshs.16,053,762/=).

6. In the ELC the appellant sought a declaration that the lease agreement had been rendered commercially impossible/frustrated, due to change in circumstances and/or by operation of law, thereby discharging both parties from their lease obligations. The appellant also asked the court to declare the intended auction unlawful and issue an injunction against the respondents, stopping them from selling the appellant's movable property and from preventing them from moving out of the suit premise.

7. In a statement of defence and counterclaim dated 24th November 2020, the respondent refuted the claims that the appellant was in financial constraints due to government directions and that the suit premises was used exclusively by self-sponsored students. They also denied claims that the appellant could not afford to honor their lease based on the conditions at the time. The respondent acknowledged receipt of the letter expressing interest in terminating the lease but denied that the lease agreement had a break clause allowing a party to terminate the lease prematurely. The respondent also acknowledged receiving a sum of Kenya shillings fifteen million seven hundred and seventy-six thousand nine hundred and seventy-three (kshs. 15,776,973/=) in respect of rent for the period of November 2020 to January 2021. The respondent however, maintained the stance that the lease had not been frustrated and that the appellant broke the terms of their lease occasioning them to engage auctioneers to recover the rent arrears from the appellant's properties.

8. In its counterclaim, the respondent posited that the appellant breached the lease agreement which would have resulted in the respondent suffering a loss in rent in the sum of Kenya shilling ninety-seven million eight hundred and seventeen thousand two hundred and thirty-one (kshs. 97,817,231/=) and building restoration costs of about Kenya shillings sixty-four million six hundred fifty-two thousand two hundred and fifty thousand two hundred and fifty, (kshs. 64,652,250/=). Consequently, the respondent sought a declaration that the lease agreement was active and did not contain a break clause. They prayed that the appellant be held accountable for his obligations under the lease and be ordered to pay the amount of the expected loss being kshs. 162,469,481/= with interest and costs.

9. During the hearing, Robert Kinyua the Vice Chancellor in Charge of Academic Affairs testifying for the appellant, stated that the appellant had since the commencement of the lease adhered to the terms

of the lease but that a series of events transpired occasioning the appellant's financial constraints. He told the court that the government implemented a new placement system requiring all students to be fully funded and in 2014 the Kenya Universities and Colleges Central Placement Service (KUCCPS) required all students admitted to the university to be placed as government-sponsored, thus limiting the money they got from self-sponsored students. The plan took effect in 2017. He testified that the Nakuru CBD campus was most affected because it was wholly reliant on self-sponsored students. Therefore, the appellant could not continue leasing the suit premises due to frustration through the operation of law. He expressed that they intimated their concern to the respondent and sought to terminate the lease and vacate the premises, but the respondent confiscated their movable property and appointed auctioneers intending to auction the property.

10. Geoffrey Makana Asanyo (DW1), the Managing Director of the defendant testified that the appellant's obligations in the contract included painting the premises with three coats of plastic emulsion oil and colour approved by the respondent and polishing all parts accordingly, prior to the expiry of the term or before termination. They also agreed to make a default payment of all moneys due in the lease failure to which the appellant's property would be attached. Further, the appellants agreed to permit the respondent 3 months before the termination of the lease, to enter and affix or retain a notice of re-letting without interference and to remove all of the appellant's properties as may be necessary during the last month without liability. Lastly, it was his contention that the appellant agreed to yield up at the expiration or before termination of the term the premises to the respondent with the fixtures and fittings thereto in good and tenantable repair conditions subject to fair wear and tear.

