



**Falcon Service Station Limited v Kenya Railways Corporation (Election
Petition Appeal E021 of 2020 & Environment & Land Case E020 of 2020
(Consolidated)) [2024] KEELC 14098 (KLR) (23 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 14098 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ELECTION PETITION APPEAL E021 OF 2020 & ENVIRONMENT
& LAND CASE E020 OF 2020 (CONSOLIDATED)**

MAO ODENY, J

DECEMBER 23, 2024

BETWEEN

FALCON SERVICE STATION LIMITED PLAINTIFF

AND

KENYA RAILWAYS CORPORATION DEFENDANT

JUDGMENT

1. By Plaint dated 16th November, 2020 which was amended on 10th March, 2021, the Plaintiff in ELCC/ E021/2020 sued the Defendants seeking the following orders:
 - a. An order of permanent injunction restraining the Defendant by itself, its agents, servant, employees, proxies and/or any person claiming under it, from Alienating, leasing, selling, transferring, trespassing, trading, allocating all that piece of KRC former Siow Yard (Part C) in Nakuru measuring one decimal seven (1.7) acres and/or otherwise however from interfering with the suit property.
 - b. Special damages Kshs 312,094,000
 - c. Loss of Business Ksh 5,384,701,636
 - d. General damages
 - e. Interest on (b), (c) and (d).
 - f. Costs of this suit.
 - g. Such other and/or further orders as this Honourable Court may deem fit and just.



2. The Defendant filed a statement of defence dated 4th June, 2021 and denied the allegations in the amended plaint.
3. By Plaint dated 16th November, 2021 which was amended on 10th March, 2021, the Plaintiff ((Nakel Investment Ltd) in ELCC/E020/2020) sued the Defendant seeking the following orders:
 - a. An order of permanent injunction restraining the Defendant by itself, its agents, servant, employees, proxies and/or any person claiming under it, from Alienating, leasing, selling, transferring, trespassing, trading, allocating All That Piece Of Krc Former Loading Yard (Part B) In Nakuru Measuring One Decimal Nought (1.0) Acres and/or otherwise however from interfering with the suit property.
 - b. General damages for unlawful eviction.
 - c. Special damages Kshs 84, 350,000
 - d. Exemplary damages for trespass
 - e. Exemplary, punitive and aggravated damages
 - f. Loss of Business Kshs 222,825,351
 - g. Costs of this suit and interest on bi), (c), (d), (e) and (f).
 - h. Such other and/or further orders as this Honourable Court may deem fit and just.
4. The Defendant filed a statement of Defence dated 4th June, 2021 and denied the allegations in the amended plaint. The Defendant prayed that the Plaintiff's suit be dismissed with costs.
5. In ELCC/E020/2020, the court in the ruling dated 23rd February, 2023 pronounced itself as follows:

“After hearing the evidence of PW1-3 in ELC No 21 of 2020- Falcon Service Station Ltd vs Kenya Railways Corporation, this court has noted that due to similarity of both facts and cause of action and the sharing of directorship/ownership of the two companies involved in this suit and ELC E20 of 2020-Nakel Investments Ltd vs Kenya Railways Corporation which is not concluded, the judgments in the two matters should be read at the same time and hence the judgment scheduled to be read today in ELC No 20 of 2020 will not be delivered today, but shall await the conclusion of the hearing of ELC No 21 of 2020-Falcon Service Station Ltd vs Kenya Railways so that they be read together.”
6. The court will therefore consider the two cases together, analyze the evidence, and deliver one judgment due to the similarity of the parties, claims and the witnesses who gave evidence.

Plaintiff's Case

7. PW1 Charles Okeyo Owuor testified with respect to ELC No. E021 of 2020 that he is a member of the Institute of Certified Public Accountants Kenya Member No. 11104 practicing under the name and style of Dalexa & Flyphony Associates. He stated that he has been a practicing Accountant for the last seventeen years, a trained lawyer, and a lecturer at various universities including Nairobi, Egerton and Kabarak where he teaches Real Estate, Finance, Financial Statement analysis and an examiner with Kenya Accountants and Secretaries National Examinations Board.
8. PW1 testified that he was instructed by the Plaintiff through Gordon Ogola Kipkoech Associates to assist it evaluate the impact of demolition of plant and equipment with the aim of checking whether



losses and damages were incurred by the Plaintiff by virtue of the demolition and produced a report in court.

