



**Mobitel Express Limited v Ambassadeur Investment (K) Limited & 2 others (Environment & Land Case E003 of 2020) [2023] KEELC 17025 (KLR) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 17025 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E003 OF 2020  
EK WABWOTO, J  
MARCH 29, 2023**

**BETWEEN**

**MOBITEL EXPRESS LIMITED ..... PLAINTIFF**

**AND**

**AMBASSADEUR INVESTMENT (K) LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**LLOYD MASIKA LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JAYDIS INVESTMENTS LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. This suit was instituted vide a plaint dated 1<sup>st</sup> July 2020. In the said plaint the Plaintiff prays for judgment against the three Defendants as follows: -
  - a. A permanent injunction restraining the Defendants whether by themselves, their servants, employees and or agents and or any other person/body claiming under it from evicting the Plaintiff's from the suit premises and or interrupting, interfering with or disrupting the Plaintiff's business carried therein or in any other manner whatsoever, depriving the Plaintiff of its quiet right to enjoyment of the said property quiet and peaceful possession occupation and tenancy within the demised premises shop No. 3 on Land Reference Number 209/8688 Nairobi.
  - b. An order of specific performance directed to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to execute a lease agreement between the Plaintiff and 2<sup>nd</sup> Defendants for a period of six (6) years commencing on the date of this Honourable Court's judgment or sworn thereafter.
  - c. Special damages of Kshs 15,902,879.20/- as pleaded in paragraph 24 of the Plaintiff.
  - d. Costs of the suit.



- e. Interest on (c) and (d) above at courts rate and such other or further orders that this Honourable court may deem it fit and just to grant.
2. Those prayers arise from the Plaintiff's contention that at all material times, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were the Landlord and the property manager respectively of Ambassadeur Hotel, the suit property herein being shop No. 3 on Land Reference Number 209/8688 Nairobi.
3. The Plaintiff's suit was contested by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant herein. The 1<sup>st</sup> Defendant in opposition to the same filed a statement of defence dated 28<sup>th</sup> April 2021 while the 2<sup>nd</sup> Defendant filed a statement of defence dated 26<sup>th</sup> July 2021.

**The Plaintiff's case.**

4. The Plaintiff asserts that by a letter of offer dated 3<sup>rd</sup> November 2016 it accepted the said offer and executed the said letter on 6<sup>th</sup> November 2016 before the deadline of 10<sup>th</sup> November 2016. The letter provided as follows:-

“Mobitel Express Limited

100794- 00101

Nairobi

Dear Sirs,

RE: Ambassadeur Hotel- LR.No.209/8688–lease To Mobitel Express Limited

We write further to your wish to lease the above premises in Ambassadeur Hotel. We now set out a summary of the principal terms on which we would recommend to the Landlord to grant you a lease ”.

Please note that these terms will form the contract up and until the lease for the premises is executed and stamped.

1. Premises  
Shop No.3 Measuring 537 sq.ft approximately.
2. Landlord  
Ambassadeur Investments (K) Ltd., P.O. Box 43796-00101, Nairobi.
3. Tenant  
Mobitel Express Limited, P.O. Box 100794- 0010, Nairobi.
4. Lease Term  
The lease will be for a term of Six (6) years.
5. Commencement  
1st December,2016.
6. User  
The premises are to be used for the sole purpose of the shop dealing in electronic business and Safaricom Dealership and change of user will not be permitted during the period of the lease.



The usage of this place will have to be in accordance with the design of the building and in fulfillment of the Nairobi County Government requirement”.