11. He refuted claims that the lease contained a break clause and asserted that the appellant asked for a waiver of the rent payable from 1st April 2020 as long as the university remained closed, but they wrote back informing that the arrangement was not tenable, upon which the appellant attempted to forcefully break the lease. It was also his testimony that upon the appellant's failure to pay their accrued rent, they wrote to them demanding payment and subsequently instructed M/S Triad Architects to inspect and evaluate the status of the suit premises. It was his position that the report indicated that they would need about kshs. 64,652,250/= to restore the property which would take approximately six months. He further testified that the appellant attempted to remove their movable property from the suit promises to defeat their rental claims occasioning them to set up security to prevent removal of the property. He stated the final sum of the cost of repairs and the accrued rent to be kshs. 162,469,481/=

12. Upon evaluating the evidence, the trial Judge dismissed the appellant's suit with costs and entered judgment for the defendant on their counterclaim. The trial Judge declared that the lease agreement entered on 1st May 2016 remained in force and that the appellant was required to pay the stipulated rent up to 30th April 2022 and further that the appellant's purported lease termination notice was null and void. The court also set the cost of restoration of the suit premises to its original state at an all-inclusive price of forty million (kshs. 40,000,000/=) and the rent due for the period between 1st February 2021 to 30th April 2022 at seventy-one million nine hundred and sixty-five thousand one hundred and thirty 38 shillings and seventy cents (kshs. 71,965,138.70/=).

13. The appellant now seeks to overturn the above verdict citing ten grounds of appeal, abridged into three grounds being: First, whether the learned Judge erred in finding that the lease agreement did not contain a break clause; second, whether the learned Judge erred in finding that the lease agreement had not been frustrated by operation of law and lastly, whether the learned Judge erred in law and fact by awarding the respondent kshs. 71,965,138.70/= in compensation for breach of the lease agreement.

14. In response, the respondent filed a notice of cross-appeal, asserting that the trial Judge erred in not holding that the total amount payable by the appellant was subject to VAT of kshs. 11,514,422.20/=

in terms of clause 3(3) of the lease agreement. It was also its contention that the learned Judge erred for not acknowledging that the amount it sought in compensation included the VAT. The respondent prayed that this Court orders the appellant to pay the VAT on the rent payable in the sum of kshs. 11,514,422.20/= in accordance with the terms of the lease agreement.

15. The appeal was canvassed by way of written submissions.

16. The appellant addressed three main issues in its submissions. On whether the learned Judge erred in finding that the lease agreement between the parties did not contain a break clause, it was the appellant's contention that clauses 5.5, 5.26 and 5.27 all contained the phrase "or on sooner determination", clauses which it contends permit termination before the term of the lease. The appellant urged that the trial Judge failed to acknowledge these plain and unambiguous phrases and their meaning in the manner adverted to by the Supreme Court in the case of *Council of Governors v Attorney General and 7 others* (2019) eklr, where the Supreme Court stated that English words ought to be given their natural meaning and that the rules of interpretation (golden or mischief) should be invoked only if there is ambiguity. The appellant argued therefore, that the trial Judge failed to acknowledge that they had rightfully exercised their right under the provisions of the lease agreement to terminate the lease, by issuing 3 months of notice.

17. The appellant argued that the trial Judge failed to uphold the contra proferentem rule so that if the wording of the contract was ambiguous in any way, then the lease agreement should have been interpreted in its favor, since the agreement was drawn by the respondent.

18. On whether the trial Judge erred in finding that the lease agreement between the parties had not been frustrated under the doctrine of frustration, the appellant submitted that it had given sufficient evidence to support their contention and that the trial Judge failed to consider the change in circumstances and the change in the law that ultimately led to the frustration of the lease agreement as espoused in the case of *Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd* [2014] eKLR, where this Court in considering the frustration of an agreement, relied on *Halsbury's Law of England*, Vol 1. 9(1), 4th edition at para 897.

19. The appellant submitted that all the evidence in support of frustration was uncontroverted, and all the respondent's contentions were mere statements and therefore, that the learned Judge erred in finding in favor of the respondent on this aspect and relied on the case of *Jadiel Gikunda Ambutu v Nyaki Farmer's Co-operative Society* [2011] eKLR to buttress this assertion.

20. Lastly, as to the merits of the cross-appeal, the appellant submitted that all the evidence it presented remained uncontroverted and the cross-appeal should fail. Further that, the respondent is bound by its pleadings in the trial court, in which it did not raise the issue of VAT as enunciated in the case of *Galaxy Paints Company Limited v Falcon Guards Limited* [1999] eKLR.

