Parkway Investment Limited v Dedan Kimathi University of Technology (Civil Appeal 6 of 2020) [2023] KEELC 838 (KLR) (16 February 2023) (Judgment)

Neutral citation: [2023] KEELC 838 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL APPEAL 6 OF 2020

JO MBOYA, J

FEBRUARY 16, 2023

BETWEEN

PARKWAY INVESTMENT LIMITED ..... APPELLANT

AND

DEDAN KIMATHI UNIVERSITY OF TECHNOLOGY ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the Honourable L.L Gicheha, Chief Magistrate in Milimani Civil Suit NO 3812 of 2018 made on 7th February 2020)

JUDGMENT

Introduction and Background:

1. The Appellant and the Respondent herein entered into and executed a lease agreement dated the 5th October 2011, wherein the Appellant (as the Landlord) demised to and in favor of the Respondent (as the Tenant), premises situate on the 10th Floor of the property known as L.R No. 209/8523. For clarity, the property in question is better described and known as Union Towers, Moi Avenue, Nairobi.

2. On the other hand, it is important to state and underscore that the impugned lease agreement, details in terms of the preceding paragraph was for a term of six (6) years and that same did not contain or expressly stipulate, whether the lease was terminable in any other manner other than by effluxion of time.

3. Pursuant to and upon the execution of the lease agreement, the Respondent herein entered upon and took possession of the demised premises and thereafter same (Respondent) partitioned the demised premises, for purposes of use as classrooms to facilitate teaching and tutorial of her (Respondent's students).

4. Nevertheless, on or about the 23rd December 2015, the Respondent generated a Letter authored by her Vice chancellor and in respect of which the Respondent informed the Appellant that same was keen to terminate the lease agreement hitherto entered into and executed on the 5th October 2011.

5. In addition, the Respondent's vice chancellor also brought to the attention of the Appellant that same were issuing a 60 days' notice of termination and for clarity, it was pointed out that the Respondent's last day of occupation of the demised premises shall be the 29th February 2016.

6. Furthermore, come the 29th February 2016, the Respondent herein vacated and moved out of the demised premises and thereafter sought to remove the partitions which had been installed and erected in the demised premises.

7. Be that as it may, the Appellant herein contended and informed the Respondent that her letter dated the 23rd December 2015 and in respect of which same sought to terminate the lease, was illegal and unlawful.

8. Additionally, the Appellant also contended that the impugned letter by and on behalf of the Respondent constituted breach of the terms of the lease agreement. For clarity, the Appellant contended that the lease agreement in question did not contain any clause/provision for termination, in the manner adverted to by the Respondent.

9. Notwithstanding the position taken by the Appellant herein, the Respondent moved out of the demised premises and thereafter sought to recover or be repaid the security deposit amounting to Kes.705, 000/= Only, which has hitherto been paid at the onset of the lease agreement.

10. Suffice it to point out that the relationship between the Appellant and the Respondent did not end well. In this regard, the Appellant herein deemed it that the Respondent breached the terms of the lease agreement and hence the Appellant filed civil proceedings vide Milimani ELC No. 1334 of 2016, were but which latter on transferred to the chief magistrate's court and re-numbered as CMCC No. 3812 of 2018.

11. Subsequently, the said suit was heard and determined vide Judgment rendered on the 7th February 2020. For clarity, the learned Chief Magistrate proceeded to and dismissed the Appellant's suit.

12. On the other hand, the Learned Chief Magistrate proceeded to and allowed the counterclaim by and on behalf of the Respondent, to the extent that the court decreed refund of the security deposit, which had hitherto been paid to the Respondent.

13. Aggrieved and dissatisfied by the Judgment and decree rendered on the 7th February 2020, the Appellant herein filed and lodged a Memorandum of Appeal dated the 18th February 2020, seeking to impugn and impeach the entire Judgment.

14. For coherence, the Memorandum of Appeal has raised various grounds, *inter-alia*;

    i. The learned Magistrate erred in law and in fact in finding that the unilateral letter dated 23rd December 2015 by the Respondent fully discharged the Defendant from the legal contractual obligations contained in the registered lease agreement dated 5th October 2011.

    ii. The Learned Magistrate erred in law and in fact in holding that the deposit paid by the Respondent amounting to Kshs. 705,000/= became payable on the unilateral termination of the lease agreement dated 23rd December 2015.

iii. The Learned Magistrate erred in law and in fact in failing to find that the Respondent's unilateral termination of lease agreement amounted to breach of the lease agreement dated 5th October 2011.

iv. The Learned Magistrate erred in law and in fact in failing to find that the Appellant was entitled to demand for rent for the month of March, April and May 2016 when the contract had not terminated amounting to Kshs. 1,858,934/=Only.

v. The Learned Magistrate erred in law and in fact in failing to award special damages to the Appellant for breach of lease agreement dated 5th October 2011 computed as the last year rent being Kshs.4,048,474.60 as covenanted in the lease agreement.

vi. The Learned Magistrate erred in law and in fact in interpreting the definition the "last year of the term" and the "expiration of the term" in the lease agreement to mean the lease had a break clause.

vii. The whole of the judgment was against the weight of evidence adduced, the submissions and the law.