5. It was the Plaintiff's case that on 4<sup>th</sup> November 2016, two cheques were drawn in favour of the 2<sup>nd</sup> Defendant of Kshs 669,650/- and Kshs 719,650/- being deposit and first instalment of rent all adding upto Kshs 1,389,300/-. The electricity bill was also charged to reflect its name and the Plaintiff was allowed access to the said premises. The Plaintiff also averred that it contracted the services of a contractor to carry out partitioning, designing, fixing and fitting of the said shop at a cost of Kshs 8,791,600/- It was also stated that the Plaintiff contracted the services of Wasso Security Services Limited from the time of taking over the shop on 12<sup>th</sup> November 2016 upto 29<sup>th</sup> May 2020 incurring a cost of Kshs 5,633,579.20.
6. It was also the Plaintiff's case that its stay at the premises was curtailed by the 1<sup>st</sup> Defendant who obstructed the Plaintiff's employees who were carrying out the renovations at the shop.
7. The Plaintiff further averred that it filed a complaint in the Business Premises and Rent Tribunal BPRT No. 980 of 2016 seeking inter alia to break upon the shop No. 3 which access was granted pursuant to orders issued on 14<sup>th</sup> December 2016. Later on 29<sup>th</sup> May 2020, Judgment was delivered by the Tribunal in BPRT 980 of 2016 where the Tribunal declined that it lacked jurisdiction to hear the complaint and further directed the premises to remain closed until 30<sup>th</sup> June 2020 and for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant herein to sort out the tenancy issue with the Plaintiff.
8. It was pleaded that owing to the defendants' actions, the Plaintiff had no option but to file this matter to court. The particulars of breach were particularized at paragraph 18 of the plaint.
9. During trial, Ismail Ibrahim Durrow testified as the sole Plaintiff's witness. He relied on his witness statement and bundle of documents filed herein as his evidence in chief. He told the court that after he had been denied access to the shop despite paying for the same, he requested for refund for the rent and damages incurred but none was paid. He reiterated that the 2<sup>nd</sup> Defendant was an agent of the 1<sup>st</sup> Defendant and they had authority from the 1<sup>st</sup> Defendant to manage the premises.
10. On cross-examinations by Counsel for the 1<sup>st</sup> Defendant, he stated that he had met 3 of the directors of the 1<sup>st</sup> Defendant. He conceded that the Plaintiff was currently not in possession of the property since the Plaintiff had left the premises after the ruling of the Tribunal. He also stated that he was not aware if there is any other tenant in the premises. He also conceded that order 7 of ruling delivered by the Tribunal had stated that the Landlord and agent will be at liberty to deal with the property as they deem fit.
11. On further cross-examination, he stated that he had a letter of offer and he conceded of not having any lease agreement since the lease agreement was to be issued at a later date. He also stated that he paid out over Kshs 1,300,000/- vide a cheque which was addressed to Lloyd Masika Limited the 2<sup>nd</sup> Defendant herein. He further stated that he was aware that the 2<sup>nd</sup> Defendant was ready to refund him the money though they had not done so.
12. On cross-examination by Counsel for the 2<sup>nd</sup> Defendant, he stated that he was granted the premises by the 2<sup>nd</sup> Defendant, and that the 2<sup>nd</sup> Defendant never evicted the Plaintiff from the premises since his eviction was done by the 1<sup>st</sup> Defendant. He also stated that the 2<sup>nd</sup> Defendant had indicated that he was the bonafide tenant and he had no issues with the 2<sup>nd</sup> Defendant. He also added that the 2<sup>nd</sup> Defendant never breached any terms of the offer letter neither did they violate or breach his rights at any given time.



13. On re-examination, he stated that he was sent to the 1<sup>st</sup> Defendant by the 2<sup>nd</sup> Defendant. He also stated that he was informed that the current tenant was the 3<sup>rd</sup> Defendant. He also stated that he had sued the 2<sup>nd</sup> Defendant because they never took any action to prevent his eviction from the premises.
14. He also reiterated that he never took possession of the premises illegally but was there pursuant to the letter of offer. He also stated that he had submitted his bill of quantities to quantify the costs he incurred.