21. The respondent in opposing the appeal identified 4 issues for determination. It submitted first, that the lease agreement contained no break clause because clause 3 of the agreement was very clear regarding the duration of the lease and clause 7 on circumstances of termination. While acknowledging that some clauses including clause 5, contain the phrase "or sooner determination", the respondent submitted that the lease agreement ought to be read holistically and that there was never an intention for either party to terminate the contract earlier than the term of 6 years. It was its contention that clauses bearing the phrase "or sooner determination" as used in clauses 5.5, 5.36, and 5.27 relate to termination contemplated under clause 7 and not one initiated by the lessee.

22. It was therefore the respondent's position, that the trial Judge correctly relied on the case of *Kenya Commercial Bank Limited and Potatlal Madhavji & Another* [2017] eKLR, where the court held as follows:

> But having found as we have above that an agreement to lease for a period of 5 years and 3 months had resulted from the terms outlined in the letter of 23rd December 1998 and the ensuing correspondence, the appellant was bound to a lease term of a period exceeding five years, which removed it from the ambits of *Cap 301*. This meant that termination of the lease midterm was not available to the appellant. The consequence of this was that the notice of termination of 25th March 2002 could not validly terminate the lease, with the result, we find that, the appellant was obligated to continue to occupy the suit premises for the entire period of the lease, and to pay the agreed rent and service charge for the period up to the date of expiry, that being the 31st December 2003".

23. Regarding the contra proferentem rule, the respondent submitted that the issue was not raised in the trial court and therefore could not be urged as a ground of appeal. Moreover, the respondent argued that the appellant negotiated the terms of the contract and was therefore estopped from denouncing it.

24. Secondly, on the issue of frustration, the respondent cited the cases of *Kimaiyo Langat v Co-operative Bank of Kenya Ltd* [2017] and *National Bank of Kenya Limited v Pipe Plastic Samkolit Ltd* [2011] eKLR to submit that courts cannot rewrite contracts for parties. The respondent urged that the relationship between the two parties began in 2010 and the respondent voluntarily signed an extension of the contract in 2016 aware of the terms. It urged that the respondent was attempting to partially rely on the doctrine of frustration by agreeing only to restore the building to its original state by paying kshs. 40,000,000/=, which completely reneges the doctrine. Further, that the trial Judge had considered all the evidence and instances alleged by the appellant to have caused the frustration and found no firm basis for frustration. The respondent urged this Court to consider the following cases; *Fiveforty Aviation Limited v. Erwan Lanoe* [2019] eKLR, *Lucy Njeri Njiroge v Kaiyahe Njoroge* [2015] eKLR, *Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd and Another* [2014] eKLR, *Samuel Chege Gitau & Another v Joseph Gicheru Muthora* [2014] eKLR and, *Kenya Airways Limited v Satwant Singh Flora* [2013] eKLR on when the doctrine of frustration can be invoked.

25. Thirdly, the respondent submitted that the trial Judge did not award them any damages but rather, the amount of kshs. 71,965,138.70/= was to the effect of the terms of the lease agreement between the parties.

26. Regarding the cross-appeal, the respondent submitted that the trial Judge failed to acknowledge that the rental sum of kshs 71,965,138.70/= was subject to a VAT of kshs 11,514,422.20/= in terms of clause 3.3(b) of the lease agreement and that the appellant was obligated to pay it. The respondent cited the case of *Ann Wairimu Wanjohi v James Wambiru Mukabi* [2021] eKLR to contend that they had pleaded for an amount that included the VAT in the trial court and that the trial Judge ought to have determine the issue on the VAT.

27. This being a first appeal, our duty as the first appellate court was explained in the case of *Mwangi v Samburu* [1984] KLR 453 as follows:

> A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding, and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances

or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

28. We have re-evaluated and re-analyzed the record of appeal in light of the rival submissions, the authorities cited, and the law. The issues we have identified for determination are as follows: whether the lease agreement contained an early termination clause, whether the lease agreement was frustrated by law and circumstances, and whether the trial court ought to have included a VAT amount in the awarded rental amount.

