



**Petro Oil Kenya Limited v Kiraithe (Environment & Land Case
174 of 2013) [2023] KEELC 610 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 610 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 174 OF 2013**

**A OMBWAYO, J
JANUARY 31, 2023**

BETWEEN

PETRO OIL KENYA LIMITED PLAINTIFF

AND

GLADYS NDIRA KIRAITHE DEFENDANT

JUDGMENT

1. Petro Oil Kenya Ltd(hereinafter referred to as the plaintiff) brought this case vide a Complaint dated June 26, 2013 seeking judgement against Gladys Ndira Kiraithe hereinafter referred to as the defendant for an order that the yearly rent determined and contained in the Report and Rental Valuation dated May 17, 2013 be the rent payable by the Plaintiff to the Defendant for the first term of 10 years of the Further Lease and for the subsequent term of ten year to be determined by a valuer nominated by the institute.
2. Moreover, an order of specific performance in terms of clause 3(f) of the Lease that the Defendant execute a further lease for the extended term of twenty (20) years at the rent stipulated in sub clause (a) above but otherwise on the same terms and conditions as are contained in the lease and in the event that the Defendant refusing or failing to execute the said further Lease within the time limited by this honourable court, an order that such Further Lease be executed by the Deputy Registrar of this Honourable Court on behalf of and in the name of the Defendant. Damages in addition to or in lieu of specific performance.
3. Lastly, an order of permanent injunction restraining the defendant from interfering with the plaintiff's peaceful enjoyment of the property for the term of the Further Lease and any further relief which the court deems just and/or expedient to grant and costs of and incidental to this suit.
4. The plaintiff stated that by a Lease agreement dated May 5, 2003, the Defendant agreed to Lease to it land parcel No Kisumu/Municipality/Block 9/194 for a period of ten years at a yearly rent of Kshs 2,160,000 for the first five years and Kshs 2,460,000/= for the remaining five years.



5. The plaintiff averred that the covenants in the lease included an option for renewal of the lease under clause 3(f). The said clause stated that should the plaintiff desire to obtain a further lease to the premises at the expiry of the term, it shall signify that desire in writing at least three months before the expiry of the term and the defendant shall on or before the expiry of such term grant a new lease for a further term of ten years at a yearly rent to be agreed by the parties.
6. The plaintiff further averred that if any difference arises between the parties on the rent payable after the expiry of the term, such difference shall be determined by an independent valuer appointed by the parties and in case of failure to agree by the Chairman of the Institute of Surveyors of Kenya and such valuer shall be acting as an expert and not arbitrator and his decision shall be final and binding on both parties.
7. The plaintiff also averred that by a notice in writing dated August 3, 2012 addressed to the defendant, it expressed its desire to obtain a further lease for twenty years and by the letter dated October 18, 2012, the defendant agreed to grant the plaintiff a further lease of twenty years but they failed to agree on the rent payable.
8. The plaintiff averred that it invoked the provisions of clause 3(f) of the lease and set out the particulars of the steps that it took and by the letter dated April 24, 2013, the Chairman of the Institute of Surveyors of Kenya appointed Mr Luke Okeyo Madende of Add Property Consultants Kisumu who upon surveying the said property prepared his report and rental valuation dated May 17, 2013 which accessed the market rent at Kshs 217,500.
9. The plaintiff averred that it has always been ready and willing to fulfil its obligations under the lease including to execute the Further Lease for the agreed further term and pay rent as ascertained and contained in the Report and Rental Valuation dated May 17, 2013.
10. The Defendant filed her amended Statement of Defence and Counter claim dated November 19, 2015. She averred that she never accepted the Plaintiff's request vide the letter dated August 3, 2012 for extension of the lease for a further term of 20 years. She further averred that the steps taken by the Plaintiff after expiry of the lease were null and void.
11. She identified the particulars of breach of the lease agreement by the Plaintiff and prayed for judgement against the plaintiff in the following terms:
 - i. That the Plaintiff's suit be dismissed with costs.
 - ii. An order for vacant possession of the property known as Kisumu/Mun.Block 9/194.
 - iii. Mesne profits to be assessed from 1st February, 2013 till date of vacation of possession together with interest thereon at courts rates.
 - iv. Costs of the defence and counter claim together with interest thereon at court rates.