9. It was PW1's testimony that he computed a hypothetical scenario, which involved testing different scenarios to calculate profits, costs, income and other items that would have prevailed in the absence of the demolition. PW1 informed the court that he used the following methods: before and after, yardstick approach, cost-based or sales approach and price prediction method.
10. PW1 therefore concluded that the cost-based method was the best alternative and followed various procedures and took key interest by referring to budgets, forecasts, investment appraisals and market surveys including market condition
11. He testified that he looked at the Energy Regulatory Commission (ERC) pricing and the market industry to come up with a projection which computation was derived from annual financial statements together with rent paid to Defendant, financial statements from Plaintiff and the pricing of ERC through Shell-Vivo Company.
12. PW1 further testified that in 2019, the company made a loss and this was brought forward to 2020, which was in the Kenya Revenue Authority portals. His evidence was that the uncertainties were also considered and addressed through price expectation theories namely, adaptive theories and relational theories.
13. He stated that he subjected assumptions to risks and uncertainties and came to a conclusion that the projected amount was Kshs 5,696,795,939/= computed as follows: Kshs 312,094,000/= on account of business run down to the rubble as per the Valuer's report, Ksh 5,384,701,636/= on account of the rental income and loss of profits as per the sub-tenancy agreements together with sales and profit margins made by Falcon services and produced the report as PExh 22.
14. Regarding ELC No E020 of 2020 Charles Okeyo Owuor testified as PW2 and reiterated the same evidence. He adopted his forensic dated 16th December 2020. He stated that he adopted different methodologies to determine the loss of income suffered by the plaintiff for the projection for 25 years as per the extended lease period.
15. He further stated that he concluded that the Plaintiff had suffered loss of income of Kshs 222,825,351/ plus Kshs. 84,350,000/ being valuation for damages to the buildings and other assets coming to a total of Kshs. 307,175351/for the lease period ending on 31st December 2042.
16. Upon cross-examination by Mr. Mbaabu for the Defendant, PW1 stated that he used the cost-based method, which involves creating projections based on accurate historical data. He further noted that the last paragraph on page 88 of the bundle states that the information provided was incomplete and inaccurate. It was his evidence that he relied on the information from Equity Bank and Vivo Energy among others.
17. PW1 confirmed that there is an agreement at page 186 of the bundle with no account statement and that the previous year's audited statements would have been necessary for his report, which were not attached. Further, the financial records and financial statements at page 108 are not audited.
18. According to PW1 the figures are estimates and may not be achieved as he included rental income and some leases which none goes up to the year 2022 as the same can be extended between the parties. PW1 also testified that in 2019, the company made a loss and in 2020, there was the COVID-19 pandemic, which led to lockdown and travel restrictions.



19. On re-examination, PW1 testified that assumptions are made in his computations that not everything can be 100% and that he used price expectation theory. He stated that when dealing with this type of assignment, one must not rely only on one record but must get other records including public records. That the sub-lease agreements were there and he assumed the parties could extend them.
20. According to PW1 the agreement dated 15th May, 2022 shows the market factors in terms of demand and supply and that demolition took place three months to the end of the year further the sales could have doubled due to branding which increased the sales by 7% .
21. It was PW1's evidence that he settled on a 10% increase rather than 14% and the worst -case scenario was a 7% increase and used 2020 as a basis for computation. Even though the businesses were closed, the Plaintiff's business was operating for twelve hours hence his report is accurate as it looked at many different scenarios.
22. PW 2 Mohamed Suraw Issack adopted his witness statement dated 10th March, 2021 and testified that he is a director of the plaintiff which was incorporated in 2004 as per the certificate of incorporation. PW2 testified that the Plaintiff is a petrol station business, a shopping mall and a variety of other businesses. It was his testimony that it never owned the property on which the petrol station was situated but it had a fifteen-year lease acquired through a competitive process from 6th February, 2013.
23. It was PW2's testimony that he got a second lease for twenty-five years starting from January 2016 vide a Letter of offer dated 15th December, 2016. He stated that after receiving the letter of offer for the first lease they followed due process and accepted the first and second letters of offer as per the letter dated 30th January, 2017.
24. PW2 testified that upon leasing the property, he found a neglected place with criminal elements operating there with no structures. He further stated that before putting any structures, they submitted them to the Defendant who approved all building plans. Later they submitted the plans as approved to the County Government of Nakuru for further approval and to the National Environment Management Authority of Kenya.
25. He testified that they then sought approval from Kenya National Highways Authority and paid money via a banker's cheque to create deceleration and acceleration lanes, which were all approved.
26. It was his testimony that the defendant having approved the plans was aware that they were putting up structures and that they never received any notice of breach of lease conditions. PW2 testified that on page 246 of the Plaintiff's bundle there is a general notice with three categories: land grabbers, the encroachers and the legal tenants. He testified that the tenants were informed/required to pay through their advocates and that his understanding was that the legal tenants were told to make their legal payments.
27. PW2 testified that the demolition had a traumatic effect on him and it was done overnight without notice as people came in the evening just to put the "X" mark and there was no formal notice from the defendant. PW2 stated that one of the properties affected by demolition has now been leased to the County Government of Nakuru for forty-five years.
28. According to PW2, they had a loan to service from the Bank and most of their properties were gone through the demolition, further they had good business on the site and many people were psychologically affected.
29. In ELC E020 of 2020 Yussuf S Issack gave evidence as PW1, adopted his witness statement dated 10th March 2021 and stated that he is a Director of (Nakel Investment Ltd the Plaintiff herein, and produced



