



**Cotton Roots Fashions Limited v Shah & another (being sued as the Administrators of the late Ramesh Kumar Gupta) (Environment & Land Case E033 of 2020) [2023] KEELC 463 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 463 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E033 OF 2020**

**MD MWANGI, J  
JANUARY 31, 2023**

**BETWEEN**

**COTTON ROOTS FASHIONS LIMITED ..... PLAINTIFF**

**AND**

**VEERAL SHAH & ROMA WADHWA ..... DEFENDANT**

**BEING SUED AS THE ADMINISTRATORS OF THE LATE RAMESH KUMAR GUPTA**

**JUDGMENT**

**Background**

1. The Plaintiff in this case has been a tenant of the Estate of Ramesh Kumar Gupta on their property known as L.R. No. 209/2527/2 along Muindi Bingu Street in Nairobi (hereinafter referred to as ‘the suit property’). The Defendants have been sued in their capacity as Administrators of the Estate of Ramesh Kumar Gupta. The Plaintiff pleads that it executed two leases with the Defendants on 15<sup>th</sup> November 2016 for a term of 5 years and 3 months for the ground and first floors of the suit property respectively.
2. It is the Plaintiff’s case that there was an implied term of the lease between the parties that from the onset of the tenancy, the Plaintiff was to undertake improvements, install fixtures and fittings for purposes of a ‘hotel and restaurant’, a ‘retail apparel garment showroom’ and a ‘shop’. The Defendants were to reimburse, compensate and pay the Plaintiff all the costs of such construction, improvements, permanent fitting, fixtures and installations.
3. The Plaintiff further avers that the Defendants were at all times continuously and actively involved in the supervision of all the construction works & improvements.



4. The Plaintiff alleges that it entered into a further arrangement with the Defendants to undertake additional construction and the development of the then non-existent Mezzanine floor, balcony and stairway with a promise to reimburse, compensate and pay the Plaintiff all the costs/expenses incurred.
5. The Plaintiff pleads that its affiliate company, Royal Palm Restaurant Ltd, occupied the ground and 1<sup>st</sup> floor of the suit premises with the consent of the Defendants. The Plaintiff on its part continued its occupation of part of the ground floor and Mezzanine floor.
6. It is the Plaintiff's further case that on several occasions, the parties varied the terms of the tenancy which variations included extension of space occupied by the Plaintiff, rent reductions as well as sublease of the premises into a hotel, shops and saloon.
7. The Plaintiff accuses the Defendant of breach of both the express and implied terms of the lease by failing to pay, refund and or compensate it for the monies expended for the construction, improvements and installation works undertaken on the suit property and threatening to evict it from the suit property.
8. In the alternative, the Plaintiff alleges that the Defendants misrepresented that they would refund and or compensate it for such sums of monies expended in improvements and construction of the mezzanine floor, balcony and stairway as well as the permanent fixtures and fittings installed in the premises amongst the other particulars pleaded in paragraph 9 of the plaint.
9. The Plaintiff averred that it expended a total sum of KShs 34,106,460/- and seeks judgment for the said amount against the Defendant with interest thereon at prevailing commercial rates. Additionally, the Plaintiff seeks an order of permanent injunction to restrain the Defendant from interfering with its quiet possession and peaceful enjoyment of the suit property and or leasing it or permitting any third party from entering, taking possession or occupation of the said premises.
10. The Plaintiff too prays for a declaratory order that the rent (due from it and payable in respect of the premises occupied by the Plaintiff) be deemed to have been pre-paid and offset, general damages, a declaration that a constructive trust exists between the parties and costs of the suit.