Plaintiff's Evidence

12. Benjamin King'ori testified as PW1. It was his evidence that he is the Chief Executive Officer of Petro Oil Kenya Limited the Plaintiff herein since February 2005. He adopted as part of his evidence his witness statement dated July 11, 2018 and filed in court on July 2, 2018. He also produced the documents filed on July 3, 2013 and filed on July 4, 2013.
13. He testified that the defendant is their landlady in respect of their leased petrol station in Kisumu and that the lease was for ten years with an option of renewal for a similar period. The written lease agreement was at page 6 to 14 of their documents. That they had leased the premises for ten years



- which expired in February 2013 and they wanted to renew the lease. The terms of renewal were that the plaintiff was to show interest and give not less than three months' notice of the intention to renew.
14. He further testified that they engaged the defendant in a discussion for renewal. That they showed interest and issued a notice on 3rd August 2012 as seen at page 18 of their bundle of documents which sought to renew their lease for a period of twenty years even though the lease provided for renewal for a period of ten years. That the period of twenty years was informed by the discussions that they had held with the defendant.
 15. It was his evidence that the lease had provided for the renewal period to be mutually agreed and that in their renewal notice, they indicated the proposed amount of rent to be paid. That they received the defendant's response agreeing to the renewal request but proposing different rent values and they were not able to agree on the rent payable.
 16. He testified that clause 4 of the lease had provided for a mechanism on settling on the rent payable if the parties did not agree and so they proposed three names of valuers to the defendant but they did not get any response. That as per the said clause, they referred the matter to the Chairman of Institute of Surveyors but that at that time the lease had expired. That they deposited Kshs 3,000,000/= with their advocates as their twelve months estimated rent as they waited to agree on the rent.
 17. He also testified that the defendant's advocates refused to provide the banking details of the defendant and so the money was never paid. That the Chairman of the Surveyors Institute appointed a valuer who determined the value of rent to be Kshs 187,500/= for the first five years without VAT and Kshs 217,500/= with VAT. That the second five years term rent would be Kshs 217,500/= without VAT and Kshs 252,300/= with VAT. That they wrote to the defendant but she did not respond and therefore they instituted the present suit.
 18. It was his evidence that the defendant had written to them through her advocates protesting the renewal of the lease and issued them with a notice of eviction from the premises. That auctioneers were sent to the property in 2017 but that they wrote a letter to the defendant indicating that they had not refused to pay rent.
 19. It was also his further evidence that upon perusal of the defence filed and the accompanying documents, it is not correct to state that the renewal of the lease agreed upon was for ten and not twenty years. That they had not abandoned the first lease after seeking for a twenty-year renewal as they engaged with the provisions of the first lease.
 20. He testified that the valuation report was obtained in accordance with the lease agreement. That they have never allowed the owner of the adjacent plot to erect structures on the suit property without the knowledge of the defendant. That as per the letter annexed to the defendant's further list of documents from pages 28 to 30, they discussed with the defendant and commissioned surveyors and that they did a report confirming that their neighbour had encroached on parcel 194 and they wrote to the trespasser to stop. That the initial lease was over parcel No 194 and that the encroachment was outside the walls that they had found.
 21. That as per the surveyors' report dated June 9, 2008, parcel 194 is an amalgamation of plots 189 and 144. That they were requested to talk to the trespasser before suing but that later the defendant asked them not to sue. That the trespasser has never paid the defendant for the encroachment and that they have deposited with their advocates all the rent due to date and that they are not in arrears. That the stay orders directed them to pay arrears of rent for 49 months which they did and that they are compliant to date.