29. It is not in dispute that the appellant and the respondent entered into a lease agreement voluntarily in 2010 and upon expiry of the agreement, it was again voluntarily renewed for a period of 6 years which was to expire in April of 2022. The updated lease agreement produced in evidence provided for rent for each annual period, notice, and obligations of both parties regarding the lease premises and performance of the agreement.

30. Regarding the 1st issue, whether the lease agreement contained an early termination clause, it is not disputed that the lease agreement was for a term of six (6) years running from 1st May 2016 to 30th April 2022. The bone of contention is whether the phrase "or sooner determination" in the contract was, or was not a break close. The appellant contended that the phrase had the effect of a break clause which either party could exercise when necessary. The respondent on the other hand argued that the lease agreement read holistically binds both parties to the full extent of the six-year term of the contract. The respondent especially argued that clause 5 should be read in light of clauses 3 and 7.10.

31. A break clause in a tenancy agreement allows a party to terminate the contract before the end of its term. The phrase "sooner determination" on the other hand was illustrated by the Indian High Court at Calcutta in the case of *Sri Ashwin Bhanulal Desai v.Bijay Kumar Manish Kumar* [2019] in the following terms;

> " 66. In the present case, although the registered lease deed was entered in the year 1992 for a period of 99 years, it was not allowed to run its full course but was terminated sooner by issuance of a notice on the ground of forfeiture under Section 111 (g) of the 1882 *Act*, although not by invoking any "sooner determination clause". Since the expression "sooner determination" need not be confined, nor was confined in any of the cited judgments, to invocation of a specific clause in the lease deed to that effect, but also contemplates any mode of determination sooner than its full tenure, including forfeiture as envisaged in Section 111 (g) of the 1882 *Act*, even applying the principle of Prakashwati Chopra (*supra*), the instant case can be said to be governed not by the 1882 *Act* but under the 1997 *Act*."

32. The agreement between the appellant and the respondent herein contained covenants such as those in clause 5 which bore the phrase, "sooner determination" as here under:

> 5.5. immediately prior to the expiration of the said term or on the sooner determination thereof to paint all the parts of demised premises previously painted with three coats of plastic emulsion oil or other best paint (as the case may require) in a workmanlike manner and in a colour approved by the lessor or its agents and to clean off and polish all parts previously polished (if any) to the satisfaction of the lessor or its agents;

5.26. to yield up at the expiration or sooner termination of the said term the demised premises to the lessor with the fixtures and fitting thereto (other than the partitions fixtures and fittings installed in the demised premises with the consent of the lessor pursuant to the provisions of this lease which shall remain the property of the lessee) in such good and tenantable repair and condition subject to fair wear and tear as shall be in the strict accordance with lessee's covenants and agreements herein contained with all locks keys and fastening complete;

5.27. the lessee's obligations to perform and observe the covenants and agreements herein contained shall service the expiration or sooner determination of the said term unless it shall fall on a Sunday or public holiday, then this lease shall expire on the business day immediately preceding. The lessor's right to vacant possession at the expiry or sooner determination of this lease shall be deemed to be of the essence of the contract between the parties hereto; (emphasis ours).

33. The phrase "or sooner determination" means early termination before full term and is contained in a contract that spells out the obligations of each of the parties. In our view, the contract contents should be read, in context and not as separate clauses but as clauses that make up part of a whole. In essence therefore, clause 5 should be read in relation to all the other clauses in which it is used. It is not disputed that the lease agreement was entered into for a fixed term of 6 years. However, the inclusion of the clause "or sooner determination" in the contract makes it apparent that the parties agreed to give themselves an exit window out of the agreed terms upon change of circumstances.