#### **The Defendants' Statement of Defence and Counter-claim.**

11. On their part, the Defendants filed a statement of defence and counter-claim dated 28<sup>th</sup> July 2021.
12. In the said Statement of Defence and Counter-claim, the Defendants while acknowledging the existence of the tenancy/lease with the Plaintiff clarify that the lease agreements executed on 15<sup>th</sup> November 2016 were in respect of the ground floor space and the first floor space of the suit property. They deny the existence of the purported implied terms of the lease as alleged by the Plaintiff. They affirm that clause 4.6.1 of the two lease agreements expressly prohibited the Plaintiff from making any alterations without the express written consent of the landlord, and further, subject to the tenant entering into covenants with the landlord as to the execution and reinstatement of the alterations at the end of the lease period.
13. The Defendants deny consenting to the alleged improvements/alterations by the Plaintiff. They aver that the Plaintiff acted on 'a frolic of his own' without their consent and or knowledge.
14. The Defendants too deny that they varied the terms of the lease with the Plaintiff at any one time. They accused the Plaintiff of ignoring, refusing and or neglecting to perform to its binding obligations under the lease.



15. The Defendants aver that during the covid-19 pandemic, they, out of their own magnanimity offered the Plaintiff a 50% rent reduction for the three months of April, May and June 2020 only.
16. It is the Defendants position that their decision to remove fixtures and fittings from the suit property was informed by the provisions of the lease agreements which allowed the Landlord to require removal by the tenant of all improvements made by the tenant in the premises.
17. The Defendants point out that the Plaintiff does not have the locus standi to make any claim on behalf of Royal Palm Restaurant Ltd which is a separate and distinct legal entity.
18. The Defendants assert that they are under no legal and or contractual obligation whatsoever to compensate the Plaintiff for the alleged improvements/alterations on the suit property.
19. Finally, the Defendants deny misrepresenting to the Plaintiff as alleged. The Defendants affirm that the lease agreements with the Plaintiff were in writing with the terms and conditions thereof clearly spelt out and there was therefore no room for implying terms. They term the Plaintiff's suit as misconceived and vexatious and assert that it does not disclose a cause of action against them.
20. The Defendants counter-claim for the sum of Kshs 16,060,000/- being the rent arrears due and owing from the Plaintiff as at July 2021. The Defendants states that the Plaintiff had issued them with a cheque for Kshs 300,000/- in partial payment of the rent arrears due and owing but the same was dishonored. They aver that the issuance of the cheque by the Plaintiff was an admission of the debt due and owing to them.
21. The Defendants pray for judgment against the Plaintiff for: -
  - a. General damages for high handedness and unconscionable conduct.
  - b. Kshs 16,060,000/- being rent arrears amounts due and owing from the Plaintiff as at 31<sup>st</sup> July 2021 and all rent arrears between the time of filing the counter-claim and the time the Plaintiff vacates the suit property and or judgment is entered with interest at court rates.
22. The Defendants too pray for the costs of the suit.
23. The Plaintiff filed a reply to the Defence and a statement of defence to the Counterclaim dated 6<sup>th</sup> September 2021 denying the Defendants' claim and reiterating its claim against the Defendants.

#### **Evidence adduced.**

24. This case proceeded to hearing with each party calling two witnesses in support of its case.

#### **Evidence adduced on behalf of the Plaintiff.**

25. The Plaintiff's principal witness was one Farooq Mohammed (PW2), a shareholder and director of the Plaintiff Company. He adopted his witness statement dated 24<sup>th</sup> July 2020 as his evidence in chief. He further produced the documents on the 'Plaintiff's list of documents' as exhibits in support of the Plaintiff's case.
26. PW2 asserted that he is the one who executed the tenancy agreements on behalf of the Plaintiff Company. The witness averred that the Plaintiff made improvements on the suit property with the knowledge of the Defendants. He stated that he used to share the photos of the progress of the works with them. He however, did not sign any written agreement with the Defendants in regard to the said improvements. He alleged that the Defendants orally promised him that the improvements would be taken care of or considered at the end of the term of the leases.