22. On cross examination he confirmed that clause 3F at page 12 of the lease agreement had a provision for renewal of the lease for ten years but admitted that he did not have document to show that the plaintiff had requested for renewal of the lease for ten years but had requested for renewal for twenty years.
23. He stated that they sought for renewal of the lease for a period of twenty years because they wanted to do developments on the suit property. He admitted that they had leased the suit property for purposes of operating a petrol station as per clause 1(c) at page 7 of the lease. He also admitted that as per their letter dated August 3, 2012, they had requested for renewal of the lease for twenty years and that the letter asked the defendant to accept their request or give her proposal. He stated that the defendant agreed to the term of twenty years but made a proposal for the rent payable which was a counter offer. He stated also that he did not agree that their offer was rejected and a new offer made.
24. He also stated that he has looked at clause 4 at page 12 of the lease but he did not agree that it was only applicable if renewal sought was for ten years and not twenty years. He admitted that the prayer for specific performance in terms of clause 3(f) was for ten years but they were seeking for twenty years. He stated that this is because the parties had already agreed to twenty years. He further stated that the defendant had a legal obligation to sign the renewed lease as per the provision of the original lease.
25. He admitted that the notice to vacate was issued after the lease had lapsed and that they stayed on the suit property for 49 months without giving the defendant the rent by the time the auctioneers went to levy distress. He also admitted that they had deposited the rent money with their advocates and that the defendant's advocates had written to their advocates for the money to be released but that there were conditions that had not been complied with.
26. He admitted that the defendant had given them the original title document to register the lease but that the document went missing but they did not notify the defendant. He also admitted that he was not there when the plaintiff took possession of the suit premises and he therefore he could not confirm whether the beacons were shown but he knew that they were not using the whole plot.
27. He further admitted that they did not sue the encroacher as threatened in their letter dated May 6, 2013. He confirmed that the defendant had an entity ready to pay the defendant Kshs 450,000/= for the premises as per her last documents in her further list of documents but that he could not agree that that was the market value for the premises.
28. On re-examination he stated that paragraph 3(f) at page 12 of the plaintiff's list of documents refers to ten years renewal period but did not stop the parties from varying any lease or term therein by consent. He also stated that the plaintiff and the defendant had by consent and in writing varied ten years renewal period to twenty years. He also stated that the defendant never changed her agreement to the twenty year renewal.
29. He pointed out that at page 7 of the Plaintiff's bundle of documents at paragraph 1(c) does not state that the plaintiff will only use it for a petrol station as they also operate convenience stores and other facilities in service stations. He stated that even though they are seeking for specific performance, they are asking for twenty years renewal as per the parties agreement.
30. He also stated that the entity offering Kshs 450,000/= to the defendant is an encroacher and that the rent they pay today was set by the valuer in accordance with the lease agreement the parties had executed. He further stated that the defendant did not participate in the exercise of valuing the rent payable. That having agreed on the twenty-year renewal and the rent payable having been set, the defendant was under obligation to sign the lease agreement and that is what they seek.



31. He clarified that they had not paid the determined rent to the defendant for 49 months though they had offered to do so but that the defendant did not provide the bank details. That it was the Land Registrar who had misplaced the title document of the defendant after it was presented to them. That there was encroachment onto the suit property but the defendant wrote to them proposing that they meet with the encroacher and sort out the matter without going to court and that that is why they did not sue the encroacher.
32. Luke Okeyo Madee testified as PW2. He testified that he is a valuation surveyor since the year 2005 and that he was called by the chairman of their association and in writing appointed on April 24, 2013 to do a valuation report. It was his evidence that he accepted the appointment and on May 16, 2013, he visited Kisumu Municipality/Block 9/194 where there was a petrol station belonging to the Plaintiff.
33. He also testified that they did their valuation and prepared a report that appears between pages 31 and 45 of the plaintiff's list of documents. That they were to determine the market rates as it appears at page 42 and so they considered comparable premises in determining the rent payable as set out between pages 37 to 39. That the comparability test is on the size, location and scale of improvement or development. That after the comparison, they analysed the rent payable for the premises by considering whether the installations were done by the landlord or the tenant.
34. It was his evidence that he had received the valuation from Amazon valuers through an email which was done by the defendant and that it seems that it discarded some of the comparable and relied on one out of the rest which does not give the market figure unlike where an average is taken. That the discarded comparable cannot be used to inform the rent payable. That the comparable that are more similar to the one in question cannot be discarded.
35. It was further his evidence that where the landlord has done development on the plot, the rent should be higher than if it was vacant or done by the tenant. That where the tenant has done some of the developments and the landlord others, the tenant may be given some discounted rates. That the valuation at page 15 of the defendant's report has double counting because rent for the petrol stations would service. That the other items are components of the service station. That the comparable No 1 at Block 3/163 is a significant building of about three floors. That the report has differentiated the petrol station rent from that of the auxiliary facilities.
36. That the report gives a recommendation of Kshs 420,000/= without showing how it has been arrived but he can question that the suit property has bigger acreage than the comparable No 2. That the report was in 2013 while that of the defendant was done in 2017 and the values must have changed. That he did not know how Amazon Valuers were appointed by their association to do the valuation of the suit property.
37. On cross examination, he stated that he prepared the report on May 17, 2013. He confirmed that their valuation was for the petrol station facility and that they were informed of a section of the land that was not utilized for the petrol station and they did not value that area. He stated that his comparable No 1 had a rent for Kshs 146,000/= which was the average for the ten years from the year 2007 and which was the rent in 2007. That the second comparison has rent for the first five years. He admitted that his comparison No 1 is in Kisumu while No 2 is along Rabai Road in Nairobi while No 3 is along Kisumu/Busia road and No 4 at Nakuru.
38. He also admitted that the four premises rent that he compared with had been negotiated in 2007/2008 period but that he took market rates as at 2013. He further admitted that the valuation of the premises done in 2013 and another in 2017 would have different values.



