



Lenana Archade Limited v Malili & 2 others (t/a Spice Liquor Store) (Environment and Planning Civil Case E002 of 2023) [2024] KEELC 7475 (KLR) (7 November 2024) (Judgment)

Neutral citation: [2024] KEELC 7475 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND PLANNING CIVIL CASE E002 OF 2023
AA OMOLLO, J
NOVEMBER 7, 2024**

BETWEEN

LENANA ARCHADE LIMITED PLAINTIFF

AND

PATRICIA AKUMU MALILI 1ST DEFENDANT

JOSEPH SUNDAY ABDALLA 2ND DEFENDANT

GEORGE STEPHEN OMONDI OGADA 3RD DEFENDANT

T/A SPICE LIQUOR STORE

JUDGMENT

1. Vide a plaint dated 26th July, 2023, the Plaintiff sued the Defendants for breach of the lease agreement dated 24th October, 2022 which leased the shop numbers 13 and 14 to the Defendants. The Plaintiff's pleads that the permitted use agreed upon was "for commercial purposes of operating a liquor store and no other."
2. It is the Plaintiff's claim that the Defendants' operating a bar and/or lounge in shop 13 is in breach of clause 4J and 5K of the under lease. It added that clause 1(f) of the head lease specifically banded the user of car-wash, bar and restaurant and coffee shop, without written consent of the head-lessor. That the Defendants have never obtained the said consent.
3. As a consequence of the Defendants' above-detailed material breach of the Under-Lease and its failure to remedy the same within fifteen (15) days' of the Notice served, the Plaintiff is entitled to exercise its right under Clause 7c of the Under-Lease (without prejudice to any other rights of action or remedies available to it) to at any time thereafter re-enter into and upon the premises in the name of the whole and have the same again, repossess and enjoy in its former state and thereupon the term of the lease shall absolutely determine, without prejudice to any right of action or remedy it has in respect of



- any antecedent breach of any covenants, undertakings, and agreement by the parties under the Lease Agreement.
4. The Plaintiff prays for judgment against the defendants for;
 - i. A declaration does issue that the Defendants are in breach of the Under-Lease.
 - ii. General Damages for breach of covenants in the Under-Lease.
 - iii. A permanent injunction does issue against the Defendants restraining them from operating/ carrying on the business of a bar and/or lounge on the premises.
 - iv. A mandatory injunction does issue against the Defendants directing them to remove all fixtures and fittings pertaining to operations of a bar and/or lounge on the premises.
 - v. In event of the Defendants' non-compliance with the above orders within 7 days of issuance, the Honourable Court does grant leave to the Plaintiff to forthwith re-enter upon the repossess the premises or any part thereof and/or evict the Defendants therefrom.
 - vi. The Officer Commanding Station Kilimani Police Station, be ordered to supervise compliance with these orders and maintain peace and order.
 - vii. The costs of this suit and expenses occasioned by and incidental to the Plaintiffs re-entry onto of the premises be borne by the Defendants.
 - viii. Any such other or further orders as maybe deemed apt by the Court in the circumstances of this case.
 5. The Defendants filed an amended defence and Counter-claim dated 29th January, 2024 and pleaded inter alia that they are not privy to the head lease. They made mention of verbal discussions held between Patricia Malili and David Kinyua Githome which discussions was centered on the business to be undertaken. That the Plaintiff through its representative David Kinyua acknowledged that the business was going to be for setting up liquor shop and an exclusive private lounge. They denied any mention from the plaintiff that there were any restrictions on the use of the premises.
 6. The Defendants plead that on 24th October, 2022, the Plaintiff's representative – Mr. David Kinyua Githome presented them with what it described as a clean version of the lease over the Premises (“the Lease”). That the Plaintiff pressed and hurried them into signing the Lease immediately while assuring the Defendants that all the agreed terms had been included in the Lease and that the lease supported the Business. Due to the pressure and assurance given by the Plaintiff, the Defendants signed the lease immediately and handed it back to the Plaintiff.
 7. In further response to the contents of paragraph 7 of the Plaint, the Defendants aver that the purported provision in clause 1(f) of the Head Lease that bars the Property from the business of “car-wash, bar and restaurant and coffee shop” constitutes an unenforceable, illegal and unlawful restrictive trade practice and a violation of the provisions of the *Competition Act*, 2010. They added that;
 - a. Within the Property there is another establishment known as Whiskey Roller Liquors, which opened its doors in May, 2023.
 - b. The Plaintiff is the landlord of Whiskey Roller Liquors.
 - c. Whiskey Roller Liquors has a liquor store and separate seating area within seats and stools, where customers sit down and are served with drinks.