34. Clause 7.10 provided that:

> "No liability shall attach in respect of any breach of any covenant or agreement (other than covenants and agreements for the payment or money) on the part of the lessor, or the lessee herein contained or implied so long as they shall be prevented from remedying the same by any statutory restrictions non-availability of labour or materials or matters beyond their control provided that if such breach shall occur as aforesaid the lessor or the lessee as the case may be, shall remedy such breach immediately conditions permit and in the event of any such breach of covenant or agreement on the part of the lessee not having been remedied before the expiration, or sooner determination of the said term the lessee shall forthwith upon such determination or sooner determination of the said term, pay to the lessor such an amount as shall be necessary to remedy such breach as aforesaid." (emphasis ours)

35. Clause 7.10 therefore, also acknowledges that there may arise situations in which the lease may be interrupted, but excludes the payments of the rent and other money owed from this break. To this end, it is our considered view that even read holistically, this clause and the others in relation thereto, are to the effect that the appellant would be obligated to pay the monies owed as at the time of determination of the agreement. In other words, the respondent is entitled to receive the rent owed up to the time the parties terminated the contract. Any reading of the clause which would force the appellant to pay monies for the remaining lease period other than that which accrued from the usage of the premises would be unfair and would amount to unjust enrichment.

36. Furthermore, as pointed out by the respondent, the parties herein negotiated the terms of the contract and voluntarily bound themselves to the terms therein. Therefore, the respondent bound itself to the

terms of the agreement which allowed for the interruption of the lease agreement prior to the expiry of the fixed term. Having given the English terms and phrases employed in the following clauses;

> "5.5; immediately prior to the expiration of the said term or on the sooner determination thereof...
>
> 5.26. to yield up at the expiration or sooner termination of the said term...
>
> 5.27. The lessor's right to vacant possession at the expiry or sooner determination of this lease,"

their ordinary meaning and interpretation, we conclude that the effect of the phrase "or sooner determination" in those clauses, was to allow the parties to opt out of the lease agreement prior to the fixed term of the lease and therefore, the trial Judge erred in finding that the phrase did not amount to a break clause entitling the parties to determine the contract before the expiry of the lease term.

37. Regarding the contra proferentem rule, the appellant contends that the ambiguous phrase "or on the sooner determination" should have been construed against the drafter of the contract, that is the respondent. While this is true, this Court is sitting as a court of appeal and therefore is bound to only consider what was raised in the trial court in these circumstances. The appellant did not allege ambiguity in the lower court and therefore cannot purport to raise it at this stage.

38. The second issue is whether the lease agreement was frustrated by circumstances and the law. It was the appellant's contention that the lease agreement was frustrated due to change in law and policy. The appellant argued that it had experienced dire financial constraints occasioned by a reduction of self-sponsored students following a change in law through the implementation of the new placement policy by KUCCPS, where all the students who qualified for admission to the university are sponsored by the government in both public and private universities pursuant to *Universities Act*, 2012. It also contended that the Nakuru campus located in the suit premises was most affected by the directive because it solely catered for self-sponsored students. On the other hand, the respondent asserted that the relationship between the two parties started before the directive was made and that upon expiration of the first contract in 2016 the appellant voluntarily entered another contract, being aware that the directive was now in place.

39. The principles of the doctrine of frustration have been restated time and again. In *Five Forty Aviation Limited v Erwan Lanoe* [2019] eKLR, this Court restated the principles as follows:

> "....the doctrine of frustration operates to excuse further performance where it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the foundation of the contract will take place, and before breach performance becomes impossible or only possible in a very different way to that contemplated without default of either party and owing to a fundamental change of circumstances beyond the control and original contemplation of the parties. The mere fact that a contract has been rendered more onerous does not of itself give rise to frustration.

(See also *Halsbury's Laws of England* (3rd Edition) Volume 8 page 185(i), on the doctrine of frustration para 320) and Davis Contractors Ltd v FAREHAM U.D.C. [1956] A.C.696 for the observations inter alia that:

> " Frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because, the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract..."