39. He confirmed that negotiations for a petrol station usually cover a canopy bar, car wash, service bay and offices as one facility. He also confirmed that he did not attach the comparable lease to his report as they usually do not attach all the source documents and that if one doubts their figures, they can avail the source documents. He also admitted that the value in all the four areas may be different but that did not affect the rent payable as much.
40. On re-examination he stated that the report he did was in 2013 and that he established the market rent. That the market rent can be assessed without an existing lease as it happens to new facilities. That he agrees that his comparable No 1 had a lease that started in 2007 and that the figure he gave was the one they took as approximate for 2013.
The plaintiff's case was then closed.

Defendant's Evidence

41. The Defendant called three witnesses. Simon Kiraithe Njogi testified as DW1. He produced his witness statement dated June 28, 2018 and filed on July 4, 2018 which the court adopted as part of his evidence. He testified that the Defendant had health problems and therefore could not testify.
42. It was his testimony that the Defendant owns the suit property and that together with the Plaintiff, they had entered into a 10-year lease agreement vide a lease dated June 10, 2003. He testified that they received a request by the Plaintiff vide a letter dated August 3, 2012 for renewal of the lease for a further term of 20 years. He added that this was not as per clause 3(f) of the lease agreement which provided for renewal of the lease for a term of 10 years. He further testified that in response to the said request, they did a letter dated 18th October 2012 declining the request by the Plaintiff.
43. DW1 testified that in 2018 he sent auctioneers to proclaim and attach the plaintiff's property since rent had not been paid for 49 months after which the said rent was paid. He added that rent has never been paid promptly and they have to follow up for payments. He testified that they had found someone willing to pay Kshs 450,000 as rent per month. He further testified that they had agreed to lease the suit property and that the Plaintiff had requested for the title to register the lease but allowed someone to encroach on the property.
44. On cross examination, he confirmed that there was no letter addressed to him or signed by himself. He further confirmed that he is not a party to the lease agreement or witness to any transaction. He added that he did not attach any minutes of a meeting or file any documents. He confirmed that his testimony was only in respect of the documents on record. He admitted to have drafted the letter dated October 18, 2012 which the Defendant signed.
45. DW1 confirmed that the letter dated September 3, 2012 was done by Shalom Investments Limited which had encroached on the suit property. He stated that they had leased the whole property to the plaintiff but later realized that another person was in occupation of part of the suit property. The lease was to be terminated on January 31, 2013 and a notice was issued on August 3, 2012.
46. On re-examination, he testified that when the Defendant entered into a lease agreement with the Plaintiff, Shalom Investments Limited was not on the suit property. He testified that the notice of renewal of the lease was not proper as the Plaintiff's had requested for 20 years.
47. James Muhia Kamita testified as DW2. He produced his witness statement dated June 28, 2018 and a valuation report filed on April 6, 2017 which the court adopted as part of his evidence. He testified that he is a registered valuer based in Nairobi and a Director of Amazon Valuers Limited. It was his testimony that on March 24, 2017 he visited the suit property Kisumu Municipality Block 9/194 and