8. In the Counter-claim the Defendants reiterated the contents of their defence adding that during and after renovating/fittings of the premises, the plaintiff made further representations that the premises was available for the purpose of setting up the business. The representations alluded to are set out in paragraph 24 of the amended defence and Counter-claim inter alia;
 - i. Frequently visited the premises to inspect the progress of the work.
 - ii. Witnessed the fit-out works and commended the Defendants thereon.
 - iii. Patronized the Defendants' lounge.
 - iv. Promised to support the business.
9. The Defendants blame the Plaintiff of imposing different terms to their tenancy aimed at restricting their ability to carry out the business. For instances;
 - a. In May, 2022 the Plaintiff sent to the Defendants a draft lease agreement over the Premises. The Defendants received and reviewed the draft lease agreement and made comments on various clauses therein.
 - b. On 24th October, 2022 the Plaintiff (through Mr. David Kinyua Githome) presented the Defendants with a document that was described as a clean version of the Lease over the Premises;
 - c. The Plaintiff (through Mr. David Kinyua Githome) pressed and hurried the Defendants to sign the lease immediately. The Plaintiff assured the Defendants that all agreed terms had been included in the clean version of the Lease and that the Lease supported the Business.
 - d. Due to the pressure and assurance referred to above, the Defendants signed the Lease immediately and handed it back to the Plaintiff.
 - e. Unbeknown to the Defendants, and contrary to the assurances given by the Plaintiff to the Defendants, the Plaintiff had, without making any declarations to them, added into the Lease Agreement a provision that purported to restrict the Defendants' use of the Premises to "commercial purposes of operating a liquor store and no other."
 - f. Subsequent to the above, the Plaintiff procured an advocate by the name Joseph Nzyoki Mwanthi to insert false attestations to the Defendants' signatures.
10. The Defendants aver that the enforcement of the impugned Lease against them would result in massive loss and damage, which would be equivalent to the value of the Business. They pray for judgment against the Plaintiff for;
 - a. A declaration that the Lease is invalid, null and void having been procured through misrepresentation, deceit and false assurances;
 - b. A declaration that the Lease is invalid, null and void on account of the false attestations added to the signatures of the Defendants;
 - c. A permanent injunction does issue against the Plaintiff to restrain it from harassing the Defendants and interfering with the Defendants' use and quiet possession of the premises.
 - d. As an alternative to prayers (a), (b) and (c) above, damages against the Plaintiff for misrepresentation and deceit.
 - e. Costs of the suit