- a copy of the Certificate of incorporation. It was his evidence that he made an application for lease to the Defendant and was issued with a Letter Offer dated 11th September 2012.
30. He testified that he was issued with a lease from 26th February 2013 for 15 years, paid the requisite fees and got building approvals from the Municipal Council of Nakuru, Railways, KENHA, and NEMA. He also sought consent from the Defendant to sublet which was approved vide a consent letter dated 3rd June 2016.
 31. He also stated that he got an extension of lease vide a lease dated 26th October 2018 for 25 years, signed the agreement and paid the rent in advance. PW1 Yussuf Issack also testified that they leased the premises to Mercy International, Glovine Motors, Sakinya Motors and UFRA Motors and paid Kshs 425, 000/ as advance rent to the Defendant. The witness further stated that if they were in arrears of rent the Defendant would not have extended the lease for a further 25 years.
 32. Upon cross-examination by Mr. Muturi, PW2 stated that they established Falcon service station in 2004 and got the lease in 2013. Further, that he operated a Falcon Service Station in Kisii, which has a Supermarket and all these are owned by the Plaintiff. It was his testimony that they entered into a lease agreement with the defendant, a State Corporation through a competitive process.
 33. PW2 stated that there was an advertisement to the public an evaluation process and paid the requisite fee as per the letter of offer which was valid for fourteen days. He stated that he did not pay the amounts in the offer letter within fourteen days as required but paid Kshs. 4,737,500/=.
 34. It was his evidence that he had not signed the lease with the Defendant for twenty-five years as it was never sent to him and further that he never wrote to the Defendant seeking to be provided with the lease.
 35. PW2 informed court that the lease on page 8 of the bundle is dated 6th February 2013 and it is for fifteen years with effect from 1st August, 2012 and that is the only lease that he signed. PW2 stated that on 10th October 2020, people came in the evening while absent and that he did not receive any notice to vacate from the Defendant.
 36. It was PW2's contention that there is evidence that the defendant is the one who demolished the premises otherwise; they would have called them regarding the damage. PW2 stated that he saw some photographs of bulldozers but he does not know the owner and further no investigation had been conducted regarding the demolition by any lawful authority.
 37. PW2 stated that it is a political issue as his neighbour's adjacent property was leased to the Nakuru County Government but does not have any document to support this. PW2 stated that no person is currently occupying the property and that he used his other properties as collateral to build on the suit property and that the said collateral has been auctioned but did not produce any evidence to prove the same. PW2 further stated that the lease was to expire in August 2027 and at expiry, he was to return vacant possession to the Defendant.
 38. He confirmed that the lease could be terminated without notice and that he had sub-leased to a company called Sai Universal Supplied Ltd on 24th January, 2020 as they had consent to sublet. PW2 stated that the approved plan was for a petrol station and a supermarket and that the structures on the property. Further, that page 45 of the lease is not witnessed and they never submitted the said lease to the Defendant and that the subleases were never approved by the Defendant.
 39. PW2 stated there were other businesses, namely a restaurant, pharmacy, barber shops, car sales, and clothes shops which he submitted as his own. Further he had not registered any of the other businesses



as separate companies. PW2 stated that most documents got lost and does not have evidence of payment of 10% of annual sub-lease rent as per clause number 2 on page 36.

40. Upon re-examination, PW2 testified that the Board of the Defendant recommended the extension of the lease and he applied for an extension of the second lease. PW2 informed the court that in the lease dated 6th February, 2013, he was paying Kshs. 550,000/= annually and in the second lease, the annual rent was Ksh. 1,200,000/=. Which he paid upto the date of demolition. PW2 testified that he was paying but he had no lease.
41. In respect of ELC NO E020 of 2020, upon cross examination by Mr. Mwirigi, PW1 stated that he did not know that he was supposed to Kenya Railways 10% of the yearly rent He also stated that the notice in the press indicated that small shop owners near the Railway line would be removed and tenants to pay up the rent.
42. On re - examination he stated that he was not given three months' notice to vacate hence he suffered loss and damage as the defendant demolished his businesses. Further that if he had defaulted on rent, the Defendant would not have extended the lease for a term of 25 years. He also stated that there is an audited financial statement in the report produced in court.
43. PW3, Joseph Inoti testified that he is a registered practicing Valuer in Nakuru town for the last 30 years and adopted his witness statement dated 10th March, 2021 as part of his evidence in chief. He testified that he prepared a valuation report at page 52 of the plaintiff's bundle regarding the business and stated that he used the replacement cost approach looking at the cost of constructing the building, replacement of equipment and construction of fences. PW3 testified that the value of the damage was Kshs. 312,094,000/= and indicated that there were three businesses namely: Rana Auto Selection valued it at Kshs. 4,500,000/=: Tyre Centre valued at Ksh15,200,2000/= and Shell Petrol Service Station valued at Kshs. 292,394,000/=:
44. Upon cross-examination by Mr. Muturi, PW3 stated that he is a registered Valuer and with a Bachelor of Arts Land Economics, and a full member of the Institute of Surveyors of Kenya. PW3 stated that the institute has four chapters; Land, Surveyors, Estates Agents and Geomatics and that Quantity Surveyors are not part of the institute as they fall under the AAK; Institute of Architects and Quality Surveyors.
45. PW3 stated that Quantity Surveyors estimate costs of buildings before construction and works costs and that when a building is constructed a Valuer values it. PW3 stated that he did the report on 20th November, 2020 and there was no existing building on the site when he did the report.
46. It was PW3's testimony that he received instructions from the plaintiff and never got any from any company called Rana or Sai and was not aware of the owners. He stated that he had done valuation of the premises previously for insurance purposes. Further that if he did not have the report of August 2020, he would not have managed to prepare this report, which he has not annexed. He also stated that the rules require the specific dates of valuation which he admitted that were not indicated. Further, that the current valuation is for the three businesses but did not indicate the values as per the August 2020 insurance report.
47. PW3 stated that he neither applied the market approach nor exhibited evidence of other sold properties in this report. That the demolition was done on 10th October, 2020 and did a valuation in August first then did another one in November 2020 and the valuation was based on the assumption of things as they were as at August 2020 but could not verify whether the buildings were there as at November 2020.