- conducted an inspection. He testified that the place is known as Ritho Service Station. He further testified that they concluded that a value of Kshs 420,000 as monthly rent was proper.
48. On cross examination, he confirmed that inspection was done in 2017 and that he was also aware that the dispute arose in 2012. He confirmed that he never inspected the suit property in 2013 as it could have been different. He added that the valuation report is more recent hence reliable. He confirmed that they were denied from taking physical measurement and added that since the Landlord put up a petrol station, the rent is usually higher.
 49. Upon re-examination, he testified that the Plaintiff's computation was done in 2013 hence not reliable.
 50. Gladys Ndira Kiraithe testified as DW3. She produced her witness statement dated September 2, 2012 which the court adopted as part of her evidence. She testified that the Plaintiff had accused her of evicting it from the suit property despite them having a discussion on rent payment. It was her testimony that the Plaintiff occupied the suit property in 2003 after they signed a 10-year lease agreement. She further testified that the lease was for the Plaintiff to sell petrol and the said lease was to expire on 2013.
 51. She testified that the lease agreement had been prepared by the Plaintiff and according to clause 3(f), a notice of 3 months was to be given before expiry of the lease. It was her testimony that she never received any request for renewal of the lease for another 10 years, but instead the Plaintiff sought for an extension of 20 years. She testified that she responded to the Plaintiff's request vide a letter on October 18, 2012 rejecting the said proposal.
 52. She testified that the Plaintiff took her to court after she refused to accept the said 20-year extension of lease proposal. She further testified that the lease was to expire in February, 2013. She stated that the Plaintiff was not honest as it had lost her title and replaced it without informing her and further that the Plaintiff had leased part of the suit land to a third party without her knowledge. It was her testimony that she had been dealing with the Plaintiff through her son DW1.
 53. On cross examination, she confirmed that she had been negotiating with the Plaintiff on payment of rent before it proceeded to court. She confirmed that in her letter, she agreed to renew a sublease and proposed rent for the first 10 years. She further confirmed that by the time the Plaintiff filed the instant case, they had not reached an agreement on rent. She also confirmed that the court had ordered payment for 49 months and that she did not receive Kshs 10,657,500 since she had not accepted to rent the suit premises.
 54. DW3 admitted that she only wanted a 10-year lease agreement but she did not have any document indicating the 10 years. She confirmed that the Plaintiff has been paying rent after going to court and after expiry of the lease, the Plaintiff stopped paying rent for 49 months. She further confirmed that the Plaintiff allowed the suit property to be used by other persons as evidenced by the letter dated May 6, 2013. The Defendant stated that the neighbour had encroached on the suit property and that the Plaintiff wrote a letter to her indicating that they were planning to file a suit against the trespasser. She further explained that she had a conversation with the trespasser and they agreed to solve the same without going to court.
 55. She confirmed that there was no evidence that the Plaintiff had let the suit property to another person. She further admitted that the auctioneers had not attached any property. DW3 stated that she had an offer from another person for Kshs 450,000 per month which was reasonable. She added that the Plaintiff had kept the suit property dirty.



56. On re-examination, the witness referred to page 40 of the Plaintiff's bundle of documents and testified that she has been receiving a monthly rent of Kshs 217, 500 and that they are currently in year 5 of the lease agreement. She added that her offer was based on the valuation report.

That marked the close of the Defence case.

Submissions

57. The plaintiff filed its submissions dated August 4, 2022 on August 5, 2022. The plaintiff gave the background of the case before identifying the following issues for determination:

1. Whether the lease agreement was renewed by agreement of parties for a further term of twenty years.
2. What was the effect of the parties' agreement to extend the lease agreement for a further term of 20 years?
3. If the parties agreed to extend the lease agreement for a further period of twenty years, is the defendant estopped from denying the renewal?
4. What was the effect of the Defendant's counteroffer to the plaintiff's proposal on the rent payable for the renewed term?
5. Whether the valuation conducted by DW2, the defendant's valuer has any relevance in this case and whether the defendant's counterclaim has been sufficiently proved.

58. On the first issue it was submitted that as per clause 3(f) of the lease, it was the parties intention that the moment the plaintiff had expressed desire to obtain a further lease and that such desire had been accepted by the defendant, the covenants of the lease agreement would continue to exist and bind the parties post the expiry period as the parties await the drafting, execution and registration of the renewed lease agreement. The plaintiff also submitted that in compliance with clause 3(f) and 5 of the Lease Agreement, it expressed interest to renew the lease vide the Notice dated August 3, 2012 which was approved by the defendant on October 18, 2012. It was the plaintiff's submissions that the lease agreement was renewed by agreement of the parties for a further term of twenty years.

59. On the second issue, the plaintiff relied on the case of *Housing Finance Company of Kenya Limited v Njuguna* LLR 1176 (CCK) among other cases and sought that the court finds that they intended to be bound by their consent.