- f. Interest on (d) and (e) above at court rates until payment in full and
 - g. Such other or further relief as this Honourable Court may deem fit to grant.
11. The matter then proceeded to trial with the plaintiff calling three witnesses and the Defendant called five witnesses. The Plaintiff called Joseph Nzioki Mwanthi as its first witness. He is an advocate of 26 years of experience. He produced the documents Nos 1 (lease dated 16/12/2021), 2 (lease dated 24/10/2022) and 8 (Notice of breach to the defendants dated 20/2/23) of the Plaintiffs bundle as exhibits in support of the Plaintiff's case.
 12. PW 1 was cross-examined by Mr. Omondi, learned Counsel for the Defendants and he admitted that the head lessor is his client; and that he is the one who drew the under-lease agreement. That he acted for the Defendants for the purposes of the lease and he is the one who issued the letter dated 20th February, 2023 to the Plaintiff on behalf of the head lessor. PW 1 denies any conflict of interest now giving evidence on behalf of the plaintiff.
 13. PW 1 asserted that he witnessed the signatures of the parties in the under lease in mid-afternoon in their presence. That prior to this, he had sent a draft lease to the parties through Mr. Githome Kinyua & Patricia Malili which draft they had for 2 weeks. That he was called by the two (Patricia and David) to go to the suit building (David's office) for execution of the lease and he complied. The witness insisted seeing each of them append their signature on the lease. In re-examination, PW 1 said he was not aware the Defendants were denying their signatures on the lease document.
 14. Antony Watene testified as PW 2 by adopting his witness statement dated 9th February, 2024. He also relied on the bundle of documents filed by the plaintiff which he produced as P ex 1- 8. PW 2 said he is a director of the plaintiff with the plaintiff being the Lessee in the agreement dated 16th December, 2021 on L.R No. 1/358 on Lenana Road.
 15. The witness avers that the parties executed a sub-lease over the suit premises dated 24th October, 2022 restricting the use of the suit premises for commercial purposes of operating a liquor store and no other. Instead, the Defendants are operating a bar and/or lounge on shop No. 13 in flagrant breach of clause 4J & 5K of the under lease. That despite written demand notice served pursuant to clause 7 (b) (ii) of the under lease, the Defendants have failed to comply.
 16. PW 2 affirms that the Defendants failure to remedy their material breach has put the plaintiff to considerable peril and breach of the head lease. That such loss cannot be adequately compensated by an award of damages. He denies that they visited the impugned premises to inspect the progress of works and commending the Defendants for a good work.
 17. In cross-examination, PW 2 stated he was conversant with the contents of the leases produced. He confirms that within the suit premises, the head lessor has a coffee shop, open restaurant, car-wash and Lenana arcade. That each tenant is not allowed to carry out similar business. PW 2 said he participated in the negotiations although David Kinyua was in direct communication with the Defendants.
 18. The witness admitted purchasing drinks worth 800 from the Defendants but denied visiting the premises on any other day or taking drinks in the lounge. That he does not know how the set up looks like. He confirmed being present when the lease agreement was signed in David's office. That he goes to the building every day since he is a landlord. In re-examine, PW 2 says he bought the drink from the wines/spirit shop and left thereafter.
 19. PW 3 is David Githome Kinyua and he adopted as his evidence in chief the witness statement dated 26th July, 2023 stating that the Plaintiff and the Defendants entered into a lease dated 24.10.2024. It is



his evidence that the Defendants are operating a bar/lounge in shop no 13 in flagrant breach of clause 4j and 5k of the under-lease. It is further evidence that the Defendants were aware of the provisions of clause 7 (i) of the lease which provided that the under-lease was subject to the provisions of clause 1(f) of the head lease which barred the use of the premises as car-wash; bar & restaurant and coffee shop without the permission of the head lessor.