15. Be that as it may, the Appeal herein came up for directions, whereupon the advocates for the Parties agreed to canvass and ventilate the appeal by way of written submissions.

16. Pursuant to and in line with the agreement by the advocates for the respective Parties, the Honourable court proceeded to and set timelines for the filing and exchange of the written submission. In this regard, it is appropriate to point out that the Parties thereafter complied with the directions by filing their respective submissions.

Submissions by the Parties

Appellant's Submissions

17. The Appellant filed two sets of written submissions, inter-alia, the submissions dated the 14th December 2022 and the Supplementary submissions dated the 23rd January 2023. For clarity, the counsel for the Appellant raised and highlighted five pertinent issues for consideration and determination by the court.

18. First and foremost, learned counsel for the Appellant submitted that the Appellant and the Respondent entered into and executed a lease agreement on the 5th October 2011. In any event, counsel added that the lease agreement which was entered into and executed by the Parties was for a fixed term of six years.

19. In addition, learned counsel has submitted that the term of the impugned lease agreement was to commence on the 15th March 2011 and running for a duration of 6 years and not otherwise.

20. Furthermore, learned counsel has submitted that the lease agreement which was entered into and executed by the Parties did not contain or stipulate a ground for termination, other than by breach of the said lease or otherwise by effluxion of time.

21. Nevertheless, counsel submitted that despite the clear and explicit terms of the lease agreement that was entered into and executed by the Parties, the learned chief magistrate sought to re-write and/or adulterate the terms of the lease agreement by purporting that the lease agreement could be terminated, in a manner other than by breach and effluxion of time.

22. In this regard, learned counsel for the Appellant has submitted that the learned chief magistrate was in error in finding and holding that the lease agreement could be terminated in a manner other than the ones contained and expressed *vide* the Lease Document.

23. In support of the foregoing submissions and in particular to reiterate the contention that a court of law cannot re-write a contract/agreement between the Parties, counsel for the Appellant invoked and relied in the case of *Samuel Kamau Macharia versus Daima Bank Ltd* (2008)eKLR and *national Bank Kenya Ltd versus Pipeplastic Samkolit Ltd & Another* (2001)eKLR.

24. Secondly, learned counsel for the Appellant has submitted that by issuance of the impugned letter dated the 23rd December 2015 and in respect of which the Respondent sought to terminate the tenancy, the Respondent herein were effectively breaching the terms of the lease agreement.

25. In addition, learned counsel has contended that the lease agreement in question, which was duly executed by the Parties, did not envisaged issuance and service of a termination notice, either in the manner propagated by the Respondent or at all.

26. On the other hand, learned counsel for the Appellant also submitted that the Respondent's conduct, including the issuance of the impugned termination letter amounted to and constituted breach of contract. In this regard, counsel for the Appellant also submitted that the learned chief magistrate was in error in finding and holding that the impugned notice suffice for purposes of terminating the lease agreement.

27. Thirdly, learned counsel for the Plaintiff has submitted that by the time when the Respondent herein vacated and moved out of the demised premises, the lease agreement was still in force and had not been terminated or at all.

28. In this regard, learned counsel has added that to the extent that the lease agreement was still in operation, it was incumbent upon the Respondent to pay the requisite monthly rents, in accordance with the clauses/provisions of the lease agreement.

29. On the other hand, counsel has further submitted that arising from the offensive notice to terminate the tenancy, the Appellant was constrained to and ultimately, terminated the lease *vide* letter dated the 31st May 2016.

30. It was the further submissions by counsel for the Appellant that by the time the lease agreement was being terminated that is on the 31st May 2016, the Respondent herein had not paid the rents for the months of March, April and May, 2016, amounting to kes.1, 501, 047/= only. In this regard, counsel contended that the said monies were due and payable by the Respondent.

31. Other than the foregoing, counsel for the Appellant also submitted that insofar as the lease agreement was for a fixed term of six years, the Respondent could not move out of the premises prior to and before the lapsed time.

32. Furthermore, learned counsel submitted that in the event that the Respondent was desirous to vacate and move out of the demised premises before the lapse of time, then same were obliged to pay the rents due and in respect of the Last year of the tenancy/lease agreement.

33. Despite the foregoing, learned counsel for the Appellant submitted that the learned chief magistrate erred in fact and in law in failing to order and direct the Respondent herein to pay the rents for the named three months prior to and before the termination of the lease, as well as rents for the Last year for the tenancy.