48. Upon re-examination, PW3 testified that there is nothing wrong with relying on a previous report to make a valuation report and that they do not attach past reports. Further that failure to state a specific date of a mentioned report is not fatal and that he had given the given the month which is sufficient. PW3 testified that one cannot give selling prices for items as he or she would expose the selling companies, unless there is a dispute.
49. He testified that what he requires is the map to show the correct location and the title and does not have to attach those documents. PW3 testified that his understanding is that the Plaintiff managed Sai and Rana and that there were thirty-two small shops and was not sure whether the businesses were tenants or owned by the Plaintiff.
50. In ELC No. E020 of 2020 the evidence was similar as he used the same approach to do the valuation report. He stated that he used the replacement costs Approach which looks at the costs of replacing different components whereby a large proportion of the costs include, cost of materials and labour. It was his further evidence that he used a Quantity Surveyor with expert knowledge on construction costs to do the report.
51. PW4 Muktar Golicha adopted his witness statement dated 10th March 2021 and testified that in 2020 he was a guard at the Plaintiff Company in Nakuru near the Railway. He testified that he went to work on 10th March, 2020 at 6:30 am and found the workplace not as he had left it as there was a burglary on the premises. He stated that there are people currently doing business at the premises.
52. Upon cross-examination by Mr. Mbaabu for the Defendant, PW4 stated that he had documents to show that he was a guard at the Plaintiff Company but they all got burnt. He stated that he saw a tractor/bulldozer but he did not see its registration number and it was green in colour. He stated that it did not have any writings and he did not know whether it belongs to the Defendant but saw policemen.
53. On re-examination, PW4 testified that the Plaintiff's parcel initially belonged to the Defendant and when he saw the police, he was told that they were instructed by the Defendant to provide security.

Defendant's Case

54. DW1 Justine Omoke adopted his witness statement dated 5th February 2021 and testified that he is the Acting Property Manager of the Defendant based in Nairobi. He stated that he is a registered practicing Valuer and Agent and has over twenty years of experience in valuation and property management. He produced documents in the list of documents dated 5th July, 2021 as s DExh 1 to 4 and a further list of documents dated 3rd March, 2022 as DEX No 5.
55. Upon cross-examination by Mr. Abdikadir for the Plaintiff, DW1 stated that the relationship between the Plaintiff and the Defendant was a Landlord/Tenant relationship and his current position is Acting Property Manager and at the time of signing the statement, he was the Principal Real Estate Officer. DW1 stated that there was a lease agreement between the Plaintiff and the Defendant and the lease agreement was extended for a further period of twenty-five years but there was no lease signed.
56. DW1 further stated that the Plaintiff was a legal tenant of the Defendant and that there was a resolution to revamp the railway lines through a reclamation notice dated 1st October, 2019. He stated that the notice was a communication to the people who were occupying the Railway line corridor to vacate and a notice to the rent defaulters on the railway line to pay the rent. DW1 stated that the Plaintiff was a legal tenant and the advertisement dated 1st October, 2019 was a notice to pay rent and not to vacate.
57. DW1 further stated that the process of getting the land back was by giving a 90 days' notice which was not given. DW1 stated that he is not aware that the properties were allocated to other parties



upon eviction of the occupants. It was his evidence that the official communication with the tenants is through Short Message Services, print media and telephone calls which they used to ask tenants to pay their rent however if they want them to vacate the premises they have to make them do so.

58. Upon re-examination. DW1 testified that the Plaintiffs had a lease with the Defendant for fifteen years from 1st August, 2012 and before the expiry of the lease they came for an extension for twenty-five years from 1st January, 2017. He testified that at the time, the Plaintiff's properties were demolished, they had not signed a lease. DW1 testified that the Plaintiff was in arrears of Ksh 1,466,260/= for about three years. He testified that the National Government through Presidential directive and the Ministry of Interior and National Co-ordination carried out the demolition.
59. In ELC No. E020 of 2020 the Defendant's witness Justine Omoke admitted that the Plaintiff was a legal tenant of the Defendant and that there was a valid lease, which was extended on 26th October 2018. He stated that there was a clause in the lease agreement that upon notice being issued the tenant would not lay any claim whatsoever.
60. It was his evidence that the Presidential Delivery Unit with the Ministry of Interior made a decision to revamp the Nakuru- Kisumu Railway line and directed Kenya Railway to issue a notice to vacate and those who had illegally acquired land were told to surrender for Railway purposes, and tenants to pay the rent.
61. Mr. Omoke testified that the demolition was done by the Presidential Delivery Unit and the Ministry of Interior and that Kenya Railways was not aware that the demolition would take place on that day.

Plaintiff's Submissions

62. Counsel for the Plaintiff filed submissions dated 10th October, 2024 and identified the following issues for determination:
 - a. Whether there was a lease agreement dated 6th February 2013 between the Plaintiff and the Defendant and whether there was an extension of the lease for twenty-five years via a letter dated 15th December, 2016?
 - b. Whether the Plaintiff was issued with sufficient notice of ninety days to vacate the property in accordance with the Lease agreement dated 6th February 2013 and the extension letter dated 15th December 2016?
 - c. Whether there was a breach of contract in respect to the lease agreement by the defendant?
 - d. Whether there was illegal demolition and eviction of the Plaintiff by the defendant?
 - e. Whether the Plaintiff is entitled to damages and the reliefs sought?
 - f. Who is liable to pay the costs of this suit?
63. On the first issue, counsel submitted that the defendant has not disputed the existence of the lease agreement between the Plaintiff and the Defendant in the Defendant's statement of defence dated 4th June, 2021. Counsel also submitted that the Defendant has not disputed the extension of the lease agreement. Further that in ELC No E020 of 2020, Mr Justine Omoke confirmed that there was a valid lease agreement which was extended on 26th October 2018
64. On the second issue, counsel submitted that Clause 12(b) of the Lease agreement dated 26th October 2018 provided that the Lessor may terminate the lease agreement at any time by giving the lessee at least three (3) calendar months written notice to that effect



Further that the legal provision for an eviction notice from public land is provided for in Section 152 G of the Land Laws Amendment Act 2016 which states that any evictees from public land should be notified in writing, by a notice in the Kenya gazette and in one newspaper with nationwide circulation and by radio announcement in local language, where appropriate at least three (3) months before eviction. It was counsel's submission that there was no evidence adduced to show that sufficient notice was given to the Plaintiff in accordance with the lease agreement.

65. On the third issue, counsel submitted that the Defendant breached the lease agreement by failing to give the Plaintiff sufficient notice and that the notice in the Daily Nation newspaper dated 1st October, 2019 was not a notice to the Plaintiff requesting them to vacate the suit property. It was counsel's submission that the Notice was addressed to three categories of people namely; a) those who illegally acquired the Defendant's land and property b) those who encroached on the railway reserve c) Tenants of the corporation of which the Plaintiff fell on category c) who were reminded to ensure that rent payment was up to date.
66. Counsel submitted that the Defendant's witness DW1 Mr. Justine Omoke admitted in his testimony during the hearing that the Plaintiff was a legal tenant of the corporation and fell in category (C) of the said notice and that the said notice was not sufficient therefore was not a proper notice in accordance with the lease agreement. It was counsel's contention that this was a blatant breach of the lease agreement and the Defendant trying to hide under the President's Delivery Unit under the Ministry of Interior and Coordination.
67. Counsel relied on the case of National Bank of Kenya Limited vs Pipeplastic Somkolit Limited & 8 others (2001) eKLR, Teresia Irungu vs Jackton Ochara & 2 others (2013) eKLR, Adan Abdirahani Hassan and 2 others vs The Registrar of Titles and others Nairobi Petition No 7 of 2012 [2013] eKLR and Rajabali T/A Giraffe Snack Bar vs Total Kenya Ltd (2009) eKLR and submitted that the evictions and demolitions were not sanctioned by law or authorized through a court order hence they violated Article 40 (3) of *the Constitution* of Kenya.
68. Counsel submitted that a forensic report on damages, loss of profit and income projections produced by the firm of Dalexa & Elphony Associates, which proved the damages, loss of profit and income as itemized in the amended plaint and relied on the case of Park Towers Ltd vs John Mithamo Njika & 7 others (2014) eKLR and urged the court to find that the Plaintiff has proved its case of a balance of probability and allow the claim as prayed.

Defendant's Submissions

69. Counsel for the Defendant filed submissions dated 3rd October 2024 and identified the following issues for determination:
 - a. Whether the Plaintiff has demonstrated that it is the Defendant that was responsible for the demolition of its property?
 - b. Whether the Plaintiff is entitled to the prayers sought in the Amended Plaint
 - c. Who bears the costs of the suit?
70. On the first issue, counsel submitted that the Plaintiff has the burden to prove that it is the Defendant who caused the demolition according to Section 107 and 109 of the *Evidence Act*. Counsel relied on the cases of Evans Nyakwana vs Cleophas Bwana Ongaro (2015) eKLR, Gichinga Kibutha vs Caroline Nduku [2018] eKLR and Ikon Prints Medis Company Limited vs Kenya National Highways Authority & 2 others [2015] eKLR and submitted that the demolitions were carried out by the



Ministry of Interior and Coordination of the National government and not the Defendant as alleged. Counsel submitted that although the Defendant is a state corporation established under the [Kenya Railways Corporation Act](#), it cannot be bound or held liable for the actions of other government agencies or third parties.

71. On the second issue, counsel submitted that the Plaintiff prayed for an award of Ksh 312,094,000/= being special damages relating to the value of the structures, machinery and equipment that was destroyed in the demolitions and Ksh 5,384,701,636/= being loss of profit and income as projected for the remainder of the lease period.
72. It was counsel's submission that the Plaintiff seems to separate the claim for loss of profit and that of special damages. That it is trite law that a claim for loss of profit is in the nature of special damages and relied on the cases of *Mohazo Epz Ltd vs New Wide Garments EPZ Limited & another* [2020] eKLR, *Kimani vs Attorney General Civil Appeal No 6 of 1969* [1969] EA 502.
73. On the special damage claim for Ksh 312,094,000 being the value of the structures, machinery and equipment; counsel submitted that it must be pleaded with particularity and proved. Counsel submitted that there was no proof from the Plaintiff on any amount incurred or paid as an expense towards the alleged construction of the premise further that there were no receipts produced for any equipment contained in the report hence the claim should fail. Counsel relied on the case of *National Social Security Fund Board of Trustees vs Sifa International Limited* [2016] eKLR.
74. On the claim for Ksh 5,384,701,636 being loss of profit and/or income; counsel submitted that the report by Dalexa & Elphony Associates cannot be relied upon as it is based on conjecture and speculation. Counsel relied on the cases of *Hydro Water Well (K) Limited vs Sechere & 2 others (Sued in their representative capacity as the officers of Chae Kenya Society) (Civil Suit E212 of 2019)* [2021] KEHC 22 (KLR), *Griffin v Colver, Bank of Baroda (Kenya) Limited vs Timwood Products Ltd Civil Appeal No 132 of 2001 (CAK)* [2008] KLR 236 and *Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd* [2013] eKLR.
75. On the claim for general, exemplary and punitive damages, counsel submitted that the Plaintiff has not shown any liability on the part of the Defendant and it follows that these damages cannot be awarded against the Defendant and relied on the cases of *Stephen Njuguna Muniu vs S.M Nyakundi & another* [2014] eKLR and *Kenya Tourist Development Corporation vs Sundowner Lodge Limited* [2018] eKLR.
76. On the prayer of a permanent injunction, counsel submitted that the prayer has been overtaken by events and the Plaintiff has not submitted on the same and thus it cannot be issued. Counsel submitted that Plaintiff's suit should be dismissed with costs to the Defendant.
77. In ELC No. E020 of 2020 counsel reiterated the submissions and urged the court to find in favour of the plaintiff and grant the prayers as per the Plaintiff with costs.

Analysis And Determination

78. The issues for determination in the two cases are:
 - a. Whether there was a lease agreement dated 6th February 2013 in ELC No E021 of 2021 and 26th February 2013 in ELC E020 of 2020 between the Plaintiff and the Defendant and whether there was an extension of the lease for twenty-five years via a letter dated 15th December, 2016 and a lease dated 26th October 2018 in ELC No, E020 of 2020.



- b. Whether the Plaintiff was issued with sufficient notice of ninety days to vacate the property in accordance with the Lease agreement dated 6th February 2013 and the extension letter dated 15th December 2016 and dated 26th February 2013 and a lease dated 26th October 2018.
- c. Whether there was a breach of contract in respect to the lease agreement by the defendant?
- d. Whether the Plaintiff has demonstrated that the defendant was responsible for the demolition and eviction of the Plaintiff.

Whether the Plaintiff is entitled to damages and the reliefs sought.

- 79. On the first issue whether there was a lease agreement dated 6th February 2013 between the Plaintiff and the Defendant and whether there was an extension of the said lease for twenty-five years via a letter dated 15th December, 2016. It is not disputed that the Plaintiff and the defendant entered into a lease agreement dated 6th February, 2013, for a term of fifteen years which was extended for twenty-five years via a letter dated 15th December, 2016, but what is in dispute is that the renewed lease was never signed.
- 80. It is further not disputed that in ELC No E020 of 2020 the Plaintiff and the Defendant entered into a lease agreement dated 26th February 2013 for 15 years and a further extension of the lease dated 26th October 2018 for a period of 25 years. The Defendant's only witness Mr. Justine Omoke who stated that the Plaintiff and the Defendant's relationship was that of landlord and tenant and that it was a legal tenancy. This shows that the plaintiff was on the suit premises legally with the permission of the defendant.
- 81. It is also on record that the Plaintiff adhered to the terms and conditions of the lease, paid the requisite fees and rents to the defendant. The Plaintiff further sought consent to sublet which the defendant approved. The Plaintiff also sought approvals from the County government of Nakuru, NEMA, KENHA, and Railways. Kenya. Such approvals and extension of the lease would not have been done if the Plaintiff were not in good standing with the defendant. The Defendant alleged that the Plaintiff was in arrears but there was no such evidence.
- 82. On the issue as to whether the Plaintiff was issued with sufficient notice of ninety days to vacate the property in accordance with the Lease agreement dated 6th February 2013 and 26th February 2013, and the extension letter dated 15th December 2016 and a lease dated 26th October 2018.
- 83. Clause 12(b) of the Lease agreement dated 26th October 2018 provided that the Lessor may terminate the lease agreement at any time by giving the lessee at least three (3) calendar months written notice to that effect. The defendant's witness admitted that the Notice on the Daily Nation dated 1st October 2019 was addressed to three categories of people namely: those who illegally acquired the defendant's land and property, those who encroached on the railway Reserve and Tenants of the Corporation of which the Plaintiff fell in this category and who were reminded to ensure their rent payment was up to date.
- 84. The witness further admitted that this was not a notice specific to the Plaintiff to vacate the property. The legal provision for an eviction notice from public land is provided for in Section 152 G of the Land Laws Amendment Act 2016 which states that any evictees from public land should be notified in writing, by a notice in the Kenya Gazette and in one newspaper with nationwide circulation and by radio announcement in local language, where appropriate at least three (3) months before eviction. This was not complied with in this case.



85. In the case of *Amina Achieng Ochieng & another v Kenya Ports Authority & 3 others* [2022] eKLR the Court observed as follows:

“Treaties and Conventions ratified in Kenya form part of Kenyan law and are therefore binding to Kenya and can be interpreted as such by Kenya Courts. The Courts have recognised the UN Covenant on Economic, Social and Cultural Rights (CESCR); UNGA, The Right to Adequate Housing which require the state to refrain from forced evictions. However, where there is unlawful occupation, forceful eviction must be carried out in a humane manner. The procedures to be followed during forced evictions include:

- a) An opportunity for genuine consultation with those affected;
- b) Adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
- c) Information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
- d) Especially where groups of people are involved, government officials or their representatives to be present during an eviction;
- e) All persons carrying out the eviction to be properly identified;
- f) Evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
- g) Provision of legal remedies; and
- h) Provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts Other international treaties which Courts have relied on include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (Banjul Charter) that seek to protect the fundamental rights of persons.

From the foregoing it is quite evident that the Statutory Procedure on evictions was not followed and that the Plaintiffs were not given sufficient notice.”

86. I agree with the Plaintiff that they were not given sufficient notice as per the terms of the lease agreement and according to international standards.

87. On the issue as to whether the defendant breached the terms of the lease agreement, it is on record that the Plaintiff and the Defendant entered into a binding agreement for lease of the premises of which the plaintiff complied with the terms by paying rent and seeking the necessary approvals from the defendant and the relevant agencies. The Plaintiff claimed that on 10th October, 2020, the Defendant without prior and proper notice and without any justifiable reason demolished, destroyed and evicted the Plaintiff from the property thereby causing it damage. The Defendant did not deny that the demolitions were done. It only blamed the Ministry of Interior who gave them a directive to issue notice for the demolition to clear the Railway line from Nakuru to Kisumu. It follows that the demolition of the Plaintiff's premises and the eviction was illegal the defendant having not followed the laid down procedures.



88. In the Supreme Court of Kenya case of Kwanza Estates Limited v Jomo Kenyatta University of Agriculture and Technology [2024] KESC 74 (KLR) the court held as follows:

“[107] For avoidance of doubt, it is our considered finding that, where the parties are compelled to disengage without mutual agreement, resulting in the termination of the lease either by the tenant vacating the premises voluntarily or by eviction initiated by the landlord, this shall be deemed a breach of contract. Consequently, we take the position that, notwithstanding the absence of a termination clause, it would be unconscionable to compel a tenant to remain in premises they no longer wish to occupy. Equally, it would be unreasonable to claim rent for the unexpired lease term after the tenant has vacated. Therefore, the remedy for such termination is rent due up to the date of vacating and damages for breach of contract. In such a case, the remedy is for the party responsible for the breach to be liable to pay damages.

[108] It is a well-established principle of law that damages for a breach of contract aim, subject to mitigation, to restore the claimant to the position they would have been in had the breach not occurred. This principle, known as *restitutio in integrum*, underscores the compensatory nature of contractual damages. Kenyan case law has consistently affirmed this approach, as seen in *Kenya Industrial Estates Ltd vs. Lee Enterprises Ltd* (NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR) and *Kenya Breweries Ltd v Natex Distributors Ltd* (Milimani HCCC No. 704 of 2000 [2004] eKLR).”

89. The Defendant cannot hide behind the Ministry of Interior as they were aware of the binding leases with the plaintiff and further that there are laid down procedures of termination of a lease and evictions from public land. The valid lease agreement with the Defendant gave the Plaintiff assurance and comfort on the legality of the transaction thereby investing heavily in the suit premises.

90. The Defendant stated in Paragraph 7 (iv) of the Defence that the Plaintiff was evicted forcefully to facilitate timely revitalization of Nakuru – Kisumu Railway. This is an admission that the Defendant has an intention of demolishing the premises and eviction of the Plaintiff hence it is proof that they actualized their intention as planned. The Defendant never obtained a court order to forcefully evict the plaintiff as required by law as was held in the case of *Teresia Irungu Vs Jackson Ochara & 2 Others* (2013) eKLR that :

“Since the proprietors of the suit premises did not obtain a court order for possession, the Plaintiff’s eviction from the suit premises was illegal’

91. Similarly in the case of *Rajabali T/A Giraffe Snack Bar vs Total Kenya Ltd* (2009) eKLR, the court held as follows:

“..... I find and hold that the Defendant could not have taken over the suit premises, and demolish the suit premises and therefore effectively evicting the Plaintiff, without an order from a court of law. The Defendant’s action to take over and demolish the suit premises was therefore both unlawful and illegal.”



92. On the issue of whether the Plaintiff is entitled to damages and the reliefs sought, The Supreme Court of Kenya in the above quoted case of *Kwanza Estates Limited v Jomo Kenyatta University of Agriculture and Technology* ((Supra) pronounced as follows:

“[109] However, it is equally established that general damages for breach of contract are not awardable in addition to quantified or special damages. The legal position on this issue was first stated in *Dharamshi v Karsan* [1974] EA 41 by the Court of Appeal for East Africa and restated several times by the Court of Appeal in subsequent cases including *Postal Corporation of Kenya v Gerald Kamondo Njuki t/a Geka General Supplies NRB CA Civil Appeal No. 625 of 2019 [2021] eKLR*. The measure of damages follows the rule established in *Hadley v Baxendale* (1854) 9 Exch.341, which holds that damages should encompass losses arising naturally from the breach itself or those reasonably foreseeable by both parties at the time the contract was formed. This principle has been adopted in Kenyan jurisprudence, as demonstrated in *Standard Chartered Bank Limited vs. Intercom Services Ltd & Others, NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR*. Such damages are special damages, which must be specifically pleaded and proven, a requirement reiterated in *Coast Bus Service Ltd vs. Sisco Murunga Ndanyi & 2 others (NRB CA Civil Appeal No. 192 of 92 (UR))* and *Charles C. Sande v Kenya Co-operative Creameries Ltd (NRB CA Civil Appeal No. 154 of 1992 (UR))*.”

93. The Plaintiff s in both cases called the same witness who carried out a valuation of the suit premises who produced valuation Reports which were never controverted by any other report by the Defendant as its defence was that they did not carry out the demolitions and the eviction.
94. The Plaintiff in ELC No E021 of 2020 sought f an order o permanent injunction restarting the Defendant from interfering with the suit premises which I find to be overtaken by events the Plaintiff having been evicted and the structures demolished.
95. The Plaintiff further sought special damages of Kshs 312,094,000/ being the value of the structures, machinery and equipment which was pleaded and the Plaintiff led evidence by calling the Valuer who did the valuation and produced a report. I find that the Defendant illegally demolished the Plaintiff's premises and is therefore entitled to the amount claimed of Kshs. 312,094,000/. However, it is trite law that a party cannot claim both special damages and general damages.
96. Further the Plaintiff claimed for loss of business of Kshs. 5,384,701,636/. Loss of income is a special damage, which is in the nature of restitution and, where proved, it is meant to restore the claimant to the position it would have been save for the action complained of.
97. The law is settled that a claim for special damages must not only be specifically pleaded but must also be strictly proved with as much particularity as circumstances permit. The Court of Appeal in the case of *Capital Fish Kenya Limited Vs Kenya Power & Lighting Company Limited* (2016) eKLR as follows:

“Starting with the first issue, it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See *National Social Security Fund Board of Trustees vs Sifa International Limited* (2016) eKLR, *Macharia & Waiguru vs Muranga Municipal Council & Another* (2014) eKLR and *Provincial Insurance Co. EA Ltd vs Mordekai Mwanga Nandwa, KSM CACA 179 of 1995 (UR)*. In the latter case this Court was emphatic that “... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly,



none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract...”

98. Even though this limb was specifically pleaded, the Plaintiff had an uphill task to prove the loss of future business taking into account that with the Covid -19 pandemic, most businesses were closed or scaled down. The projections of future earnings upto 2042 were shaky. I find this limb not proven, therefore it fails.
99. This also applies to ELC No. E20 of 2020, the court finds that the Plaintiff is entitled to Kshs. 84,350,000/ being special damages and the loss of business claim for kshs. 222,825,351 fails.
100. The claim for exemplary, punitive and aggravated damages for trespass also fails, as the defendant cannot trespass on its property. What happened was an illegal eviction and demolition of the suit premises. The plaintiff is entitled to the costs of the suit plus interest.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 23RD DAY OF DECEMBER 2024.

M. A. ODENY

JUDGE