60. On the third issue, the plaintiff reiterated that the defendant's acceptance of the twenty years renewal term is evidenced in her letter dated October 18, 2012 where the defendant confirmed the extension and validity of the Lease Agreement and relinquished her right to challenge the validity of the extension of the lease agreement. The plaintiff relied on the cases of *Sita Steel Rolling Mills Ltd v Jubilee Insurance Company Limited* [2007] eKLR and *Serab Njeri Mwobi v John Kimani Njoroge* [2013] eKLR.

61. On the fourth issue, the plaintiff reiterated that the effect of its offer to renew and the defendant's approval of the offer to renew was that the lease agreement was renewed for a further term of twenty years.

62. On the fifth issue, the plaintiff submitted that Clause 4 of the lease agreement required that where there is no consent by the parties on the issue of rent, they would defer the appointment to the Chairman of the Institute of Surveyors in Kenya. That the defendant excluded herself from participating in the process outlined at clause 4 before conducting the valuation in 2017 which was over four years after the dispute had arisen. The plaintiff also submitted that the valuation conducted was outside the provision



of Clause 4 and was improper and irregular and sought that it be disregarded in its entirety. The plaintiff relied on the cases of *Chief Land Registrar & 4 others v Nathaniel Tirop Koech & 4 others* [2018] eKLR and *Zum Zum Investment Limited v Habib Bank Limited* [2014] eKLR.

63. On the sixth issue, the plaintiff submitted that the defendant's counterclaim has not been proved. That the defendant confirmed that the plaintiff had paid to her the rental sum of Kshs 217,500 directed by the court since February 27, 2017 to date without fail. It relied on section 107 of the *Evidence Act* and the case of *Chief Land Registrar & 4 others v Nathaniel Tirop Koech & 4 others* [2018] eKLR among other cases.
64. The Defendant filed her written submissions dated August 16, 2022 where she gave a background of the case and identified the following issues for determination:
 1. Whether the Plaintiff's letter dated August 3, 2012 did comply with the provisions of Clause 3 (f) of the expired lease in seeking for an extension of the lease for a further term of 20 years.
 2. Whether the Defendant's letter dated the October 18, 2012 was an acceptance of the terms set out in the Plaintiff's letter dated the August 3, 2012 to warrant there being a binding agreement for 20 years.
 3. Whether the Plaintiff was right in seeking to implement clause 4 of the expired lease.
 4. Whether the Plaintiff is entitled to the prayers sought in the Suit.
 5. Whether the Defendant is entitled to the prayers sought in the Suit.
 6. Who should pay the costs of the suit and Counterclaim?
65. On the first issue, the Defendant relied on the case of Mombasa Industrial Cause No 851 of 2009 *Dr Mwangi Ngumo v Kenya Institute of Management* and submitted that the Plaintiff was not keen in exercising the option to renew the lease but was only negotiating for a new lease.
66. On the second issue, the Defendant cited several cases including the Court of Appeal case of *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited* [2017] eKLR. She submitted that the letter dated October 18, 2012 was not an acceptance of the offer letter dated August 3, 2012 but rather a proposal/counter offer which was never accepted by the Plaintiff. She submitted that an acceptance must be unconditional, unequivocal and absolute accompanied by consideration.
67. On the third issue, the Defendant relied on Clause 4 of the expired lease and submitted that there was no agreement between the Plaintiff and Defendant for renewal of the lease for a further term of 20 years. She contends that the only issue was the rent payable which the said clause expressly provided.
68. On the fourth issue, the Defendant while answering in the affirmative submitted that the Plaintiff did breach the lease by losing the title and replacing without informing the Defendant and further that the Plaintiff allowed third parties to encroach on the suit property.
69. On the final issue, the Defendant contends that the Plaintiff having failed to prove its case to the required standard, their prayers should therefore be dismissed with costs and the Defendant awarded costs.