27. According to PW2, the initial rent was Kshs 700,000/- plus VAT per month for the ground floor and Kshs 550,000/- plus VAT for the 1<sup>st</sup> floor. There was no agreement on the rent payable in regard to the mezzanine floor since it was the Plaintiff who constructed it thereafter. The Defendants at the time were experiencing some financial challenges.
28. PW2 stated that after the Plaintiff made the improvements, the rental space increased by 1,500= square feet. No agreement was made to take care of that extra/additional space. The Plaintiff continued enjoying the same without paying any additional rent.
29. During the covid-19 pandemic, PW2 alleged that they made an arrangement with the Defendant whereby the rent payable was reduced. That, according to the PW2 was the reasons why the invoices sent to the Plaintiff Company by the Defendants indicated amounts lesser than the initial rent agreed. In 2019, the Plaintiff had also experienced theft in the suit property and the Defendants had then also reduced the amount of rent payable. There was no written agreement signed though in both instances.
30. PW2 acknowledged rent arrears of about Kshs 6.2 million as at the time of filing the suit. Since then, the Plaintiff had not been paying rent; though he stated that the Plaintiff had been complying with the court order of paying the sum Kshs 200,000/- every month as ordered. PW2 therefore prayed for the refund of the expenses incurred less the amount due and owing as rent arrears to the Defendants.
31. In cross-examination by Mr. Waigwa, Advocate for the Defendants, PW2 confirmed that the term of the tenancy(s) lapsed on 28<sup>th</sup> February 2022. Further, PW2 agreed that all the terms and conditions of the leases with the Defendants were contained in the Lease agreements. One of such terms was in clause 8.5.2 in each of the Lease documents, that provided that any alterations had to be authorized in writing.
32. PW2 further agreed with the Defendants' Advocate that he had not produced any agreement with the Landlord providing that the Plaintiff was to be compensated for the alterations made on the suit premises.
33. The second witness for the Plaintiff was the valuer (PW1) who had prepared the valuation report – “the conditional compensation report” on the suit property covering internal finishes and fittings. The report was dated 24<sup>th</sup> January 2022. It assessed the replacement compensation payable at Kshs 32,800,000/=

#### **Evidence on behalf of the Defendants.**

34. The Defendants too called 2 witnesses. DW1, Dr. Divyesh Shah was an ex-administrator of the Estate of Ramesh Kumar Gupta. He adopted his witness statement dated 17<sup>th</sup> March 2022 as his evidence in chief.
35. In cross-examination, DW1 confirmed that he executed the Leases, the subject matter of this suit on behalf of the Defendants and in his capacity as an Administrator of the Estate of Ramesh Kumar Gupta. He confirmed that at the commencement of the tenancy, the suit premises was a ‘car show room’. The tenant converted it into a restaurant and shops. Previously, it had been more or less an open space but had an office space and some washrooms.
36. The Leases were entered into on 15<sup>th</sup> November 2016. The terms of the leases allowed the tenant to use the premises as a restaurant/hotel, retail apparel, garment showroom and shop only.
37. DW1 confirmed that his co-administrator had handled most of the issues concerning the Leases but his assumption was that the tenant was allowed to renovate the premises to fit his proposed use. The



Leases did not however, allow change of the main structure of the premises, without the express written permission of the Defendants.

38. DW1's evidence was that at the time of making the Leases, the suit property did not have a mezzanine floor. He was not aware if, and when permission to make the mezzanine was given, if at all.
39. DW1 could not remember signing any other documents thereafter with the tenant other than the Leases for the ground and first floor of the suit property. He did not sign any consents either, in favour of the tenant at any one time.
40. In re-examination, DW1 affirmed that clause 4.6 in both the Leases was explicit that the tenant was not allowed to make 'any additions or alterations' on the suit premises without the permission of the Landlord. Further that the last day of tenancy(s) was 20<sup>th</sup> February 2022.
41. DW2 was one of the current administrators of the Estate of Ramesh Kumar Gupta. He adopted his witness statement dated 28<sup>th</sup> July 2021 as his evidence in chief. He further produced the 4 documents on the 'Defendants list of documents' as exhibits in support of the defence case.
42. DW2 affirmed that as at 22<sup>nd</sup> November 2022, the rent due and owing from the Plaintiff was Kshs 59,842,996/=.
43. In cross-examination, DW2 confirmed that he was appointed as an Administrator in the Estate of Ramesh Kumar Gupta in October 2019 after the Leases with the Plaintiff had already been signed. At the time when he visited the suit property, the tenant (Plaintiff) was in occupation. There was a section of the ground floor however, which was occupied by a Salon which the tenant had sublet to a third party. All the other space was occupied by the tenant as far as he could tell.
44. The witness confirmed that the suit property had a canopy; not exactly a mezzanine floor as described by the Plaintiff.
45. When he took over as an Administrator, the rent payable was: -Ground floor – 5,200 square feet - Kshs 941,920/- (inclusive of VAT)Upper floor – 5, 700 square feet - Kshs 676,281/- (inclusive of VAT)  
The canopy was not included in the Leases.
46. DW2 categorically asserted that there was no agreement with the Plaintiff for reduction of rent as alleged, to Kshs 400,000/- and Kshs 300,000/- for the ground and upper floors, respectively. The amounts payable were as per the Lease agreements. He explained that the Estate's accountant was sending the Plaintiff invoices for the figures of Kshs 400,000/- and Kshs 300,000/- for purposes of taxation only so that the estate would only pay tax for the amounts of money actually received rather than for the invoices raised.

#### **Court's Directions.**

47. Upon close of the hearing, the court directed parties to file written submissions. Both parties have complied and the court has had the opportunity to read them.

#### **Issues for Determination.**

48. Having considered the pleadings in this matter and the reliefs sought by the parties, the evidence adduced during the hearing and the submissions filed, there is no dispute about the existence of the Leases signed between the Plaintiff and the defendant dated 15<sup>th</sup> November 2016 for a term of 5 years and 3 months. The last date of the tenancy was therefore 28<sup>th</sup> February 2022.
49. The court is of therefore of the opinion that the issues for determination in this matter are: -



- i. What is the impact of the lapse of the term of the Leases between the Plaintiff and the Defendant on the prayers sought by the parties in this matter?
- ii. Whether there was an implied term in the lease(s) between the parties allowing the tenant (Plaintiff) to undertake improvements and install fixtures and fittings to suit the premises for the purposes of a hotel/restaurant, retail apparel/garments showroom and a shop with a promise for reimbursement of the expenses incurred by the Defendants.
- iii. Whether there were variations of the terms and conditions of the Leases in terms of the rent payable by the tenant (plaintiff) to the Defendants.
- iv. Whether the Defendants are entitled to recover rent arrears from the Plaintiff. If so how much?
- v. Whether either party is entitled to general damages.
- vi. Who should pay the costs of the suit and counterclaim?

### **Analysis and determination.**

#### **A. What is the impact of the lapse of the term of the Leases between the Plaintiff and the Defendant on the prayers sought by the parties in this matter?**

50. As I already noted earlier in this judgment, there is no dispute at all as to the existence and the validity of the Leases signed between the Plaintiff and the Defendants on 15<sup>th</sup> November 2016. The term of the lease(s) was 5 years and 3 months.
51. By the time of filing of this suit, the Leases were subsisting. They however lapsed during the pendency of this suit. As the witnesses for both parties confirmed, the last date for the Lease(s) as per the signed Lease agreements between the parties was 28<sup>th</sup> February 2022.
52. I must reiterate that there is no dispute as to the legality of the Leases signed by the parties. They are therefore binding upon the parties. To answer the question of the impact of the lapse of the Lease(s), I must go back to the Lease agreements. The terms and conditions of both lease agreements save for the description of the rented spaces and the amounts payable were identical.
53. Clause 4.14 in the Leases is the governing clause on ‘the term of the lease’. It provides that
  - “ 4. subject to the provisions of Section 66 (1)(c) of the [Land Act](#), to yield up the
    - 14.1 premises in good and satisfactory repair and in accordance with the terms of this lease; and
    4. to remove all signs erected by the tenant in upon or near the premises and
      - 14.2 immediately to make good any damage caused by such removal.
      4. to remove all additions, alterations, or improvements made by the tenant in
        - 14.3 and upon the premises and immediately to make good any damage caused by such removal.”
  54. In case the Tenant was interested in renewing the Leases, clause 7 of the agreements provided that the tenant ‘makes a written request at least three (3) months before the expiration of the term’. The Landlord would then, at his own sole and unfettered discretion, grant to the tenant a lease of the premises for a further term to be agreed by the parties on such terms and conditions as shall be agreed between them.



55. The tenant was at the expiry of the term of the Lease therefore supposed to surrender the premises to the Landlord.
56. Prayers (a) and (b) in the Plaint, seeking a Permanent injunction to restrain the Defendants from interfering with the Plaintiff's quiet possession and enjoyment of the suit property and or leasing it or permitting any third party from entering, taking possession or occupying the suit premises would there not be allowable. It is overtaken by events, so to speak, since the term of the tenancy has lapsed and the Leases have not been renewed in accordance with clause 7 of the Lease agreements.
57. To succeed for the grant of an Order of Permanent injunction, a party must show that it has either a legal or equitable right which requires protection by way of an injunction (see the case of Kenleb Cons Ltd- Vs- New Gatitu Service Station Ltd & Another (1990) eKLR).
58. The Plaintiff's continued occupation of the suit premises upon expiry of the term of the Leases has no legal basis whatsoever having in mind the fact that the Plaintiff's witness/director too admitted being in rent arrears even at the time of filing this suit contrary to the express terms and conditions of the Leases. I note that the Plaintiff in its submissions did not actually submit on the 2 prayers.
59. I disallow the Plaintiff's prayers (a) and (b) in the Plaint.

**B. Whether there was an implied term in the lease(s) between the parties allowing the tenant (Plaintiff) to undertake improvements and install fixtures and fittings to suit the premises for the purposes of a hotel/restaurant, retail apparel/garments showroom and a shop with a promise for reimbursement of the expenses so incurred by the Defendants.**

60. The Black's Law Dictionary, 11<sup>th</sup> Edition defines an implied term as,  

“A provision not expressly agreed to by the parties but instead read into the contract by a court as being implicit. An implied term should not, in theory contradict the contract's express terms.”
61. In its pleadings, the Plaintiff pleaded that there was an implied term between the parties that the Plaintiff was to undertake improvement, install fixtures and fittings for purposes of a hotel/restaurant, retail apparel/garment showroom and a shop and that the Landlord (Defendant) was to reimburse, compensate and pay the Plaintiff the costs incurred in the construction improvements, permanent fitting and fixtures' installation.
62. The Defendants in their statement of Defence and Counter-claim vehemently denied the Plaintiff's claim of the existence of implied terms. The Defendants' position was that all the terms and conditions governing the tenancy between them and the Plaintiff were contained in the Leases signed by the parties.
63. In regard to the improvements, alterations, fittings and fixtures, the Defendants pleaded that the Leases were specific and explicit that the tenant (plaintiff) was prohibited from making any such improvements and or alterations without the express and written consent of the Landlord. They made reference to clause 4.6.1 of the two Leases.



64. The position in law is clear as to the binding nature of a contract/agreement willingly entered into and executed by parties. The Court of Appeal in the case of National Bank of Kenya Ltd – Vs- Pipe Plastic Samkolit (K) Ltd & Another (2001) eKLR stated that:

“It is clear beyond para adventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.”

65. In other word, parties are bound by the terms of a contract/agreement willingly entered into and executed by them however bad the terms may be for one of the parties. The Court in the above case of National Bank of Kenya Ltd –Vs- Pipe Plastic Samkolit (K) Ltd (supra) went on to state that: -

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.”

66. In the case of Pius Kimaiyo Langat –Vs- Co-operative Bank of Kenya ltd (2017) eKLR the Court of Appeal affirmed the position and reiterated that it was alive to the ‘hallowed’ legal maxim that, “it is not the business of courts to rewrite contracts between parties as the said parties were bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”

67. I have keenly perused the 2 leases signed by the parties in this case. I find that the leases expressly made reference to ‘improvements/alterations’. At clause 4.6.1 of the Leases, the ‘preconditions for alterations’ were expressly stated as follows:

- “4. obtains and complied with the necessary consents, licences and permits of the  
6.1.1 competent authorities and pays their charges for them;
- 4. makes an application to the Landlord for consent;  
6.1.2
- 4. enters into any covenants the Landlord requires as to the execution and  
6.1.3 reinstatement of the alterations; and
- 4. subject to the provisions of section 67 of the *Land Act*, obtains the written  
6.1.4 consent of the landlord.”

68. One thing that is very clear from the above provisions is that the tenant was bound to obtain the written consent of Landlord before making any alterations/improvements including the installation of any internal partitions to the suit premises. Secondly, the tenant was required to obtain all necessary consents, licences and permits for such proposed alterations from the competent authorities, at its own costs.

69. Clause 4.6.2 of the Leases on the other hand addressed the issue of removal of the alterations (made by the tenant on the suit premises) at the end of the term of the tenancy. It categorically stated that;

“At the end of the term, if so requested by the landlord, the tenant must remove any additions, alterations or improvements made to the premises and must make good any part of the premises damaged by the removal.”



70. The issue of alterations, additions or improvements was also addressed under clause 4.14 of the Leases which provided that at the expiration of the term,
- “ 4. (the tenant covenants) to remove all additions alterations or improvements  
14.3 made by the tenant in and upon the premises and immediately to make good any damage caused by such removal.”
71. I must, without any doubt in my mind state that a court cannot imply or import terms into a contract where there are explicit and unambiguous terms in the contract executed by the parties. In this case, the issue of alterations/additions/improvements was expressly and sufficiently addressed in the leases signed by the parties without any ambiguity.
72. The clause 4.6 of the Leases addressed the issue of alterations/improvements without any ambiguities. The tenant was obligated, before embarking on any improvements/alterations or additions to seek the written consent of the Landlord. No such consent has been exhibited in this case. When the plaintiff chose to make the alterations/improvements without the written consent of the landlord, it took a risk that was not within the defined terms and conditions of the lease. If any loss was suffered, it has only itself to blame. It cannot blame the Landlord or call upon the Landlord to reimburse for the expenses thus incurred. In any event, the Plaintiff has a right to remove the said additions, alterations or improvements subject to ‘making good any damage caused by such removal’.
73. Accordingly, the Plaintiff’s claim for special damages for the sum of Kshs 34,106,460.00/- under prayer (d) in the plaint, being the estimated value of the improvements, alterations, and additions has no basis. Prayer (g) too in plaint, which seeks for a declaration for specific performance in respect of the implied contract between the parties in respect of construction works undertaken by the Plaintiff on behalf of the Defendants Estate, must also fail.

**C. Whether there were variations of the terms of the tenancy in terms of the rent payable by the tenant (Plaintiff) to the Landlord (Defendant).**

74. The clause on the rent payable for both the Leases was clause 2.4.
75. In respect of the ground floor, the rent, exclusive of VAT was payable as follows: -
- a. The 1<sup>st</sup> and 2<sup>nd</sup> years (from 1<sup>st</sup> December 2016 to 30<sup>th</sup> November 2018); - Kshs 725,000/- per month.
  - b. The 3<sup>rd</sup> and 4<sup>th</sup> years (from 1<sup>st</sup> December 2018 to 30<sup>th</sup> November 2020): - Kshs 812,000/- per month.
  - c. In the 5<sup>th</sup> year of the term, (from 1<sup>st</sup> December 2020 to 30<sup>th</sup> November 2020)- Kshs 909,440/- per month.
  - d. In the last 3 months of the term, (from 1<sup>st</sup> December 2021 to 28<sup>th</sup> February 2022): - Kshs 909,440/- per month.
76. In respect of the first floor, the rent, exclusive of VAT was payable as follows: -
- i. The 1<sup>st</sup> and 2<sup>nd</sup> years (from 1<sup>st</sup> December 2016 to 30<sup>th</sup> November 2018); - Kshs 550,000/- per month.
  - ii. The 3<sup>rd</sup> and 4<sup>th</sup> years (from 1<sup>st</sup> December 2018 to 30<sup>th</sup> November 2020): - Kshs 583,000/- per month.



- iii. In the 5<sup>th</sup> year of the term, (from 1<sup>st</sup> December 2020 to 30<sup>th</sup> November 2020)- Kshs 617,980/- per month.
  - iv. In the last 3 months of the term, (from 1<sup>st</sup> December 2021 to 28<sup>th</sup> February 2022): - Kshs 617,980/- per month.
77. The clause 2.5 of the Leases was categorical that rent was payable monthly in advance, on or before the 5<sup>th</sup> day of every month.
78. The Plaintiff/tenant alleges that the rent payable was reduced on various occasions. In his testimony, PW2 alleged that during the period of the covid-19 pandemic, there was an agreement to reduce the rent payable as evidenced by the invoices sent by the Defendants during that period. Again in the year 2019, the Plaintiff's witness (PW2) alleged that the rent payable had been reduced for the Plaintiff after a theft incident. No written agreements howsoever were signed between the parties. None were produced before the court.
79. The Defendants vehemently deny any agreements, written or oral, with the Plaintiff to reduce the rent payable at any one time. The Defendants however acknowledged that during the covid-19 pandemic period, they out of their own volition, allowed the Plaintiff to pay half of the rent payable for a period of 3 months only. DW2 explained that the reason why they were sending the Plaintiff invoices of Kshs 400,000/- and Kshs 300,000/- for the ground floor and 1<sup>st</sup> floor respectively was for tax purposes to ensure that they only paid tax for the actual amounts collected rather than on invoiced amounts.
80. I have carefully perused the Lease documents executed between the parties. Clause 8.5 of the documents caught my attention.
81. Clause 8.5.1 provides that;
- “The failure of the landlord or the tenant as the case may be to seek redress for violation of or to insist upon the strict performance of any covenant agreement condition restriction stipulation or provision of this lease or of any of the rules and regulations from time to time promulgated by the Landlord shall not prevent any subsequent act which would have originally constituted a violation from having all the force and effect of an original violation.”
82. Clause 8.5.2 provided that;
- “No provision of this lease shall be deemed to have been waived by the Landlord or the tenant unless such waiver be expressly made by the landlord, or the tenant, as the case may be in writing”.
83. This clause negates the Plaintiff's claim of variation by the Landlord on the actual amount of rent payable. Without a written document to support the claim of variation of rent, the Plaintiff's claim holds no water.

**D. Whether the Defendants are entitled to rent arrears from the Plaintiff, if so how much?**

84. The tenant's obligation to pay rent in a tenancy arrangement is indeed a fundamental condition in any tenancy. In this case, the Plaintiff covenanted 'to pay the rent on the days and in the manner set out in the lease.' The Defendants accuse the Plaintiff of ignoring, refusing and or neglecting to perform its binding obligations under the lease including paying rent as set out in the lease.



85. In examination in chief by his own Advocate, Mrs. Shabana, the Plaintiff's director and witness PW2, admitted that at the time of filing the suit, the Plaintiff was in rent arrears owing to the Defendants amounting to about Kshs 6.2 million. Since then, the witness further admitted that the Plaintiff had not been paying rent according to the lease. The Plaintiff has only been complying with this court's order by paying a sum of Kshs 200,000/- every month to the Defendant.
86. At the time of filing their statement of Defence and Counter-claim, the Defendant's claim for rent arrears was Kshs 16,060,000/- which as stated in the counter-claim, was the arrears due and owing from the Plaintiff as at 31<sup>st</sup> July 2021.
87. No doubt, the Defendant is entitled to recover the rent arrears payable from the Plaintiff. The Plaintiff occupied the suit premises for the entire period of the Leases. The Defendant has tabulated the rent due and owing on the schedule produced and marked "DE".
88. Rent by law would be payable upto the last date of the Leases. Thereafter, if the Plaintiff continued to occupy the suit property or failed to yield vacant possession, the Defendant would be entitled to mesne profits. They have not sought the same in their Counter-claim for the period after the lapse of the term of the Leases. I will therefore assess the rent arrears due and owing upto the last date of the lease only.
89. As at the date of filing their Counter-claim, the Defendants tabulation of rent arrears due and owing was Kshs. 16,060,000/= as at 31<sup>st</sup> July 2021. This is the figure claimed in the Counter-claim dated 28.7.2021. To this figure, I will add the rents payable for the months of August 2021 to February 2022 both months inclusive as follows;

Ground Floor

August 2021 1,054,950.40

September 2021 1,054,950.40

October 2021 1,054,950.40

November 2021 1,054,950.40

December 2021 1,054,950.40

January 2022 1,054,950.40

February 2022 1,054,950.40

7,384,652.80

1<sup>st</sup> Floor

August 2021 716,856.80

September 2021 716,856.80

October 2021 716,856.80

November 2021 716,856.80

December 2021 716,856.80

January 2022 716,856.80

February 2022 716,856.80

5,017,997.60

Total Kshs 12,402,650.40



90. The total rent arrears then due and owing as at 28<sup>th</sup> February 2022 (the last date of the leases) is Kshs 28,462,650.40 (being Kshs 16,060,000 + Kshs 12,402,650.40). From this figure the amounts paid by the Tenant at the rate of Kshs 200,000/- P.m from August 2021 to November 2022 exclusive of the month of October 2022 is equal to Kshs 3,000,000/-. This is the amount to be deducted from the total arrears due and owing as at 28<sup>th</sup> February 2022.
91. The amount therefore awarded to the Defendants is Kshs 25,462,650.40 with interest at court rates from the date of this judgment until payment in full.

**E. Whether either of the parties is entitled to general damages.**

92. The law is that general damages are not award-able for breach of contract or breach of contractual obligations (Dharamshi vs Karsan {1974} EA, 41, Securicor Curior Kenya Ltd vs Benson David Onyango and Ano {2008} eKLR, Kenya Women Microfinance Ltd vs Martha Wangari Kamau {2021} eKLR). The claims for general damages by both parties are therefore disallowed.

**F. Who should pay the costs of the suit and counterclaim?**

93. From the foregoing, the Plaintiff claim fails in its entirety whereas the Defendants' claim succeeds in terms of the prayer for rent arrears. The costs follow the cause. Accordingly, the Defendants shall have the costs of both the suit and the Counter-claim.

**Summary**

94. The final disposition is that the Plaintiff's case is dismissed with costs to the Defendants. The Defendants; Counter-claim on the other hand is allowed for the sum of Kshs 25,462,650.40/- being the rent arrears due and owing from the Plaintiff with interest from the date of this judgement until payment in full with costs to the Defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JANUARY 2023

M.D. MWANGI

JUDGE

In the virtual presence of:

Mrs. Shabana for the Plaintiff.

Mr. Waigwa for the Defendant.

Court Assistant – Yvette.

M.D. MWANGI

JUDGE