20. PW3 stated that the Defendants were duly served with a notice to remedy the breach vide letters dated 21st December 2022, 11th January, 2023 and 14th February 2023. The letters are produced in the documents contained in the Plaintiff's bundle. He contends that the failure of the Defendants to remedy the breach is likely to cause them damage as the head lessor has threatened to terminate their lease. He urged the court to grant the prayers sought in the plaint.
21. Under cross-examination, PW 3 said he was the point person for the plaintiff during the transactions relating to the underlease. He denies the Defendants told him they were going to operate a lounge and liquor store. The witness was shown the communications exchanged via whatsapp at pages 2 – 7 of the Defendants' bundle and he confirmed he has not produced similar communication. PW 3 admitted to visiting the liquor store only when it was being set up.
22. It is his evidence that the lounge is enclosed and he only learnt of it through Pilotage complaining of someone operating a lounge. PW 3 denied ever entering the lounge section of the business. That there was a genuine complaint raised by Pinotouch. He denied rushing the Defendants to sign the lease agreement. He confirmed the existence of a business called Whisky Roller in the suit premises but added that Whisky Roller does not have a sitting area where people sit to take drinks.
23. In re-examination, PW 3 reiterated there was no agreement to operate a bar and lounge as the head-lease does not allow the same. That the Whatsapp messages were for purposes of the negotiations. He confirmed that they responded to the letter dated 9th February, 2023. PW 3 said pinotouch operates a bar and restaurant within the premises. That he had a lessor from the headlessor addressed to Joseph Mwangi directing them to close the lounge which was operating illegally. That he informed the Defendants. This marked the close of plaintiffs' case on 26th February, 2024.
24. Ms. Patricia Akumu Malili opened the evidence for the defence as DW 1. She adopted her witness statement dated 25th October, 2023 and produced their bundles of documents dated 25th October, 2023 and 29th January, 2024. DW 1 said she was introduced to David in March, 2021 by Rebecca Likani who owned the business before. She said David requested her shop which sold men's clothes. That she expressed a desire to open another shop to operate children's clothes. DW 1 avers that instead David proposed a liquor store and he promised to give her support in renovating the premises and sending her clients.
25. DW 1 continued that she consulted Joseph and Steve if they could do the liquor business together. Later in May when David asked if she was still interested, she stated that she was but with a dyferiantor of operating a lounge. They began to negotiate on the lease term. It is her contention that she expressly said she was going to do a liquor supermarket and a lounge and David had no problem with it. That David allowed 2 months of renovations and even checked the progress.
26. According to DW 1, the lease agreement was executed in the spice Lounge and not in David's office. In cross-examination, DW 1 said she considered David a friend besides being their landlord. That she wanted her business differentiated to give an edge over the existing liquor store next to her clothes shop. She said she was verbally and in analysing coerced by David to sign the lease agreement. That they were already in operation when they signed the lease on 24th October, 2022.



27. The witness was referred to SMS messages at pages 2 – 7 of their bundle with words “the lounge would bring problems sent on 9th September, 2022 before the execution of the lease. She admitted their lease restricted the use of the shop as a liquor store. That she did not file a suit based on the trust with David that he would include everything discussed in the lease agreement. She added that her partners agreed to sign the lease because of the relationship they had with David.
28. DW 1 continued that she didn’t sign the lease agreement in the presence of the advocate (PW 1). It is her assertion that the lease terms they discussed is not in place. That her counter-claim is merited because she was invited to do business there. They were given a draft lease in May 2022. In re-examination, DW 1 said that David did not explain what the issues were in the communication at page 5 of the bundle.
29. Arnold Agina who is customer gave evidence as DW 2. He produced the valuation report in the supplementary bundle. He said he has family relations with the Defendant’s and affirmed to patroning spice rocks lounge. That he would pay for his drinks although he did not produce receipts. In re-examination, he confirmed paying for beers he purchased from Whisky Rollers on 14th December, 2023 in court.
30. David Maina who said he is a certified public accountant testified as DW 3. He produced the audited accounts of the Defendants’ business (D ex 10). In cross-examination, he explained that the auditing process involved looking at the trial balances and supporting documents (general ledges, invoices, vouchers etc) of the company. He gave the capital of the business at Kshs.8,573,877 and non-current assets at Kshs.7.7 million.
31. Joseph Sunday Abala was the fourth witness (DW 4). He adopted his witness statement dated 29th January, 2024. He denied signing the lease agreement on 24th October, 2022 in the presence of Joe Mwanthi that on that day, he was on his way to an external meeting, he passed by the liquor store and found his co-directors and David at the Lounge. He asserted that he had interacted with David and Antony before and was surprised they denied ever visiting the lounge.
32. DW 4 posits that they were given permission to carry the business. That he knew a liquor store only was not viable because there was an existing liquor store. He confirmed receiving the lease draft in May, 2022. That they authorised DW 1 to continue with the negotiations. The business opened in September, 2022 and it is in December, 2022 he learnt one of the tenants had raised a complaint.
33. In cross-examination, DW 4 said he was not present during the negotiations between David and Patricia. As far as he knows, they are complying with the terms of the lease. He was not aware they were not allowed to operate a lounge. That the lease was signed after the business started. In re-examination, DW 4 said he was not given an opportunity to read the lease and that he was persuaded by David to sign.
34. The Defendants’ final witness was George Stephen Omondi Ogada (DW 5). He also adopted his witness statement dated 29th January, 2024. DW 5 avers that it is utterly incorrect to say they signed the lease agreement in the presence of the advocate. Like DW 4, he said he had gone to the premises to see the progress of the business where he found Patricia and David seated at the lounge. Patricia introduced him to David and also told her that David was under duress to formalise their relationship.
35. DW 5 reiterated that they commenced business before the signing of the lease agreement. That they had raised a few issues with the draft lease shared to them earlier such as VAT, user of the premises and service charge. It is his evidence that David told him he had addressed those concerns and that he (David) was under time constraints so they needed to sign the lease.