Analysis and Determination

70. After considering the pleadings, the evidence and the submissions of the parties, the issues that arise for determination are as follows:



1. Whether the defendant is bound by clause 3(f) of the lease to grant the plaintiff a renewal of the lease with the terms of rent as per the Report and Rental Valuation dated May 17, 2013.
 2. If (1) is in the affirmative, whether the plaintiff is entitled to the orders sought in the Plaint.
 3. Whether the defendant is entitled to the orders sought in her counterclaim.
72. The plaintiff's case is that it entered into a lease agreement dated May 5, 2003 with the defendant herein for land parcel No Kisumu Mun. Block 9/194 which is not disputed. Clause 3(f) of the said lease agreement provides for renewal of the same as follows:
73. Should the lessee desire to obtain a further lease of the premises at the expiry of the term hereby granted and shall signify such desire by notice in writing to the lessor not less than three (3) months before the expiration of the term hereby granted then the lessor shall on or before the expiration of the said term grant to the lessee a new sub-lease of the premises for a further term often (10) years at a yearly rent, and such manner of payment of rent, to be agreed between the parties hereto but otherwise subject to the same covenants stipulations and provisos as are herein contained excluding this present proviso for renewal.”
74. It is the plaintiff's case that subject to the said clause, it wrote the letter dated August 3, 2012 seeking for extension of the lease for a further term of twenty years and gave a proposal for rent.
75. By the letter dated October 18, 2020, the defendant responded to the plaintiff's letter indicating that she was in agreement to renew the sublease and gave her own proposal on the amount of rent to be paid.
76. By a letter dated November 26, 2012, the plaintiff responded to the defendant indicating that since there was a discrepancy on the amount of rent to be paid, the plaintiff proposed to invoke clause 4 of the lease. Clause 4 provides as follows:
- “if any difference shall arise between the parties hereto touching on the rent payable after expiry of the term hereby granted as provided by clause 3(f) such difference shall be determined by an independent valuer appointed by the parties and in case of failure to agree by the Chairman of the Institute of Surveyors of Kenya and such valuer shall be deemed to be acting as an expert and not arbitrator and his decision shall be final and binding on both parties”
77. It was the plaintiff's case that they were unable to agree on the rent payable for the renewed term and so they wrote a letter to the Chairman, Institution of Surveyors of Kenya seeking for appointment of a valuer. Add Property Consultants were appointed to conduct a valuation and its report and rental valuation was filed in court. The plaintiff is seeking among its prayers that the court orders that the yearly rent be determined as per the said report.
78. The defendant's case on the other hand is that the plaintiff's letter dated August 3, 2012 did not comply with the requirements of clause 3(f) of the lease agreement as it sought renewal for a twenty-year lease instead of a ten-year lease. That the plaintiff's offer for a further term of twenty years was not accepted by the defendant as one of the primary terms of the proposed lease which was rent, was not agreed by the parties. That the plaintiff's actions to implement clause 4 of the said lease was null and void as the plaintiff had not complied with the requirements of clause 3(f) of the lease.
79. The defendant's case is further that the lease between herself and the plaintiff expired on January 31, 2013 and therefore the defendant has no right to be still in possession of the property and therefore sought for its eviction among other orders.



80. Most of the facts herein are not disputed and the first issue I will address is whether the defendant is bound by clause 3(f) of the lease to grant the plaintiff a renewal of the lease with the terms of rent as per the Report and Rental Valuation dated May 17, 2013. Consideration will be placed on the correspondences between the plaintiff and the defendant herein.
81. As pointed out before, it is not disputed that the plaintiff and the defendant entered into a lease agreement over land parcel No Kisumu Mun./Block 9/194 for a period of ten years. The term of the lease was to expire on January 31, 2013.
81. Clause 3(f) of the said lease agreement provided for renewal of the lease. It required that should the lessee desire to obtain a further lease of the premises, it shall give a notice in writing to the lessor not less than three months before the expiration of the term. The plaintiff in this matter wrote the letter dated August 3, 2012 seeking for extension of the lease.
82. Clause 3(f) of the lease further required that the lessor shall or on before the expiration of the term grant the lessee a new sub-lease for a further term of ten years at a yearly rent to be agreed upon. The plaintiff's letter sought for the renewal of the lease for a further term of twenty years and gave proposals for the rent to be paid. In response the defendant wrote the letter dated October 18, 2012 where she indicated that she was in agreement to renew the sublease but gave her own proposals for the rent payable.
83. The defendant argued that the plaintiff did not comply with clause 3(f) of the lease which provided for renewal of the lease for a period of ten years as it sought for renewal for twenty years. The defendant's letter dated October 18, 2012 stated as follows:
- “Your letter dated August 3rd reference POK/CONV/KSM/GNK/08 requesting me to renew your sublease of the above plot for 20 years refers. I am in agreement to renew the sublease but my payment proposal is as follows...”
84. It is my view that as per the defendant's letter dated October 18, 2012, she was agreeable to the renewal of the lease for a period of twenty years and cannot then argue that the plaintiff was not compliant with clause 3(f) of the lease when in essence she was amenable to the lease being renewed for a period of twenty years.
85. As indicated by the plaintiff, clause 4 of the lease provided that in the event that any differences arise on the rent payable after the expiry of the term as provided for by clause 3(f), the difference was to be determined by an independent valuer appointed by the parties and in case of failure to agree by the Chairman of the Institute of Surveyors of Kenya.
86. As per clause 4 of the Lease, the plaintiff wrote the letter dated November 26, 2012 proposing the names of three valuers. The said letter was followed by another letter dated February 20, 2013 inviting the defendant for discussions on the issue of rent and another letter dated March 1, 2013 from the defendant's counsel to the plaintiff indicating the defendant's unavailability to attend the said meeting but proposed for another meeting. There are also other correspondences between the plaintiff and the defendant before the plaintiff wrote to the Chairman of the Institution of Surveyors of Kenya on March 20, 2013 requesting for the appointment of a valuer for the suit premises.
87. The lease between the plaintiff and the defendant was set to come to an end on January 31, 2013. As at the time the plaintiff was writing to the Chairman of the Institution of Surveyors of Kenya on March 20, 2013, the lease had already expired.
88. A Report and Rental Valuation was done by Add Property Consultants who the plaintiffs allege were appointed by the Chairman of the Institution of Surveyors of Kenya to do the valuation and it gave its