**The 1<sup>st</sup> Defendant's case.**

15. The 1<sup>st</sup> Defendant's case is contained in the statement of defence dated 28<sup>th</sup> April 2021, witness statement dated 5<sup>th</sup> May 2021 and bundle of documents dated 5<sup>th</sup> May 2021 together with the testimony of John Kaguma Maina and written submissions dated 23<sup>rd</sup> January 2023.
16. It was the 1<sup>st</sup> Defendant's case that it has never interacted with the Plaintiff at any levels more particularly in the capacity of a tenant and a landlord relationship. It was also contended that the 1<sup>st</sup> Defendant has never come across or shown any offer letter by the 2<sup>nd</sup> Defendant purporting to recommend the Plaintiff as a viable tenant to the suit premises.
17. The 1<sup>st</sup> Defendant denied ever receiving any payment from the Plaintiff in respect to rent of the suit premises. It was also the 1<sup>st</sup> Defendant's case that no permission, authority or consent was sought from them allowing the Plaintiff to occupy the premises. The 1<sup>st</sup> Defendant also averred that there is a new tenant already in occupation of the premises vide a lease agreement entered on 1<sup>st</sup> July 2020 and hence the prayers sought cannot be granted.
18. John Kaguma Maina a director of the 1<sup>st</sup> Defendant testified on their behalf. He relied on his witness statement dated 5<sup>th</sup> May 2021 and the bundle of documents of even date as his evidence in chief.
19. He stated that the Plaintiff was not a tenant and neither had he ever met him.
20. It was his testimony that no lease agreement had ever been signed and neither had he seen any letter of offer. The Plaintiff was never given any formal lease. He never saw any cheques from the Plaintiff. The Plaintiff is not in the premises and the said premises is currently occupied by another tenant.
21. He also stated that they had tried to contact the Plaintiff for a meeting but they did not attend and hence the premises were granted to another third party who had applied for the same. He also stated that they have never received any money from them. He urged the court to dismiss the suit with costs.
22. Upon cross-examination by Counsel for the 2<sup>nd</sup> Defendant, he stated that the Plaintiff's case at the Business Premises and Rent Tribunal was dismissed with costs.
23. He also stated that no demand letter was ever sent to them either by the Plaintiff or the 2<sup>nd</sup> Defendant. He also said that he never saw any bill of quantities. He also disputed the provision of guards as stated by the Plaintiff's witness and stated that they had their own security who guard the premises.
24. On further cross-examination he also stated that they have never denied the Plaintiff access and neither did they evict the Plaintiff at shop number 3. The Plaintiff was never their tenant. He also stated that they are willing to refund the money taken from the Plaintiff.
25. On cross-examination by Counsel for the Plaintiff, he stated that it is not true that the Tribunal dismissed the reference solely on the issue of jurisdiction. He also stated that the Plaintiff signed a letter of offer and also made payment. He also disputed service of the letter of offer that was addressed to them since it was not served.



26. He also stated that he was not aware of ELC Case No. 1568 of 2015 neither had he seen the order. He also stated that no lease was given to the Plaintiff and neither did they bring him to the premises.
27. On re-examination, he stated that there was no priority of contract between Plaintiff and them. He reiterated that he has never received any payment from the Plaintiff. He also stated that any partitioning of the premises together with the provision of security was to be done by the 1<sup>st</sup> Defendant.