34. Premised on the foregoing, learned counsel has therefore contended that the Appellant duly established and proved her claims as articulated at the foot of the Plaint, in accordance with the Provisions of Sections 107,108 and 109 of the *Evidence Act*, Chapter 80, Laws of Kenya.

35. In a nutshell, counsel for the Appellant contended that the claim by the Appellant was special in nature and same was duly pleaded and specifically proved. In this regard, counsel contended that the claim ought to have been allowed.

36. Finally, counsel for the Appellant has submitted that the Respondent herein was never constructively evicted from the demised premises. For clarity, counsel has added that by the time that the agents of the Appellant padlocked the premises, the Respondent had vacated pursuant to and on the basis of her letter dated the 23rd December 2015.

37. In addition, learned counsel for the Appellant has also contended that the lease agreement, which was entered into and executed by the Parties contained express and explicit terms, which were binding on both Parties. In this regard, counsel contended that the terms of the lease agreement were devoid of ambiguity.

38. In view of the foregoing submissions, learned counsel for the Appellant invited the Honourable Court to find and hold that the entire Judgment and decree of the learned Chief Magistrate which dismissed the Appellant's suit, was therefore erroneous and ought to be varied, set aside and quashed, in its entirety.

39. Furthermore, counsel for the Appellant added that the Honourable court should be pleased to allow the Appellant's suit in terms of the Plaint dated the 26th October 2016, while dismissing the Counter-claim by the Respondent herein.

Respondent's Submissions

40. The Respondent filed submissions dated the 9th February 2023 and in respect of which counsel for the Respondent identified, isolated, highlighted and amplified four issues for consideration by the Honourable court.

41. Firstly, learned counsel for the Respondent submitted that the Appellant and the Respondent duly entered into and executed a lease agreement dated the 5th October 2011. For clarity, learned counsel added that the lease was for a fixed term of six years.

42. Be that as it may, learned counsel submitted that even though the impugned lease was for a fixed term of six years, same was however terminable in ways other than by breach and effluxion of time. In this regard, learned counsel for the Respondent invited the court to take cognizance of and into account the preambular clauses and schedule of the lease in question.

43. Furthermore, learned counsel for the Respondent submitted that the Respondent herein issued and served the Appellant with a notice dated the 23rd December 2015 and in respect of which, the Respondent signified her desire and intention to terminate the lease.

44. Premised on the foregoing, learned counsel for the Respondent has therefore contended that the lease in question was duly and lawfully terminated *vide* the termination notice duly served upon the Appellant.

45. In any event, learned counsel for the Respondent invited the court to take cognizance of Clause 2 of the Lease Agreement, which same contended provided and stipulated that the impugned lease could be determined otherwise, than by effluxion of time.

46. On the other hand, learned counsel invited the Honourable court to take cognizance of and to apply the holding of the case of *Garibi Limited versus Ogilvy East Africa Ltd* (2014)eKLR and *Brand City Ltd versus United Housing Estate Ltd* (2015)eKLR, respectively.

47. Secondly, learned counsel for the Respondent submitted that upon the issuance and service of the termination Notice dated the 23rd December 2015, the Respondent herein remained in occupation of the demised premises up to and including the 29th February 2016.

48. Nevertheless, counsel for the Respondent added that thereafter the Respondent vacated the demised premises and commenced efforts to remove the partition, which had hitherto be put in place by the Respondent.

49. However, it was the submissions of counsel for the Respondent that when the employees of the Respondent went to the demised premises and sought to remove the partitions and to restore the demised premises to the status ante, the agents/guards of the Appellant proceeded and locked the premises.

50. Arising from the foregoing, learned counsel contended that the Respondent and her employees were therefore barred and prohibited from gaining access into the demised premises.

51. Furthermore, learned counsel contended that by locking/padlocking the demised premises, the Appellant herein constructively terminated the lease, that is, in the event the lease remained in existence and had not been terminated *vide* the letter dated the 23rd December 2015.

52. In the premises, learned counsel for the Respondent has therefore invited the court to find and hold that the actions by and at the instance of the Appellant and in particular, the locking of the premises and thus depriving the Respondent of access thereto, constituted constructive termination.

53. To this extent, learned counsel for the Respondent has submitted that the actions and or activities by the Appellant herein falls within the purview of the provisions of Section 77 of the *Land Act*, 2012(2016).

54. To vindicate the foregoing submissions learned counsel for the Respondent also quoted and cited the cases in the decision in *Munaver N Alibhai T/a Diani Galary versus South Coast Holdings Ltd* (2020)eKLR and *Boniface Ngure Ndingu versus Gathu Holdings Ltd & Another* (2021)eKLR.