36. According to DW 5, they signed the lease based on trust and on account that the business was already operating. He urged the existing lease be invalidated having been signed under duress. He also urged that they be allowed to continue with their business.
37. Under cross-examination, the witness said he is a financial consultant with a degree in B. Comm. He said he knows effects of contracts and admitted his signature appears on every page of the lease. He said the meeting when they signed the lease was not scheduled. He avers they signed the lease under duress although he did not give particulars of the duress in the pleadings.
38. DW 5 believed the 3rd party giving David pressure was Mr. Watene and their head landlord. He was referred to paragraph 12 A and 15A of amended defence and counter-claim dated 22nd January, 2024. The duress is that he was not allowed to read the agreement before signing. That once the document was signed, we did not receive a copy immediately. He denied their claim was fabricated.
39. In re-examination, the witness referred the court to paragraph 15 and 18(g) of his statements which reads thus;

“ 15. On 24th October, 2022, Mr. Kinyua presented my co-Defendants and me what he described as a clean version of the lease over the premises. Mr. Kinyua pressed us to sign the lease immediately in order to diffuse the tension that he said he was having with his co-directors and shareholders due to the absence of a signed lease over the Premises. Mr. Kinyua assured us that he had included all agreed terms and that the lease supported the Business. Due to the pressure and assurance from Mr. Kinyua, we signed the lease immediately and handed it back to Mr. Kinyua.

“18(g) Despite all the matters set out in paragraph (a) to (f) above:

- i. In October 2022, the Plaintiff deviously prepared a lease that purported to restrict the Defendants’ ability to use the Premises for the Business.
- ii. Using pressure and deceitful and false assurance, the plaintiff caused the Defendants to hurriedly execute the lease over the premises”

40. That the fit-out period began in May and ended in July – August, 2022 and there was no signed lease agreement at this period. DW 5 said they responded to the letter dated 21st December, 2022 vide theirs of 5th January, 2023. He visited what was provided was ahead lease not under lease and by 11th January, 2023 they were still asking for a copy of the under lease. He contended the Defendants took the approach of trying to resolve the matter mutually. Hence there was no need to file case immediately. He prayed for orders in the Counter-claim. This marked the close of the defence case.
41. The plaintiff filed submissions dated 21st May, 2024 while the Defendants detailed submissions are dated 30th July, 2024. I have read both submissions and will make appropriate references in the body of my analysis and determination.

Analysis & Determination:

42. From the pleadings, there is no dispute that the Defendants tenants of the Plaintiff and are running a business of Liquor Store and Lounge in shop no. 13 and 14 on the building premises L.R No. 1/358 Nairobi leased vide the impugned lease dated 24th October, 2022. The only contention which calls for



this court's determination is whether or not the running of the Lounge goes contrary to the terms of the agreement reached between the parties.