proposals for the amount of rent to be paid. The plaintiff forwarded the said report to the defendant and then filed the present case seeking for orders of specific performance for the defendant to execute a further lease.

89. The Court in the case of *National Oil Corporation of Kenya v Robert Obegi Ongeru & another* [2014] eKLR held as follows:

25. In my view, the only agreement which the plaintiff and the 1st defendant had for the renewal of the lease dated December 19, 2003 which expired on January 1, 2014 which could be enforced by the plaintiff was contained in paragraph 3 (viii) of the said lease. That paragraph of the lease contained an option to renew clause which could be exercised by the plaintiff. It provided that the said lease was renewable for a further term of ten (10) years with effect from 1st January 2014 at a rent to be agreed. The lease had an arbitration clause in paragraph 3 (v) through which a dispute over the rent payable could be resolved. If the plaintiff had exercised this option in the manner set out in the said clause, the 1st defendant could be compelled by an order of specific performance to renew the lease. See the case of *Sands v Mutual Benefits Ltd* [1971] EA 156.

90. In the present matter, the plaintiff is seeking to enforce clause 3(f) of the lease agreement. The plaintiff has demonstrated the various steps it took as provided for by the lease in seeking for its renewal and it is my view that the plaintiff has made out a case for grant of the orders sought in the plaint. The court in the case of *Tusker Mattress Ltd v Bank of Baroda (Kenya) Ltd & another* [2017] eKLR held as follows:

A person can only be entitled to an order of specific performance if it is shown that he has done all that he was expected to do and that what is remaining is for the other to meet his part of the bargain.

91. The plaintiff is therefore entitled to the orders sought in the plaint. Having found that the plaintiff succeeds in its claim against the defendant, the orders sought by the defendant in her counterclaim are not capable of being granted.

92. In conclusion, the plaintiff's suit succeeds and the orders sought in the Plaint are granted thus an order that the yearly rent determined and contained in the Report and Rental Valuation dated May 17, 2013 be the rent payable by the Plaintiff to the Defendant for the first term of 10 years of the Further Lease and for the subsequent term of ten year to be determined by a valuer nominated by the institute. An order of specific performance in terms of clause 3(f) of the Lease that the Defendant execute a further lease for the extended term of twenty (20) years at the rent stipulated in sub clause (a) above but otherwise on the same terms and conditions as are contained in the lease.

94. In the event that the Defendant refusing or failing to execute the said further Lease within the time limited by this honourable court, an order that such Further Lease be executed by the Deputy Registrar of this Honourable Court on behalf of and in the name of the Defendant.

95. An order of permanent injunction restraining the defendant from interfering with the plaintiff's peaceful enjoyment of the property for the term of the Further Lease. Costs to the plaintiff.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 31ST DAYS OF JANUARY, 2023.

AO OMBWAYO

JUDGE