55. Thirdly, learned counsel submitted that the claims that were alluded to by the Appellant herein at the foot of the Plaint, constituted special damages and hence same ought to have been particularly pleaded and specifically proved.

56. However, it was the submissions of learned counsel for the Respondent that the impugned claims, which were special in nature, were neither particularly pleaded nor specifically proved. In this regard, learned counsel contended that the said claims therefore could not be granted by the Chief Magistrate's court.

57. In support of the submissions that the claims at the foot of the claims were special and therefore needed to have been particularly pleaded and specifically proved, learned counsel invited the court to rely on the case of *Swalleh C Kariuki & Another versus Viloet Owiso okuyu* (2021)eKLR and *Consolata Anyango Ouma versus South Nyanza Sugar Company Ltd* (2015)eKLR.

58. Fourthly, learned counsel for the Respondent also submitted that upon vacating the demised premises, it behooved the Appellant herein to take appropriate measures to procure and obtain (*sic*) a new tenant to take up the vacant space.

59. Nevertheless, learned counsel for the Respondent contended and submitted that the Appellant herein did not exercise reasonable steps and due diligence in endeavoring to mitigate her losses, if any.

60. Owing to the foregoing, learned counsel for the Respondent has therefore submitted that the claims by the Appellant, inter-alia, rents for the last year are not payable on the basis of the doctrine of mitigation of damages.

61. To underscore the importance and significance of the Doctrine of Mitigation of damages, learned counsel invited the court to take cognizance of the decision of *Equator Products Ltd versus Baobab Ventures Ltd* (2020)eKLR and *Chimanlal Meghji Naya Shah & Another versus Oxford University Press (EA) Ltd* (2007)eKLR.

62. Finally, learned counsel submitted that having duly and lawfully terminated the lease *vide* letter dated the 23rd December 2015, the Respondent herein was entitled to recover the security deposit, which had been deposited with the Appellant at the onset of the lease/tenancy in question.

63. In the premises, learned counsel added that the decision by the learned chief magistrate to decree and order refund of the sum of Kes.705, 000/= only, to the Respondent herein was lawful and legitimate.

64. For the avoidance of doubt, learned counsel contended that there was no error committed by the learned Chief Magistrate in directing the Appellant to refund the impugned Security Deposit.

65. In view of the foregoing, learned counsel for the Respondent has therefore impressed upon the court to find and hold that the impugned Judgment of the learned Chief Magistrate, was sound and correctly dealt with the issues that were raised by the Parties.

66. Consequently and in this regard, counsel for the Respondent has invited the Honourable court to find and hold that the Appeal is devoid of merits and to dismiss the appeal with costs.

Issues For Determination

67. Having reviewed the Memorandum of Appeal dated the 18th February 2020, the Proceedings and Judgment appealed, against as well as the entire Record of Appeal and having taken into account and considered the written submissions filed by the Parties, I am of the opinion that the following Issues do arise and are thus germane for determination;

    i. Whether or not the impugned Lease Agreement was terminable *vide* Notice of termination or otherwise than by breach or effluxion of time.

    ii. Whether the Termination Notice dated the 23rd December 2015, constituted and amounted to breach of the Lease agreement and if so, whether the Appellant was entitled to Damages for breach of (*sic*) contract/lease agreement.

    iii. Whether the Appellant was/is entitled to rent for the Last year of the tenancy either in the manner claimed or otherwise.

    iv. Whether the Respondent herein was entitled to Refund of the Security Deposit which was paid at the onset of the lease agreement.

Analysis and Determination

Whether or not the impugned Lease agreement was terminable vide Notice of termination or otherwise than by breach or effluxion of time.

68. It is common ground that the parties herein duly entered into and executed a lease agreement dated the 5th October 2011. For clarity, the lease agreement contained and stipulated the totality of the terms and conditions upon which the parties herein agreed to be bound.

69. Additionally, it is worth starting that the impugned lease agreement was for a specified duration and/or term. In this regard, there is no gainsaying that the lease was for a duration of six years.

70. Having entered into and executed the impugned lease agreement, it is safe to state and observe that the parties herein agreed to be bound by the terms contained therein and not otherwise.

71. In any event, it is important to restate and reiterate that where two or more parties have entered into and executed a written memorandum, agreement, contract and or deed, such parties are bound by the express terms of the written memorandum. In this regard, neither of the parties can renege or resile from the clear and express terms of the executed Contract.

72. On the other hand, it is also imperative to point out that where a dispute arises from and pertains to a duly executed agreement/contract, it behooves the court to interpret the impugned agreement/contract by relying on the express terms contained therein. For clarity, this is what is otherwise referred to as the Four- Square Rule.

73. To vindicate the established and hackneyed legal position pertaining to and concerning the manner of interpreting and construing written agreement/contract, it is appropriate to restate and reiterate the holding of the Court of Appeal in the case of the *Speaker County Assembly of Kisii & 2 Others versus James Omariba Nyaoga* (2015)eKLR.

74. For coherence, the Honourable court stated and observed as hereunder;

> The 1st appellant's attempt to vary the terms of the letters of appointment, in our view, offends the provisions of Sections 97 and 98 of the *Evidence Act*, Chapter 80 Laws of Kenya, which attempt we must reject. . This is not the first time we are doing so. In the case of John Onyancha Zurwe v Oreti Atinda alias Olethi Atinda [Kisumu Civil Appeal No. 217 of 2003] (UR), we cited, with approval, Halisbury's Laws of England 4th Edition vol. 12, on interpretation of deeds and non-Testamentary Instruments paragragh,1478 as follows:-
>
> " Extrinsic evidence generally excluded:
>
> Where the intention of parties has been reduced to writing it is in general not permissible to adduce extrinsic evidence whether oral or contained in writing such as instructions ,drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary or add to the terms of the document.
>
> Extrinsic evidence cannot be received in order to prove the object with which a document was executed or that the intention of the parties was other than that appearing on the face of the document."

75. Other than the foregoing decision, wherein the Court of Appeal elaborated and underscored the importance of construing an agreement/contract or better still a memorandum within the four corners of the impugned documents, the said legal principle had hitherto been illuminated and highlighted

vide the holding in the case of *National Bank of Kenya Ltd versus Pipeplastic Samkolit Ltd & Another* (2001)eKLR, where the honourable court held as hereunder;

> A Court of law cannot re-write 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. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.
>
> As was stated by Shah JA in the case of Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported):
>
> "It is clear beyond peradventure 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".

76. Additionally, the sanctity of contract/agreement and the requirement that a court of law ought not to re-write the terms thereof for and on behalf of the Parties, was similarly underscored in the case of *Samuel k Macharia versus Daima Bank Ltd* (2008)eKLR, where the court stated and observed as hereunder;

> " A Court of law cannot re-write 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.

77. In view of the foregoing, it is therefore common ground that if the Respondent was keen to terminate the impugned lease agreement, then same were obliged to invoke and rely on the express terms thereof, if any and not otherwise.

78. Nevertheless, it is also not lost on the court that the impugned lease agreement was for a specified term, namely, six years period and same did not contain or provide a termination clause, other than by breach or effluxion of the lease term.

79. Notwithstanding the foregoing, the Respondent herein generated and issued a termination notice dated the 23rd December 2015 and wherein same signified their intention to terminate the lease agreement. For clarity, the Respondent indicated that same would be vacating the demised premises on or before the 29th February 2016.

80. According to the Respondent, the termination notice was informed and anchored on the preambular clauses and sub-headings of the impugned lease. Essentially, the Respondent contended that the preambular segment of the lease contained a clause which sated as hereunder;

> References to "the last year of the Term", include the last year of the Term if the Terms hall determine otherwise than by effluxion of time and references to "the expiration of the Term include such other determination of the Term.

81. According to the Respondent, the fact that the said clause contained a phrase that the Lease term could determine or otherwise than by effluxion of time, meant that the impugned lease could indeed be terminated and/or be determined in other ways, other than (*sic*) by breach or effluxion of time.

82. In my humble view, the interpretation or construction given to the said clause by the Respondent, would certainly be correct, if there were no other overriding clauses and/ or limiting clauses, explaining the relevance and application thereof.

83. However, in respect of the instant matter, it is imperative to recall and observe that the parties themselves agreed and stated that the preambular clause and the sub-heading schedule which include the impugned clause referred to herein before, agreed that said preambular clause and sub-heading schedule shall not form part of the lease.

84. Furthermore, the Parties added that the said preambular clause and sub-heading Schedule shall also not be taken into account in the construction and interpretation of the Lease agreement.

85. For completeness, it is appropriate to reproduce the latter clause, which articulates the aspects which I have just alluded to in the preceding paragraph. In this regard, same are reproduced as hereunder;

> The clause and sub-headings schedule headings do not form part of this lease and shall not be taken into account in its construction and interpretation.

86. From the foregoing, it is crystal clear that the parties herein had agreed and covenanted that the preambular segment and the clauses contained therein would not be invoked and relied upon for purposes of construction and interpretation of the impugned lease.

87. In view of the foregoing, I come to the conclusion that the learned chief magistrate was in error in finding and holding that the impugned lease could be terminated in ways other than by breach or effluxion of time.

88. Clearly, the impugned holding of the learned chief magistrate breached, infringed and violated the four-square rule, which prohibits courts from importing extrinsic factors and circumstances, (whether written or otherwise) in the interpretation of a deed, agreement/contract.

89. Additionally, I am also in agreement with counsel for the Appellant that by holding and finding that the lease agreement was terminable in ways other than by breach or effluxion of time, the learned chief magistrate endeavored to re-write the contract between the Parties, contrary to the established and hackneyed legal position.

90. In a nutshell, it is my finding and holding that ground 1 of the Memorandum of Appeal succeeds.

Issue Number 2

Whether the termination notice dated the 23rd December 2015, constituted and amounted to breach of the lease agreement and if so, whether the Appellant was entitled to damages for breach of (sic) contract/lease agreement.

91. Having found and held that the impugned lease agreement between the Appellant and the Respondent was only terminable by breach or effluxion of time, it is therefore evident and apparent that the termination notice dated and issued on the 23rd December 2015, was therefore issued contrary to and in contravention of the terms of the lease.

92. In view of the foregoing, it is therefore my humble finding and holding that the impugned notice did not abide by or accord with the express terms of the Lease that were binding on the parties.

93. Put differently, it is explicit that the termination notice was therefore in breach and violation of the terms of the lease agreement dated and entered into on the 5th October 2011.

94. Additionally, it is therefore apparent and beyond peradventure that by generating and issuing the impugned notice and thereafter acting on the same to vacate and hand over the demised premises, the Respondent indeed breached and violated the terms of the lease.

95. In respect of the foregoing position, I beg to adopt and reiterate the holding in the case of *Ramji Meghji Gudka Limited versus Kisii University* [2019] eKLR, where the honourable court stated and held as hereunder;

> 20. The fact that the agreement between the parties was for a fixed term of 6 years did not exclude the possibility of termination. It only means that termination would amount to a breach for which the party at fault would have to pay damages. In Chimanlal Meghji Naya Shah & Another v Oxford University Press (EA) Limited ML HCCC NO. 556 of 2005 [2007] eKLR, Warsame J., explained this principle as follows:
>
> If for example, the lease provides for a fixed period of 6 years and the tenant is unable to pay the rent applicable, then the tenant cannot be heard to say that the landlord cannot end or terminate his lease. In my view where there is no termination clause and the lease is terminated before its period of expiry, the situation that obtains is a breach of a contract. Where the parties are not regulated by their lease agreement as to the nature and mode of notice, if the lease is terminated by either party, then the party offended is entitled to damages for breach of contract. In essence my position is that a lease agreement properly registered is a form of a contract and therefore when there is a default, the terms of breach of a contract aptly applies.

96. Be that as it may, the auxelliary issue that arises and which deserves determination is whether the impugned breach, arising from the issuance of the termination notice contrary to the terms of the lease, would entitle the Appellant to damages for breach of contract.

97. From the onset, I beg to state and underscore that where breach of contract has been proven and established, it thus follows that the aggrieved party, in this case, the Appellant, shall be entitled to recompense in damages.

98. However, in respect of this matter, it is imperative to recall and restate that immediately the Respondent vacated the demised premises and prior to the Respondent removing the partitions which had been erected therein and by extension, restoring the status ante, the Appellant unleashed her guards and employees to lock the premises.

99. Arising from the action and activities by the Appellant herein, the Respondent was effectively denied or deprived of access to the demised premises. For clarity, the fact that the demised premises were locked by the Appellant was duly conceded and acknowledged by Appellant's witness.

100. It is evident that henceforth from March 2016, the Respondent herein could not access and gain entry into the demised premises, for whatsoever purpose, *inter-alia*, removal of her partitions or otherwise.

101. In my humble view, the impugned actions by and at the instant of the Appellant by themselves constituted and amount to forsaking the terms of the lease agreement. Consequently, it is my humble view that the activities by the Appellant therefore terminated the lease/contract, if at all, the lease in question was still in existence.

102. To this end, it is my finding and holding that by locking and padlocking the demised premises, the Appellant effectively kicked out the Respondent and even denied the Respondent the opportunity to retrieve the partitions which remained in the demised premises.

103. It is imperative to recall that I have found and held that the impugned termination notice constituted breach of the contract and would have entitled the Appellant to compensation/ recompense on account of breach of contract.

104. However, it is important to state that the compensation which the Appellant was entitled to was in respect of rents which ought to have been payable towards and in respect of the months for which (*sic*) the Lease remained alive.

105. Be that as it may, it is trite to recall that rent is a consideration that is paid and becomes payable for as long as the tenant is in occupation of the demised premises or is better still, deemed to be in occupation of the demised premises.

106. Nevertheless, in respect of the instant matter, the Appellant herein Suo moto decided to lock/padlock the premises. Consequently, there is no gainsaying that the Respondent were effectively deprived of access from whatsoever purpose.

107. In this regard, can the Appellant be heard to lay a claim for rents for and in respect of the months of (*sic*) March, April and May, 2016, when they had by locked the premises and thereby ousted the Respondent therefrom.

108. In my humble view, by resorting to and applying the law of jungle, inter-alia, locking the demised premises and thereby prohibiting the Respondent from further access, the Appellant herein deprived herself of a legitimate basis to demand payment of rents for the impugned months of March, April and May 2016.

109. In this respect, I am duly persuaded and inspired by the holding of the court in the case *Munaver N Alibhai t/a Diani Gallery versus South Coast Holdings Limited* [2020] eKLR it was held that:

> " In the absence of a court order, I find hat the Defendant acted in total disregard of the Law when it unlawfully locked up the Plaintiff's premise thereby depriving the plaintiff of his possession. I am inclined to agree with the Plaintiff that it was actually constructively evicted from the suit premises.
>
> Rent is the consideration a tenant pays to the landlord for the enjoyment of the premises let. Rent is that due when the enjoyment persists. When possession is taken away the right to receive rent cannot be retained. That is what section 77. *Land act* provides.
>
> Having found that the Plaintiff was a controlled tenant who was constructively evicted it follows that the landlord cannot be entitled to rent for the duration the plaintiff was deprived of possession. The defendants counter-claim being based on rent entitlement cannot in fairness include rent for the period of unlawful dispossession. It must exclude the period of the dispossession from January 2015 to January 2016. The plaintiff is therefore relieved from the obligation for the payment of all the sums claimed as rent and service charge for the period of dispossession."

110. Consequently and in view of the foregoing, I therefore hasten to state that even though in ordinary circumstances breach of contract will automatically attract and accrue recompense in damages (read special damages), however, the conduct of the aggrieved Party ex-post the breach of contract, would have a bearing on the award and computation of such damages.

111. In a nutshell, I come to the conclusion that the behavior and conduct of the Appellant by locking the demised premises therefore deprives same of a right to demand and receive rents, for and in respect of the Months, for which it is deemed that the Lease Agreement is deemed to have remained in existence.

112. Clearly, to find and hold that the Appellant herein would be entitled to rent for the impugned months of March, April and May 2016 (when same had locked the premises) would be contrary to Equity and Social justice in terms of Article 10(2) (b) of the *Constitution* 2010.

Issue Number 3.

Whether the Appellant was/is entitled to rent for the last year of the tenancy either in the manner claimed or otherwise.

113. The other claim, which was raised and put forth by and on behalf of the Appellant herein related to rents for the Last year of tenancy. In this regard, the Appellant demanded that the Respondent be ordered to pay rents amounting to Kes.4, 048, 474.60/= only for the duration covering 15th March 2016 to 14th March 2017.

114. However, before venturing to address and deal with the aspect as to whether or not the Appellant herein would be entitled to rents for the last year of the lease contract, it is important to recall and restate that damnified by the termination notice dated the 23rd December 2015 and coupled with the vacation of the premises by the Respondent, the Appellant herein ultimately terminated the lease agreement *vide* letter dated 31st May 2016. See page 248 of the record of appeal.

115. For completeness, the contents of the letter under reference were as hereunder;

> Dedan Kimathi University Of Technology
>
> 657-10100
>
> Nairobi
>
> 31st May 2016
>
> Urgent'
>
> "Advance copy via e-mail"
>
> Dear Sir,
>
> R.E:oeetce Premh Ses On Tnte Etoor Oe Union Torers
>
> Dedan Kimanthi University Leases
>
> We refer to our letter dated 5th April 2016 which has elicited no action from your end.(copy enclosed for your ease of reference).
>
> The outstanding rent as at 31st May 2016 is Kshs. 1,501,047/= which you have neglected and or refused to make payment.
>
> We note that you have continuously left the premises unoccupied for a period of more than thirty(30) days in breach of the fourth schedule of the lease agreement.
>
> Take Notice that in breach of the aforesaid obligations our client hereby elects to terminate the lease agreement dated_5th October 2011.
>
> Take Further Notice that unless the outstanding rent as at 31st May 2016 is paid to our client amounting to Kshs. 1,501,047/= within the next Fourteen (14) Days from the date hereof, our client shall forthwith initiate recovery proceedings without any further reference to you whatsoever.
>
> Yours Faithfully
>
> VSLaw & Co.Advocates
>
> Muturi Kariuki.

C.c: Parkway Investment

Attn: Mr. Antony

Conveyancing | Real Estate | Intellectual Property

Commercial|Public Law

Partners: Veronica W. Mbugua Waweru

Sammy Kariuki

116. My understanding of the contents and tenor of the letter, (whose details have been reproduced above) is to the effect that the Appellant was terminated the lease/contract with the Respondent herein.

117. For clarity, the termination of the contract *vide* letter under reference proceeded on the basis that the lease between the Appellant and the Respondent was still in existence.

118. However, it is worth remembering that the Appellant herself had hitherto locked and padlocked the premises; and thereby denied or deprived the Respondent of any right of entry or otherwise.

119. In addition, it is also imperative to observe that this court has previously found and held that the impugned actions of locking the premises, amounted to invocation and application of the law of the jungle and hence same constituted constructive termination of the lease.

120. Taking into account the foregoing observation, I am afraid that no lease remained in existence ex-post the impugned actions and or activities by the Appellant to warrant (*sic*) the termination *vide* letter dated the 31st may 2016.

121. Notwithstanding the foregoing and assuming that the lease was still in existence and thus capable of termination in terms of the letter dated the 31st May 2016, then the question, which merits to be addressed and dealt with is; did the lease exists after the termination?

122. In my humble view, having exercised her option/rights to terminate the impugned lease, it then means that the contractual relationship between the Appellant and the Respondent was brought to a close.

123. In the premises, I come to the conclusion that pursuant to and by dint of the letter dated the 31st May 2016, terminating the lease, the Appellant herein ceases to have a legal basis to anchor the claim for payment of rents for the Last year.

124. In addition, it is my considered view that the payment of rents for the last year, would only be tenable, if the Appellant herein had not terminated the lease and therefore the situation would remain anchored on the basis of (*sic*) breach of the lease and contract.

125. In a nutshell, it is my finding and holding that immediately upon (*sic*) the termination of the lease by and at the instance of the Appellant herein, there ceased to exists a lease/contract capable of being breached.

126. Consequently and in this regard, the claim for rents on account for Last year, which is an aspect of breach of contract, does not legally lie.

127. In the premises, it is my conclusion that the claim for rents on account for Last year was propagated and mounted in vacuum and hence same was correctly and legally declined by the learned chief magistrate.

Issue Number 4

Whether the Respondent herein was entitled to Refund of the security deposit which was paid at the onset of the lease agreement.

128. It is not in dispute that at the onset of the lease/tenancy between the Appellant and the Respondent, it was incumbent upon the Respondent to pay a security deposit in the sum of kes.705, 000/= only.

129. In any event, there is no dispute that indeed the Respondent proceeded to and paid the said security deposit. For clarity, evidence of such payment was provided and supplied *vide* documents contained at pages 210, 211 and 212 of the Record of Appeal.

130. Other than the foregoing, it is also worthy to recall that the Respondent herein stated and underscored that same paid all the rents due and payable up to and including February 2016.

131. Furthermore, the fact that the Respondent paid rents up to and including February 2016, has neither been contested nor disputed by the Appellant.

132. To the contrary, the rents which the Appellant was seeking to recover and be paid by the Respondent related to the month of March, April and May 2016, when the Respondent had vacated the premises and for good measure, when the premises had been padlocked by the Appellant.

133. Be that as it may, it is important to remember that the issues as to whether or not rents for the months for March, April and May 2016, was due and payable, has hitherto been dealt with and addressed, elsewhere hereinbefore.

134. Consequently, what becomes evident is that by the time the Respondent vacated and left the suit premises, there was no rent in arrears or at all.

135. To the extent that there was no rent in arrears and having found and held that there was no liability that attached to the Respondent herein, it suffices to state that the Respondent was therefore entitled to recover and be refunded the amounts deposited on account on security deposit.

136. In view of the foregoing considerations, I therefore come to the conclusion that the learned Chief Magistrate was right in finding and holding that the Respondent was entitled to recover the security deposit in the sum of kes.705, 000/= only.

137. In this regard, the limb of the Judgment relating to refund of the security deposit is was legally sound and correct. Consequently, same be and is hereby affirmed.

Final Disposition

138. Having addressed and analyzed the issues that were isolated and highlighted for consideration and whose details are contained in the body of the Judgment herein, it is now evident and apparent that the instant appeal, save for ground one (1) thereof, is otherwise devoid of merits.

139. Consequently and in the premises, the Appeal *vide* Memorandum of Appeal dated the 18th February 2020, be and is hereby Dismissed. However, as pertains to costs, I find that the Appellant was only successful on two (2) of the named grounds.

140. In view of the partial success, anchored on the two grounds of appeal that were successful, I find and hold that the Respondent shall only be entitled to 2/3 of the cost of the appeal.

141. Finally, in the course of perusing the record of appeal, I found and establish that the sum of kes.705, 000/= only, which was the refund of the security deposit, was indeed deposited in an Escrow account in the joint names of the advocates for the Appellant and the Respondent, respectively.

142. However, given that the said deposit was to act as security pending the hearing and determination of the subject appeal, which has since been determined vide the current Judgment, it is now imperative that the monies obtaining in the said escrow account be released and paid out to counsel for the Respondent for onward transmission to the Respondent.

143. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF FEBRUARY 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Benson - Court Assistant.

Mr. Kipkorir for the Appellant.

Mr. Gikonyo for the Respondent.