43. The Plaintiff's claim is premised on the terms of the lease agreement executed between the parties. The Defendants on their part adopted two lines of defence in contesting the Plaintiff's claim as well as in defence of their counter-claim. First, that there were discussions prior to the signing of the lease which allowed them to proceed with fittings for the lounge. That they acted in trust from the engagements of DW 1 and PW 3. The second line is that they signed the agreement under duress and as a consequence, the lease agreement dated 24th October, 2022 should be declared null, void and invalid.
44. The plaintiff has made reference to several clauses in the head lease and the under lease inter alia;
- “1(f) (of the head lease) provided that: “Permitted user” means use of the premises for commercial purposes of a supermarket/convenience store and other businesses but those of a car-wash, bar & restaurant and coffee shop (subject however to the Landlord approval).”
- From the under lease
- “4j. Not to use the said premises or any part thereof otherwise than for the permitted user and a breach of this clause shall constitute a material breach.
- “5k. Not to use or permit the premises or part thereof to be used for purposes other than the permitted user as defined in clause 1(f).”
45. The Defendants admit receipt of a draft lease for the impugned premises in May of 2022. They submit that they raised issues in the draft lease and the plaintiff provided feedback that he would address the contested clauses. That the Plaintiff assured them their concerns would be addressed. The Defendants produced evidence of Whatsapp communication exchanged between David and Patricia regarding the negotiations on the terms of the proposed lease.
46. On its part the Plaintiff submitted that courts cannot re-write contracts between parties and that parties are bound by their bargains, however bad citing the case of National Bank of Kenya Ltd vs Pipe plastic Samkoit (k) Ltd & Another (2001) eKLR. The plaintiff submitted that the Defendants were aware of the provisions of clause 7 (ii) of the lease which made it subject to and subordinate to all ground and underlying leases.
47. In contradicting the plaintiff's position, the Defendants submitted that they took possession without a signed lease hence the signed lease did not influence their taking over the possession, neither did it govern the existing relationship. That their communication began on 12th May, 2022 with an sms from David asking Patricia if she was still interested in the liquor shop.
48. I have perused the whatsapp messages exchanged between Mr David (PW3) and Ms Patricia (DW1) and there is no doubt that the intention expressed therein was the tenant was allowed to operate a liquor store with a sitting area and or lounge. For instance, on 17th May, 2022, David asks “any other business that you will run or its just a liquor store.” DW 1 answered that it is “a private lounge.... within a liquor supermarket.” David answered back “ok/noted.”
49. All these time, PW 2 (Mr. Watene) and the advocate (PW 1) are not involved in the on-going negotiations/conversation. Mr David raised the issue of the lounge bringing a problem on 9th September, 2022 after the Defendants displayed the name “Spiced Rocks Lounge” on the impugned shop. Ms Patricia (DW1) asked him what issues and his answer was “you would have made it private. Conflict with pilotage.”