40. Again, in the case of *Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd* [2014] eKLR, to which the appellant referred us, this Court differently constituted, considering the doctrine of frustration of an agreement, revisited the multi-factorial approach set out in *Halsbury's Laws of England*, Vol 1. 9(1), 4th edition at paragraph 897 as follows:

> " As subsequently developed, the doctrine of frustration operates to excuse from further performance where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated. This assessment has been said to require a 'multi-factorial' approach. Five propositions have been set out as the essence of the doctrine. First, the doctrine of frustration has evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises so as to give effect to the demands of justice. Secondly, the effect of frustration is to discharge the parties from further liability under the contract, the doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not to be extended. Thirdly, the effect of frustration is to bring the contract to an end forthwith, without more and automatically. Fourthly, the essence of frustration is that it should not be due to the act or election of the party seeking to rely upon it, but due to some outside event or extraneous change of situation. Fifthly, that event must take place without blame or fault on the side of the party seeking to rely upon it; nor does the mere fact that a contract has become more onerous allow such a plea."

41. Considering the guiding principles of the doctrine of frustration, it is important for us to evaluate the evidence to ascertain whether the appellant contributed to the frustration. It is not disputed that the parties entered into the impugned lease agreement in 2016, four years after the directive was issued. The appellant admitted in cross-examination that the directive was implemented in 2014. Therefore, the appellant knew about the directive before voluntarily binding itself to the contract. The important question therefore, is whether the frustration was foreseeable in the circumstance. Ewan Mckendrick's, Contract Law, eighth edition, Par 14, 15 Page 251, sets out what constitutes a foreseeable event as follows:

> " An event is foreseeable and will prevent frustration of the contract only where it is one which 'any person of ordinary intelligence would regard as likely to occur' (see Treitel, 2007, para. 19-078, and contrast Hall 1984). In other words, the question would appear to be one of fact and degree and much will depend on the extent to which the event in question was foreseeable by the parties. As Rix LJ stated in

> The Sea Angel [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep 517, [127], 'the less that an event, in its type and its impact, is foreseeable, the more likely it is to be a factor which, depending on other factors in the case may lead on to frustration.'"

42. It is not disputed that the appellant was aware of the change in law, the policy in place and even the implementation of the directive prior to signing the impugned lease agreement. We note however, that despite the change in law and policy and the implementation of the directive, the appellant managed to maintain the campus without a hitch until the year 2020. It appears that the Nakuru CBD campus ran out funds following the closure of universities by government directive, due to the Covid-19 pandemic. The appellant stated that this caused severe financial restrain on it, thereby frustrating the contract.

43. We take cognizance of the government mandated lockdown that affected all institutions in this country and the effect it had on all businesses. Like other institutions of higher learning, the JKUAT Nakuru campus was affected by the lockdown and subsequently closed its doors. It is therefore not disputed that for a period the appellant was rendered unable to use the property subject of the lease agreement and was therefore, not generating any income from the intended purpose of the contract.

44. Consequently, it is our view that the pandemic was a force majeure event that caused the appellant undue difficulty in continuing with the lease agreement in accordance with its purpose and making the payments thereupon agreed. The appellant, in good faith, continued to make payments as required up to January 2021 long after seeking to be released from the lease agreement vide a letter dated 10th July 2020. Through the respondent's own actions of restricting the appellant's exit it curtailed its own chances of entering into business arrangements with other entities. The pandemic was no secret, and the respondents were aware of the government directive to close schools and universities. Therefore, to require performance in the face of such unforeseen and unavoidable circumstances, not caused by any acts and/or omission on the part of the appellant is absurd, unfair, and unjust.

45. In the circumstance therefore, we find that the trial court fell into error in condemning the appellant to make rental payments for the entire duration of the lease, when it was no longer using or benefiting from the premises, due to forces beyond its control.

46. Following the foregoing analysis and findings we shall not belabor the issue of VAT on the amount payable subject to the trial court's order. In short, the cross-appeal is found to have no merit and is therefore dismissed.

47. In conclusion, and following the foregoing analysis, we find that the appellant's appeal has merit and is hereby allowed in the following terms:

    i. The appellant shall pay the cost of restoration of the suit premises to its original state at an all-inclusive price of forty million (kshs. 40,000,000/=).

    ii. Each party shall bear its own costs.

DATED AND DELIVERED AT NAKURU THIS 16TH DAY OF JUNE, 2023.

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR