



**Shah v Centre Park Plaza Limited & another (Environment and Land Appeal E080 of 2022) [2024] KEELC 13468 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13468 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E080 OF 2022  
OA ANGOTE, J  
NOVEMBER 20, 2024**

**BETWEEN**

**REENA SHAH ..... APPELLANT**

**AND**

**CENTRE PARK PLAZA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**JAPANESE VEHICLE SERVICE CENTRE LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Judgement of the Chief Magistrates Court at Nairobi (Hon. A.N Makau (P.M) dated the 16th September, 2022 in Nairobi Chief Magistrates Civil Case No E071 of 2021)*

**JUDGMENT**

**Background**

1. This suit was instituted before the Trial Court by the Respondents (Plaintiffs therein) as against the Appellant (Defendant therein) vide a Plaint dated 7<sup>th</sup> January, 2020, amended on the 5<sup>th</sup> August, 2021.
2. Vide the Amended Plaint, the Respondents sought as against the Appellant, inter-alia, the sum of Kshs 2, 040, 496/= and Kshs 1, 882, 983/= in favour of the 1<sup>st</sup> and Respondents respectively, with interest at Court rates until full payment, general damages for breach of contract, damages for loss of business, costs of the suit and incidental costs.
3. Briefly, the Respondents case before the Trial Court was that from the 1<sup>st</sup> June, 2017 to the 30<sup>th</sup> March, 2018, the 2<sup>nd</sup> Respondent was a tenant of the Appellant at her premises situate at L.R 1870/VIII/90 within Westlands Area in Nairobi County; that at the commencement of the Lease, it paid a deposit of Kshs 500,000/= and one months' rent; that it continued to pay rent until the 30<sup>th</sup> March, 2018 when the 1<sup>st</sup> Respondent took over the Lease.



4. They stated that during its occupation, the 2<sup>nd</sup> Respondents incurred several expenses incidental to its occupation of the premises including towards change of account name in respect of water and electricity service providers, change of user of the premises, repair of electric fence and renovation of the premises in a bid to make it habitable.
5. According to the Respondents, the 2<sup>nd</sup> Respondent, initially sought to run a Koroga/outdoor restaurant arrangement but the Appellant was opposed to the same forcing it to consider alternatives; that in February, 2018, it was desirous of surrendering its lease over the premises to the 1<sup>st</sup> Respondent which the Appellant agreed to and that a Deed of Surrender was prepared in this respect, signed by the Respondents and forwarded to the Appellant but she did not execute or revert the same.
6. The Respondents averred in the Complaint that nonetheless, the Appellant handed over the premises to the 1<sup>st</sup> Respondent who took over from the 15<sup>th</sup> March, 2018 at a monthly rate of Kshs 450,000/= creating a contractual landlord tenancy relationship.
7. According to the Respondents, the Appellant was aware that the 1<sup>st</sup> Respondent intended to set up a restaurant and was open to the same as long as it was not a Koroga type restaurant; that the 1<sup>st</sup> Respondent having initially intended to set up a Koroga type restaurant decided to sub-lease the premises and the Appellant referred a potential client to it.
8. It was contended that that in May, 2018, the 1<sup>st</sup> Respondents' Director informed the Appellant of a prospective tenant and requested that no other tenant be shown the premises; that further, the Appellant was informed that if she was desirous of engaging a sub-tenant directly, she had to do so with the 1<sup>st</sup> Respondents' consent being the tenant in occupancy.
9. The Respondents averred that in early June, 2018, the 1<sup>st</sup> Respondent forwarded a draft letter of offer to a prospective sub-tenant who intended to set up an Italian restaurant having agreed on the rent payable, user of the premises and that it would take possession of the property upon signing of the letter of offer and issuance of the approval for the change of user by the County Government.
10. It was their case that simultaneously, they were engaging the Appellant on the terms of the sub-lease to wit whether the sub-tenant would sub-lease through the 1<sup>st</sup> Respondent or through the Appellant; that at some point during the negotiations, the Appellant and the prospective tenant engaged directly to its exclusion; that soon thereafter, and without their consent, the proposed sub-tenants accessed the premises either having received keys from the Appellant or its caretaker and began making renovations.
11. When the Appellant discovered the foregoing, they asserted, she unlawfully terminated the 1<sup>st</sup> Respondents lease sometime on the 5<sup>th</sup> July, 2018; that she demanded a return of the keys in August, 2018 and that by 1<sup>st</sup> September, 2018, she had leased the premises to another 3<sup>rd</sup> party running a Koroga restaurant.
12. The Respondents maintained that the Appellant was guilty of breach of contract the particulars of which included her failure to refund the security deposit and other monies used by the 2<sup>nd</sup> Respondent despite it having surrendered the Lease; renting out the premises to the third party without the 1<sup>st</sup> Respondent's consent; unilaterally terminating the Lease between itself and the 1<sup>st</sup> Respondent and demanding the keys to the premises; maliciously refusing to allow the 1<sup>st</sup> Respondent run a Koroga type restaurant and allowing the new tenant to do so.
13. They urged that the Appellant's actions caused the Respondents unnecessary loss and commercial frustrations; that notably, the prospective sub-tenant was to pay an additional Kshs 3, 500,000/=above



- the rental amount which would be paid by the 1<sup>st</sup> Respondent towards the rent and that attempts to have the Appellant discharge the rent were futile.
14. In response, the Appellant vide an Amended Defence dated the 23<sup>rd</sup> August, 2021 denied the Respondents' assertions stating that she is the registered proprietor of the suit property; that on the 25<sup>th</sup> July, 2017, she entered into a Lease agreement dated the 25<sup>th</sup> July, 2017 with the 2<sup>nd</sup> Respondent for a period of 5 years, 6 months starting from the 1<sup>st</sup> June, 2017 and that however, the 2<sup>nd</sup> Respondent failed to make payment towards the stamp duty for the Lease.
  15. She noted that pursuant to the terms of the Lease, the 2<sup>nd</sup> Respondent was contractually obligated to pay suppliers for utilities and pay for repairs and renovations and that the 2<sup>nd</sup> Respondent did not approach her seeking to run a Koroga/outdoor restaurant and she was in any event entitled to restrict the use of the property in the manner she saw fit.
  16. It was the Appellant's case that on 26<sup>th</sup> March, 2018, the 1<sup>st</sup> Respondent, a separate legal entity from the 2<sup>nd</sup> Respondent, notified her that the 2<sup>nd</sup> Respondent could not fulfil its obligations under the Lease and it was willing to take over its obligations; that on the 17<sup>th</sup> April, 2018, her, through her Counsel, forwarded a Deed of Surrender to the 2<sup>nd</sup> Respondent and a Lease to be executed by the 1<sup>st</sup> Respondent; that the 1<sup>st</sup> Respondent failed to execute the Lease and resultantly there was no formal surrender thereof; that she nonetheless granted the 1<sup>st</sup> Respondent a periodic tenancy until July, 2018 after which the 1<sup>st</sup> Respondent failed to settle the August, 2018 rent.
  17. It was her case that while her and the 1<sup>st</sup> Respondent had discussions with respect to the user of the property, no contract was entered into over the same; that nonetheless, at the time of the discussions, she preferred to avoid the property being used as a Koroga type restaurant; that sometime in August, 2018, a third party who intended to set up an Italian restaurant on the property commenced renovation works without her knowledge or consent and upon being informed that she had not given the 1<sup>st</sup> Respondent authority to sub-let, the third party left the premises; that the 1<sup>st</sup> Respondent also voluntarily abandoned the property as it could no longer occupy the property being in default of the August, 2018 rent.
  18. She contended that the Respondents are not privy to the terms of the Lease between it and the third party and as the registered owner of the property, she was at liberty to use the property and contract on terms she so wished; that the allegations of breach of contract and entitlement to refunds are unfounded; that the 2<sup>nd</sup> Respondent owes it rent for the duration of the Lease dated 25<sup>th</sup> July, 2017 and that the 1<sup>st</sup> Respondent having abandoned the property, the Appellant was well within its right to seek another tenant.
  19. The matter proceeded for hearing and vide its Judgment rendered on the 16<sup>th</sup> September, 2022, the Trial Court found that the Respondents had partially proved their case and proceeded to grant the following reliefs:
    - i. Kshs 1, 850,000/= being 3 months' rent pay and deposit of Kshs 500,000/= paid by the 1<sup>st</sup> Plaintiff and not utilized.
    - ii. Kshs 500,00/= to the 2<sup>nd</sup> Plaintiff being rent deposit.
    - iii. Kshs 179, 535/= for expenses incurred in erecting the electric fence which remained as the Defendants property to date.



- iv. General Damages for breach of tenancy, NIL. It has not been demonstrated to the Court how much the loss the Plaintiffs incurred for failing to conduct business when tenancy was terminated. I am unable to quantify the same.
  - v. Costs of the suit to the Plaintiffs.
  - vi. Interest at Court rates from the date of filing suit until full payment.
20. Dissatisfied with the entirety of the decision aforesaid, the Appellant filed the present Appeal. The Memorandum of Appeal dated the 21<sup>st</sup> September, 2022, is premised on the grounds that:
- i. The Learned Magistrate erred in law and in fact by failing to distinguish the two (2) separate positions of the Respondents.
  - ii. The Learned Magistrate erred in law and in fact in holding that the Appellant issued unilateral conditions to be complied with before executing the Deed of Surrender.
  - iii. The Learned Magistrate erred in law and in fact by ignoring that the 1<sup>st</sup> Respondent admitted in their pleadings that exclusive occupation was granted to them by the Appellant from the 15<sup>th</sup> March, 2018.
  - iv. The Learned Magistrate erred in law and in fact by failing to determine that the 1<sup>st</sup> Respondent and the Appellant had entered into a periodic tenancy from 15<sup>th</sup> March, 2018 pursuant to Section 57 of the Land Act.
  - v. The Learned Magistrate erred in law and in fact by failing to note that the rent was due to the Appellant by the 1<sup>st</sup> Respondent upon exclusive occupation having been granted and not on use of the property.
  - vi. The Learned Magistrate erred in law and in fact by misapprehending the landlord-tenant relationship between the Appellant and the Respondents.
  - vii. The Learned Magistrate erred in law and in fact by making contradictory findings that the 1<sup>st</sup> Respondent was in a position to sub-let the premises while also at the same time that it was unable to use the premises.
  - viii. The Learned Magistrate erred in fact by holding that the Appellant negotiated directly with the third party when the evidence was entirely to the contrary.
  - ix. The Learned Magistrate erred in law and in fact by holding that the 1<sup>st</sup> Respondent was entitled to refund of rent paid despite having occupation of the property.
  - x. The Learned Magistrate erred in law and in fact holding that the Appellant terminated the lease between itself and the 1<sup>st</sup> Respondent without notice.
  - xi. The Learned Magistrate erred in law and in fact that the Respondents failed to prove that it did incur expenses of Kshs 179, 535/= in accordance with the law on special damages.
  - xii. The Learned Magistrate erred in law and in fact by holding that the 1<sup>st</sup> Respondent paid a deposit of Kshs 500,000/= when the evidence was to the contrary.
  - xiii. That the Learned Magistrate erred in law and in fact by holding that the 2<sup>nd</sup> Respondent was entitled to a refund of the deposit of Kshs 500,000/=.



- xiv. That the Learned Magistrate erred by failing to justify why the Respondents were entitled to a refund of any rent paid, staff expenditure and repair of electric fence despite absence of any agreement to that effect.
  - xv. That accordingly, the Learned Magistrate erred in law and in fact in awarding the Respondents, the cumulative sum of Kshs 1, 850,000/= together with interests from the date of filing the suit and costs without justification.
  - xvi. That the Honourable Court erred in law and in fact by failing to consider the Appellants pleadings, evidence and submissions hence arrived at an erroneous conclusion.
21. The Appellant therefore seeks:
- a. That this Appeal be allowed.
  - b. That the Judgement and Decree of the Chief Magistrates Court delivered on the 16<sup>th</sup> September, 2022 be set aside and replaced with an order that the suit be dismissed with costs.
  - c. That the Respondents do pay the costs of this Appeal: and
  - d. Any such other or further relief as this Honourable Court may deem just to grant in the circumstances of this Appeal.
22. The Respondents filed a Cross-Appeal on 11<sup>th</sup> October, 2022 averring that the Trial Court's decision ought to be varied or reversed partially as regards Order No (iv) of the Judgement on General Damages on the grounds that:
- i. The Learned Magistrate erred in law and in fact in failing to assess and award general damages for breach of contract despite having made a finding that the Appellant had admitted that she had terminated the tenancy contract unilaterally with no notice to the 1<sup>st</sup> Respondent.
  - ii. The Learned Magistrate erred in law and in fact in failing to find that the Appellants' actions of forcefully taking over possession of the premises was unlawful and amounted to breach of contract as well as violation of statutory provisions under the *Land Act*, 2012.
  - iii. The Learned Magistrate erred in law and in fact in failing to consider the evidence adduced by the Respondents (Plaintiffs/Respondents Exhibit 24 and 27) that a Letter of Offer had been issued to a sub-tenant(Kesi Limited) by the 1<sup>st</sup> Respondent and the Appellant was agreeable to the sub-lease.
  - iv. The Learned Magistrate thus erred in law and in fact in failing to find that indeed the 1<sup>st</sup> Respondent had demonstrated the loss of business when the Appellant unilaterally terminated the lease and the 1<sup>st</sup> Respondent could thus not continue with the sub-lease.
  - v. The Learned Magistrate erred in law and in fact in failing to consider the submissions by the Respondent and failed to consider the decision of the Superior Court in *Harry Kitulo Mumo vs Municipal Council of Mombasa & Anor*[2018]eKLR where the Court held that a violation of a right or just breach of law ought to attract reprieve to the violated and one is entitled to damages for wrongful eviction.
  - vi. The Learned Magistrate thus erred in law in failing to assess and award damages having found that the Appellant had unilaterally terminated the tenancy contract with no notice to the 1<sup>st</sup> Respondent.
23. They seek by way of Cross-Appeal:



- a. That the Appeal by the Appellant be dismissed with costs.
  - b. That the Cross-Appeal by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent be allowed.
  - c. That this Honourable Court do vary or reverse Order No (iv) of the Judgement and the Decree delivered on the 16<sup>th</sup> September, 2022 in Nairobi Chief Magistrates Civil Case E071 of 2021 and this Honourable Court be pleased to assess and award General Damages to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for breach of contract by the Appellant.
  - d. Costs of this appeal and cross-appeal to be borne by the Appellant.
24. The Appeal was canvassed by way of submissions.

### **Submissions**

25. The Appellant filed submissions in support of its Appeal and in opposition to the Cross-Appeal on 26<sup>th</sup> April, 2024.
26. Counsel averred that it is undisputed that the Lease dated 25<sup>th</sup> July, 2017 was never registered; that subsequently and as explained by the Courts in Marie Stopes (K) Limited vs Cecilia Kihara [2020] eKLR and Chon Jeuk Suk Kim & Another vs E.J Austin and 2 Others [2013] eKLR, there existed between the parties an enforceable contract in the nature of a periodic tenancy.
27. Reliance was also placed on the cases of Pius Kimaiyo Langat vs Co-operative Bank of Kenya Ltd [2017] eKLR, Ukwala Supermarket (Eldoret) Limited vs Amritral Sojpar Shah Wholesalers Limited [2017] eKLR and Kamau vs Horeria t/a Horeria & Co & Another [2023] KEELC 17871 (KLR).
28. It was submitted that contrary to the Trial Court's finding, the Appellant did not unlawfully terminate the Lease between itself and the 1<sup>st</sup> Respondent. Rather, the 1<sup>st</sup> Respondent voluntarily gave up possession of the property abandoning the same; that further, rent became due to the Appellant upon the 1<sup>st</sup> Respondent's exclusive occupation and not use of the property disentitling it to a refund of rent.
29. Reliance in this respect was placed on the cases of Kenya Commercial Bank Limited vs Pickwell Properties [2020] eKLR, Kenya Commercial Bank of Kenya Limited & Another (Suing as Executors of the Estate of the Late Prof. Simon Ominde) vs Godfrey Ngatia Njoroge t/a Karen Auto Bazaar [2024] KEELC 603(1 February, 2024) (Judgment) and Pampa Grill Limited & another vs North Lake Limited & Another [2021] eKLR.
30. The Respondent filed submissions in opposition to the Appeal and in support of its Cross-Appeal on 12<sup>th</sup> February, 2024. Counsel submitted that it is an undisputed fact that there existed a Lease Agreement dated 25<sup>th</sup> July 2017 between the Appellant and the 2<sup>nd</sup> Respondent and a subsequent surrender of the lease to the 1<sup>st</sup> Respondent who took over the premises starting 15<sup>th</sup> March 2018.
31. Counsel noted that from the 15<sup>th</sup> March, 2018, there existed between the 1<sup>st</sup> Respondent and the Appellant, a periodic tenancy as expressed under Section 57 of the *Land Act*, 2012, as the lease was not signed and the 1<sup>st</sup> Respondent continued to pay rent on a month-month basis; that the law requires requisite notice before termination of a periodic tenancy which was admittedly not done herein and the Magistrate correctly found so.
32. It was urged that the Courts in Kenya International Fisheries Development and Fish Supplies Agency Ltd vs Agricultural Development Corporation & 2 others [2016] eKLR and Isaac Njuguna Kariuki v Rehab Muthoni Nderi [2021] eKLR were categorical that tenancies must be lawfully terminated and where a landlord terminates a tenancy without issuing a notice, the same constitutes an illegality.



33. Counsel urged that even if the 1<sup>st</sup> Respondent was in rental arrears, it did not absolve the Appellant of the responsibility to issue it with a termination notice; that where a Landlord wants to exercise the right of forfeiture, they are bound by the provisions of Section 75 of the Land Act. Reliance in this respect was placed on the case of Harry Kitulo Mumo vs Municipal Council of Mombasa & Another [2018] eKLR.
34. Counsel submitted that in addition, Section 77 of the Land Act provides that in instances where a Lessee is evicted contrary to the express or implied terms and conditions of a Lease, they are relieved of all obligations to pay any rent or other monies due under the lease, or perform any of the covenants and conditions thereof.
35. It was urged that ultimately, the 1<sup>st</sup> Respondent's eviction and the Appellant's actions of forcefully taking over possession of the premises was unlawful and amounted to breach of contract as well as violation of statutory provisions under the Land Act, entitling the Respondents to an award of damages and that similarly, the Respondents duly proved their case on refund of monies as sought in the Plaintiff.
36. Counsel averred that the 1<sup>st</sup> Respondent duly demonstrated that he had found a sub-tenant who was to sub-let the premises and the very clear difference in rent which the sub-tenant would have made for the period is Kshs 3,500,000/=. Counsel placed reliance on the cases of Harry Kitulo Mumo vs Municipal vs Council of Mombasa & another [2018] eKLR and Il Mattarelo Limited vs Michael Bell & Another [2018] eKLR.
37. The Respondent filed supplementary submissions on the 9<sup>th</sup> August, 2024. Counsel reiterated its assertions in the previous submissions and submitted that Appellant has introduced new issues, to wit, that the 1<sup>st</sup> Respondent consented to give up possession of the property; that this, not being an issue for determination by the Trial Court is a new issue which the Courts in Lore vs Ojwaka & 2 others (Environment and Land Appeal E026 of 2022) [2023] KEELC 17656 (KLR) (25 May 2023) (Judgment) categorically stated cannot be raised at the appellate stage.
38. It was submitted that nonetheless, this position is untrue. Reliance was also placed on the case of Kenya Trypanosomiasis Research Institute vs Anthony Kabimba Gusinjilu (Suing for and on behalf of 112 Plaintiffs) [2019] eKLR.
39. According to Counsel, the Appellant cannot argue that there was no need to issue a termination notice having admitted that there existed a tenancy agreement; that the Appellant cannot be allowed to approbate and reprobate at the same time and that during the period between March 2018 and the time the Appellant terminated the tenancy, the parties were still in negotiations on the manner in which the premises would be sub-let and subsequently, the Appellant unlawfully terminated the lease with the 1<sup>st</sup> Respondent and acted in bad faith and thus the monies sought are recoverable.

### **Analysis and determination**

40. The jurisdiction of a first appellate Court was well settled in the case of Selle & Another vs Associated Motor Boat Co. Ltd & Others [1968] EA 123, where the Court of Appeal stated thus:

“This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect.”



41. This position was recently re-affirmed by the Court of Appeal in the case of Peter M. Kariuki vs Attorney General [2014] eKLR, where it was held that:
- “We have also, as we are duty bound to do as a first appellate Court, reconsidered the evidence adduced before the trial Court and reevaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.”
42. As to the circumstances under which this Court can interfere with the decision of the subordinate court, the Court of Appeal in Khalid Salim Abdulsheikh vs Swaleh Omar Said [2019] eKLR expressed itself thus:
- “We nevertheless appreciate that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings.”
43. The Court also remains alive to the fundamental principle that the burden of proof lies with the party making an allegation as captured in Sections 107, 109 and 112 of the *Evidence Act*.
44. Having considered the Appeal and the Cross-Appeal, as well as the submissions in support and opposition thereto, the Court finds that the following are the issues for determination:
- i. Whether the Learned Magistrate misapprehended the nature of the relationship between the Appellant and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents?
  - ii. Whether the Learned Magistrate erred in holding that the Appellant terminated the lease without notice?
  - iii. Whether the awards to the Respondents were made without sufficient evidence and/ or justification?
  - iv. Whether the Magistrate erred in failing to assess general damages for breach of contract?
  - v. What are the appropriate orders to issue?
45. Vide grounds 5 and 6, the Appellant asserts that the Trial Court misapprehended the nature of the relationship between the parties. Tied to this is the claim under ground one that the Trial Court failed to distinguish the parties’ contrary positions.
46. By way of a brief background, the Respondents’ case before the Trial Court was that the 2<sup>nd</sup> Respondent first entered into a Lease Agreement with the Appellant over the property sometime in 2017; that it thereafter, with the Appellants’ consent, surrendered the Lease to the 1<sup>st</sup> Respondent.
47. It was contended that the 2<sup>nd</sup> Respondent having surrendered its Lease, the Appellant owed it a refund of the security deposit, staff expenditure, rent for the period between December, 2017 and March, 2018 as well as monies expended by it towards fencing and renovations all totaling Kshs 1, 882, 983/=.
48. As regards the 1<sup>st</sup> Respondent, it was stated that it took over the premises from the 2<sup>nd</sup> Respondent sometime on 15<sup>th</sup> March, 2018; that as the Appellant was not agreeable to the type of restaurant it intended to set up, as an alternative, it sought a sub-tenant whom it issued with an offer letter; that before they completed negotiations, and without its permission, the sub-tenant took over and made alterations and that the foregoing led the Appellant unlawfully terminate the lease on 5<sup>th</sup> July, 2018.



49. The 1<sup>st</sup> Respondent claimed the deposit, rent for the months of April, May and June, 2018 as well as monies expended towards renovations of the electric fence and staff expenditure all amounting to Kshs 2,040, 096/=.
50. The Appellant conceded to entering into a Lease with the 2<sup>nd</sup> Respondent, albeit that the same was not registered, and its subsequent surrender to the 1<sup>st</sup> Respondent. She however stated that she does not owe any of the Respondents any monies. With respect to the 1<sup>st</sup> Respondent, the Appellant maintained that it voluntarily abandoned the property without notice to her and it duly paid her rent for the period it was in occupation of the property which sums are not due to it.
51. Considering the foregoing narration, it is evident that while the suit involved the same property, it pertained to two distinct transactions between the Appellant and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. As the 2<sup>nd</sup> Respondent's Lease was the first in time, the Court will begin with the same. It is undisputed that the 2<sup>nd</sup> Respondent and the Appellant entered into a Lease Agreement on the 25<sup>th</sup> July, 2017.
52. The Lease was for a period of 5 years 6 months and pursuant to the provisions of Section 40 of the Registration of Titles Act (now repealed) under which the property was registered, the Lease was required to be registered. Section 40 provided thus:

“When any land is intended to be leased for any term exceeding twelve months, the proprietor, or if the proprietor is a minor or of unsound mind the guardian, next friend or other person appointed by the court to act on behalf of the minor or person of unsound mind in the matter, shall execute a lease in form H in the First Schedule, and every such instrument shall, for description of the land intended to be dealt with, refer to the grant or certificate of title of the land, or shall give such other description as may be necessary to identify the land: Provided that no lease for the period above specified shall be valid unless registered.”

53. Similarly, the *Land Registration Act* provides as follows under Section 43 :

- “(1) Every instrument effecting a disposition of land under this Act shall be in the form prescribed in relation to that disposition under this Act or any other written law.
- (2) No instrument effecting any disposition of private land under this Act shall operate to sell or assign land or create, transfer or otherwise affect any land, lease or charge until it has been registered in accordance with the laws relating to the registration of instruments affecting the land in respect of which the disposition has been made.”

54. Admittedly, however, this Lease was not registered. So what then is the legal effect of an unregistered lease. The Court of Appeal in the case of *Chon Jeuk Suk Kim & Another vs E. J. Austin & 2 others* [2013] eKLR held that:

“An agreement of a lease or unregistered lease where the statute requires registration, though not conferring any legal or equitable estate is nevertheless enforceable as contract between the parties for the period stated in the document and the non-registration does not preclude the use of the document to show the terms of contract between the parties. Although those decisions relate to the construction of the provisions of the Registration of Titles Ordinance Act they apply with equal force to the legal effect of an agreement for a lease of unregistered



lease of a period of over two years under the Registered *Land Act* as section 47 thereof is similar to the provision under consideration in those decisions.”

55. This position was re-affirmed by the Court of Appeal in *Mega Garment Limited vs Mistry Jadv Parbat & Co.(EPZ) Limited* [2016] eKLR, which stated as follows:

“The time-honored decision of this court in *Bachelors 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 holds true in this case...”

56. Guided by the foregoing, the Court finds that notwithstanding the failure to register the Lease, the same acted as a contract inter-partes between the Appellant and the 2<sup>nd</sup> Respondent and on account of the monthly rental payments, the relationship between the Appellant and the 2<sup>nd</sup> Respondent was periodic tenancy.

57. Moving on to the 1<sup>st</sup> Respondent, while it admittedly took possession of the suit property from the 2<sup>nd</sup> Respondent with the consent of the Appellant, and paid rent to the Appellant, neither the Deed of Surrender nor Lease was executed. Essentially, there was no written contract between the parties in this regard.

58. Section 57(2) of the *Land Act* contemplates this scenario and provides:

“ 57.

(2) If the owner of land permits the exclusive occupation of the land or any part of it by any person at a rent but without any agreement in writing, the occupation shall be deemed to constitute a periodic tenancy.”

59. Similarly, the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* provides that an unwritten tenancy over a shop, hotel or catering establishment constitutes a controlled tenancy.

60. The Court finds that there also existed as between the Appellant and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, a periodic tenancy.

61. Although the Trial Court did not explicitly outline the nature of the tenancies between the parties, this omission is not, in itself, significant. However, it becomes material when determining the nature of the alleged breach and its attendant consequences, which will be addressed hereunder.

62. It is contended under ground 10 that the Trial Court’s determination that the Appellant unlawfully terminated the lease between it and the 1<sup>st</sup> Respondent was erroneous. As aforesaid, the Appellant and



the 1<sup>st</sup> Respondent were in a periodic tenancy. The manner of termination of a periodic tenancy is as provided in Section 57(4) of the Land Act which provides thus:

“(4) A periodic tenancy may be terminated by either party giving notice to the other, the length of which shall be not less than the period of the tenancy and shall expire on one of the days on which rent is payable.”

63. Regard can also be had to Section 4 of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act, which provides that:

“4

(2) A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.”

64. The 1<sup>st</sup> Respondent asserted that no notice was issued to it by the Appellant who unilaterally terminated the tenancy. The Appellant admitted on cross-examination that no notice was issued. She contends that the 1<sup>st</sup> Respondent abandoned the premises having failed to pay rent sometime in August, 2018 and that she subsequently asked for the keys to the premises which she was given in October, 2018.

65. Beginning with the claims of non-payment of rent, it is trite that failure to pay rent does not justify the unilateral termination of a tenancy. The law outlines specific safeguards and procedures for addressing default in rent payment. Additionally, the claim of abandonment was not substantiated. It is evident that although the 1<sup>st</sup> Respondent was in possession of the premises, they had not commenced utilizing it and were instead attempting to sub-lease the property.

66. Ultimately, the Court agrees that the requisite notice was not issued before termination of the Lease rendering the termination unlawful. The Appellant ought to have given the Respondents a month's notice of her intention to terminate the lease on the ground that no rent was being paid.

67. The totality of the remaining grounds 2, 3, 4, 7, 8, 9, 11, 12, 13, 14 & 15 revolve around the propriety of the awards made to the Respondents in light of the evidence adduced. The Trial Court awarded the 1<sup>st</sup> Respondent the sum of Kshs 1, 850,000/= being 3 months' rent as well as the sum of Kshs 500,000/= being rental deposit and Kshs 13,000/= for repairs of the electric fence.

68. Beginning with the claim for rent, being for the months of April, May, June 2018, it is undisputed that these sums were paid to the Appellant. However, it is equally undisputed that during these months, the 1<sup>st</sup> Respondent was in occupation of the property. Notwithstanding that the 1<sup>st</sup> Respondent had not begun operations, they were occupying the property and subsequently rightfully owed the Appellant the rent in that regard.

69. For that period, and having taken over the Lease from the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent cannot escape the obligation to pay rent notwithstanding that its business was not operational. There was no consent between it and the Appellant that the payment of rent will be suspended. The Trial Court's award under this head was therefore erroneous.

70. As regards the deposit, the 1<sup>st</sup> Respondent adduced into evidence the letter dated the 19<sup>th</sup> November, 2018 which indicates payment of the deposit of Kshs 500,000/= by itself which payment was made vide SBM No 0006 cheque on the 5<sup>th</sup> May, 2018.



71. On her part, the Appellant states that the 1<sup>st</sup> Respondent did not pay any deposit by itself, rather that the same was transferred to it by the 2<sup>nd</sup> Respondent who had paid two months' deposit. Notwithstanding this contradictory positions, the common ground was that there was a deposit paid on behalf of the 1<sup>st</sup> Respondent.
72. The Appellant concedes that she did not refund the deposit alleging that there were rental arrears and she applied the deposit towards the arrears. The Court opines that in the absence of a mutual agreement to the same, the Appellant could not unilaterally employ the deposit towards rental arrears especially as there was no attempt to first distress for rent. The Court finds that the 1<sup>st</sup> Respondent is entitled to a refund of the same and the Trial Court was correct in this respect.
73. As regards the claim for the repair of the electric fence, the same being in the nature of special damages, should have been specifically proved. Having carefully considered the evidence in this regard, it is noted that the Respondents adduced quotations which form the evidentiary basis for this claim. PW1 conceded on cross-examination that there were no receipts in this regard. This was insufficient in the circumstances.
74. There was equally no concession by the Appellant to refund the aforesaid monies, vide the email of 12<sup>th</sup> July, 2018, the Appellant's Counsel intimated that the Respondents were at liberty to uninstall the fence. The award under this head was erroneous.
75. The 2<sup>nd</sup> Respondent was granted the sum of Kshs 500,000/= being the rental deposit as well as the sum of Kshs 166,535/= for the repair/renovation of the electric fence.
76. As aforesaid, the Lease between the Appellant and the 2<sup>nd</sup> Respondent being unregistered, the tenancy as between them was a periodic tenancy. Nonetheless, while an unregistered lease is unenforceable, reference can be had to its terms. This was the position in *Mega Garment Limited vs Mistry Jadva Parbat & Co.(EPZ) Limited(supra)*.
77. As regards the deposit, the Lease at clause 4.2.2 provides thus:  
“The landlord may apply the deposit towards the Tenants obligations and may thereafter allocate any subsequent payment by the Tenant to restore the deposit in full. The Deposit shall be refundable without interest to the Tenant after the expiry of this Lease and the delivering up of the premises in proper condition and in accordance with the provisos of this Lease provided that at the end of the Term wgere part or whole of the Deposit is used towards restoring the premises, the Deposit if any will be refundable less any such deductions.”
78. Similarly, clause and 5.4 of the Lease provided that:  
“Within 14 days of the expiry or determination of the Term and after delivery up of the premises in proper condition and in accordance with the Tenants covenants herein, the landlord will refund to the Tenant the Deposit or any part thereof without any interest whatsoever. The parties will inspect the premises at such time and prepare a final inventory in comparison with the one taken at the commencement of the Lease to confirm the state of the premises at the end of the Lease and such inventory ought to be signed by both parties. Photographs of the premises should be taken if need be.”



79. It is undisputed that the tenancy between the Appellant and the 2<sup>nd</sup> Respondent terminated upon the 1<sup>st</sup> Respondents takeover of the premises. It is equally undisputed that the 2<sup>nd</sup> Respondent had paid the deposit and the same was not refunded.
80. Considering the cited sections, the Lease was clear on the manner in which the deposit was to be employed upon the leases' termination. While alleging that the 2<sup>nd</sup> Respondent did not fully discharge its obligations under the lease, this was not demonstrated. It has not been alleged that the 2<sup>nd</sup> Respondent left the premises in a state of disrepair which the funds were used to repair. The Lease equally did not provide for transfer of the deposit which has in any event not been proven. In the circumstances, the Court finds that the award by the Trial Court in this respect was correct.
81. Moving to the claim for a refund for the electric fence, the Appellant asserts that this has not been proven. As held above, these sums were indeed not proven as per the requisite parameters for proof of special damages. The Trial Court erred in awarding this sum.
82. Vide the Cross-Appeal, the Respondents are aggrieved by the failure of the Trial Court to assess damages for breach of contract. It is their position that having found that the tenancy was unilaterally terminated, contravening statutory provisions, the same should have been awarded. They contend that they duly demonstrated the loss of business occasioned by the breach aforesaid.
83. The Trial Court indeed found that no notice was issued prior to the termination of the 1<sup>st</sup> Respondent's notice as required by law. This Court has affirmed this position. The only question is whether general damages were due.
84. By their nature, general damages are compensatory damages which the law presumes follow as a result of any wrong or harm done to a claimant. Unlike special damages, general damages need not be specifically proved. Once the claimant demonstrates that he suffered harm as a result of the defendant's conduct, the court undertakes an assessment and makes an award in exercise of its discretionary jurisdiction.
85. As a general rule however, general damages are not recoverable for breaches of contract. In the case of Kenya Tourism Development Corporation vs Sunpowner Lodge Ltd [2018] eKLR, the Court of Appeal stated as follows:

“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. Beyond the non-recoverability of general damages for breach of contract, a proper consideration of the nature of the respondent's claim ought to have led to the same conclusion that only such proven loss could be compensated by way of damages.”

86. The Court finds that general damages cannot be awarded as sought and finds no fault in the Trial Court's refusal to grant the same.
87. It is noted that the Respondents' claimed the sum of Kshs 3, 500,000/= at the behest of the 1<sup>st</sup> Respondent for loss of business being profits anticipated from the sub-lease of the property. However, this claim is in the nature of a special damage and should have been specifically pleaded and proved which it was not.
88. In the end, the Court finds makes the following final determination.
  - a. The Appeal partly succeeds and the Judgment of the Trial Court is hereby set aside and substituted as follows:
    - i. The 1<sup>st</sup> Respondent is awarded the sum of Kshs 500,000 being refund of the rental deposit.
    - ii. The 2<sup>nd</sup> Respondent is awarded the sum of Kshs 500,000 being the refund of rental deposit.
  - b. The Cross-Appeal is found to be unmerited and is hereby dismissed.
  - c. Each party shall bear her/its own costs for this appeal and suit in the lower court.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

No appearance for the Appellant

No appearance for Respondent

Court Assistant: Tracy