50. He proceeded to state through the WhatsApp conversation that he “indicated to the lawyer it’s a liquor store with a sitting area not a lounge.” Although the Defendants stated they were acting on trust, by September 20022 they should have been concerned with the nature of the communication from the Plaintiff. They may have already finished the fit-out process but the lease agreement was yet to be executed. The text ought to have put the Defendant on notice that the operation of the lounge had not been agreed between them. Therefore, it was expected of the Defendants to confirm this portion of the lease was addressed before appending their signatures on it.
51. The plaintiff urges the court to hold that the Defendants are estopped by deed (the lease agreement) from claiming any other operative terms of the lease other than those contained in the document. He cited the case of *Yare Safaris Ltd. Vs County Government of Samburu (2020) eKLR* which held thus;
- “It is trite that where parties hold oral discussions and/or negotiations and subsequently reduce any agreement reached into writing, the written agreement takes precedence and supersedes any implied or oral agreement that the parties may have had.”
52. The Plaintiff further cited the case of *Prudential Assurance Co. of Kenya Ltd vs Sukhwender Singh Jutney & Another Civil Appeal No. 23 of 2005* which held thus;
- “The common law of contract is trite that one may not use evidence made prior to the written contract to contradict the ultimate contract that has been reduced into writing.”
53. Besides the Whatsapp communication provided by the Defendants, there was no other evidence that contained different terms of engagement from the contested under lease. Consequently, for the Defendants case seeking to declare the lease null and void, that had an obligation to prove the existence of grounds for invalidating a contract. The grounds include mistake, misrepresentation, fraud, agreement that is contrary to public policy and or duress (see the decision in *Sapra Studio v Kenya National Properties Ltd [1985] eKLR* and *Flora Wasike vs Destimo Wamboko (1982)eKLR*). The cases cited by the Defendants also points to the same grounds for vitiating a contract.
54. The Defendants cited the provisions of section 3(3) of the *Law of Contract Act* Cap 23 which requires the signature of each party to be attested by a witness who was present during the execution of the agreement. The signatures of the parties on the lease are attested by PW1 and the Defendants took issue that they signed the documents in the absence of the said advocate. Once the signatures were attested and the Plaintiff called the attestor to confirm he was present and saw the Defendants assign the lease, the burden shifted on them to prove otherwise. Since a document speaks for itself, and both parties are at cross purposes on the events of 24th October 2024, only an independent witness would sway the court to hold otherwise.
55. It was submitted for the Defendants that clause 1(f) of the head lease constitutes an unlawful/illegal restrictive trade practice and a violation of the provisions of the *Competition Act*. This is an issue that was not pleaded nor any evidence led in that respect. I adopt the holding of Onguto J. (may RIP) in the case of *Manta Peeush Mahajan is Yashwan Kumari Mahajan (2017) eKLR* cited the Supreme Court of the United Kingdom in the case of *RTS Flexible Systems Ltd Vs. Molkerei Alois Muller GMBH & Co. KG (2010) UKSC 14 (415)* held at paragraph 94 thus:
- “94. The Defendants’ allegations at paragraph 12A & 15A of the Defendants’ Amended Defence & Counter-claim that the clauses restricting the user under the Head-Lease and the under-Lease constitute an unenforceable, illegal and



unlawful restrictive trade practice and a violation of the provisions of the Competition Act, 2010, are wholly without merit for the following reasons: -

- a. The relevant body that is mandated to deal with complaints and investigate restrictive trade practices in cases falling under the Competition Act is the Competition Authority of Kenya, which is a point of first instance in complaints of breaches of its provisions.
- b. This Court lacks jurisdiction in the first instance to hear and determine complaints under the Competition Act before the statutorily prescribed avenues of dispute resolution therein have been exhausted. The Defendants are required to exhaust their remedies under the Competition Act before bringing an action in Court claiming violations of that Act (doctrine of exhaustion). It is trite that where procedures and processes exist for resolution of disputes such processes must be exhausted first before a party can approach court.”

56. Duress is defined by Black’s Law Dictionary, 10th edition as;

“Strictly, the Physical confinement of a person or detention of a contracting party’s property.

Broadly, a threat of harm made to compel a person to do something against his will or judgment, especially a wrongful threat made by one person to compel a manifestation of seeming assent by another person to a transaction without real volition.”

57. On the heading of duress, the Defendants aver that the Plaintiff went on to persuade Patricia to go see the advocate (on 6th October, 2022) as the landlord has been calling him. The Defendants rightfully put it that David was under pressure from their landlord and in turn shifted the pressure on the Defendants to execute the agreement. The question is whether the shift of the pressure if at all by PW3 amounted to duress/coercion on the Defendants to sign the lease agreement.

58. Other than the expression contained in the text messages, there was no evidence led by any of the defence witnesses of any sort of force issued by David. Mr. Ogada and Mr. Agina both stated that their presence in the suit premises on the day of signing the lease was not scheduled. They both said it was a coincidence and that they found Patricia and David seated at the lounge. There is no prior communication between David & themselves that can be translated to duress. I donot hold that the Defendants were coerced into signing the agreement.

59. Further, the Defendants submitted that the business was permitted within the property and gave an example of Whisky rollers which was operating a lounge. They argue that if a representation was made to the advocate who drew the agreement that the business was not permitted then such misrepresentation vitiated the contract executed on 24th October, 2022. The misrepresentation relied on by the Defendants are the text messages where on the one hand, David wants the Defendants to operate the liquor with sitting area but on the same breath, he wants them to make it private and or that it is contrary to the head lease.

60. Black’s law dictionary defines misrepresentation as “the act or instance of making false or misleading assertion about something with the intent to deceive. The word denotes not just written or spoken word but any conduct that amounts to a false assertion.”



61. It was the case of the defendants that after they received the draft agreement, they reviewed it and raised issues with Mr David who promised to address them. By this the Defendants are admitting the issue of the restriction was contained in the draft lease. If they wanted this addressed and the same was not addressed by the Plaintiff before signing, the issue of misrepresentation does not lie because they became aware it was a contentious issue before they signed the lease. The Defendants also contend that the conduct of Mr David inspecting the progress of the work and also visiting the lounge amounted to permission to conduct business.
62. If they relied on the representations of David from the commencement of the fittings to when they began operation, their option was to decline signing the agreement until the clause restricting the business to Liquor store only was revised. When they failed and or neglected to do so, the contract signed on 24.10. 2024 became binding upon them. It cannot be voided on misrepresentation if any which was within their knowledge before appending their signatures however bad the bargain turns out to be as was held in the case of National Bank of Kenya Ltd supra.
63. It is now a settled principle of law in Kenya that courts not allowed to re-write contracts between parties has been held in several case laws. For example, in Centurion Engineering Builders vs. Kenya Bureau of Standards (2023) KECA 1289 (KLR) the Court of Appeal reiterated the finding in the case of National Bank Ltd that courts do not re-write contracts between parties.
64. Further, section 97 and 98 of the Evidence Act Cap 80 provides for exclusion of oral by documentary evidence. Section 97(1) provides that;
- “1) When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.”
65. Exception to this proviso at Section 98(ii) refers only in cases of fraud, intimidation, illegality, want of due execution, lack of capacity, failure of consideration or mistake in fact or law. As already stated hereinabove, the Defendants argument of duress (intimidation) and misrepresentation was not proved and therefore this court finds that they are bound by the terms of the lease they signed.
66. In the circumstances of the case, the Defendants’ operation of the bar/lounge in shop 13 was in breach of clauses 1(f), 4(j) and 5k of the lease agreement executed on 24th October, 2022. The Plaintiff prayed to be awarded general damages but did not lead evidence on the losses it has suffered as a result of the material breach. The only thing which came out from the notices of breach served was that the head lessor had threatened to terminate their lease.
67. Having found the Defendants have not proved any grounds to invalidate the lease, their counter-claim dated 29th January, 2024 fails and is hereby dismissed with no order as to costs.
68. Consequently, judgment is entered for the plaintiff against the Defendants and I make the following orders;
- i. A declaration is issued that the Defendants are in breach of the underlease dated 24th October, 2024.



- ii. Mandatory injunction be and is hereby issued directing the Defendants to remove their fixtures and fittings pertaining to the operation of the lounge from the impugned premises within 90 days of this judgment.
- iii. Thereafter an order of permanent injunction shall issue restraining the Defendants from operating and/or carrying on the business of a lounge without a written consent of the head lessor.
- iv. Costs of the suit to the Plaintiff.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF NOVEMBER, 2024

A. OMOLLO

JUDGE