**The 2<sup>nd</sup> Defendant's case.**

28. The 2<sup>nd</sup> Defendant's case is contained in its statement of defence dated 26<sup>th</sup> July 2021, witness statement and testimony of its witness Julius Njuguna tendered in court together with 2<sup>nd</sup> Defendant's written submissions dated 3<sup>rd</sup> February 2023.
29. The 2<sup>nd</sup> Defendant averred that the Plaintiff was indeed granted possession of the suit premises after being issued with a letter of offer and it proceeded to renovate, partition and do the necessary adjustments its needed in order to commence business. It was also averred that the 2<sup>nd</sup> Defendant was not privy to the company whose services the Plaintiff sought for the partitioning and the amount they paid for the services.
30. It was also stated that the 2<sup>nd</sup> Defendant is ready to refund the Plaintiff the amount of money paid as deposit and 1<sup>st</sup> quarter rent pursuant to the ruling delivered by Justice S. Okongo on 18<sup>th</sup> March 2021. The 2<sup>nd</sup> Defendant denied any breach and particulars of breach that had been pleaded by the Plaintiff.
31. Julius Njuguna testified on behalf of the 2<sup>nd</sup> Defendant. He relied on his witness statement on record and stated that the no request for refund had been made to them by the Plaintiff. He also stated that they are ready and willing to refund the same.
32. He testified that they had issued an offer letter to the Plaintiff and they were to recommend to the Landlord to grant a lease to the Plaintiff. It was also his testimony that the Plaintiff took possession even though no lease had been executed.
33. He told the court that security was to be provided by the landlord and also any partitioning of the shop had to be done pursuant to an approval from the landlord and in this case no such approval had been granted by the landlord.
34. On cross-examination by the Counsel for the 1<sup>st</sup> Defendant, he told court that the duty of the 2<sup>nd</sup> Defendant was to manage and to let the premises on behalf of the landlord.
35. He also stated that the landlord could not be forced to take another tenant since the said premises had already been issued to another party.
36. When re-examined by the Counsel for Plaintiff he stated that there was no official hand over of the premises to the Plaintiff.
37. He also conceded that indeed they received the deposit and he was the one who had handled the matter. He also stated that they had given access to the Plaintiff to bring in his architect to come up with plans for consideration by the Landlord and that the letter of offer that was issued indicated that they had recommended issuance of lease to the Plaintiff upon complying with some conditions.
38. He also stated that the Plaintiff never declined to receive the fund. He also stated that he had sight of the letter dated 16<sup>th</sup> November 2016 addressed to Kenya Power Limited and was aware of its contents.
39. On re-examination, he stated that the Tribunal had directed the landlord to deal with the premises as it pleases, subsequently upon which the landlord gave his final determination which was to the effect



that they did not want to engage further with the Plaintiff. He also reiterated that the offer did not constitute a lease.

### **The 3<sup>rd</sup> Defendant's case.**

40. The 3<sup>rd</sup> Defendant never filed any pleadings neither did it call any witness to testify at the trial on its behalf and neither did it participate in the proceedings.

### **Plaintiff's submissions.**

41. The Plaintiff filed written submissions dated 23<sup>rd</sup> January 2023. Counsel for the Plaintiff identified the following issues for determination: -
- i. Whether the 2<sup>nd</sup> Defendant was acting as an agent of the 1<sup>st</sup> Defendant.
  - ii. Whether the Defendants are liable for breach of contract.
  - iii. Whether the Plaintiff is entitled to the reliefs sought.
42. On the first issue, Counsel submitted that the 2<sup>nd</sup> Defendant herein was appointed to be the manager of the properties registered under the Umbrella of the 1<sup>st</sup> Defendant herein from 1<sup>st</sup> June 2012 vide the High Court order issued on 29<sup>th</sup> May 2012 and therefore any acts committed by the 2<sup>nd</sup> Defendant holds the 1<sup>st</sup> Defendant vicariously liable.
43. It was also submitted that the 1<sup>st</sup> Defendant is estopped from denying their agent since it is trite law that a principal is jointly and severally liable for the acts committed by its agents within its authority, Reliance was made to the cases of Lucy Mungai Ngigi & 32 others –Vs- National Bank of Kenya & 150 others (2016) ECLR, Garnac Grain Co. Inc –Vs- HMF Faure and Faireclough (1967) 2 ALL ER 353, P.N. Mashru Transport Limited –Vs- Rashyian Apparels Limited (2018) eCLR and R-Vs- Commissioner of Domestic Taxes Large Tax Payers Officer Ex-parte Barclays Bank of Kenya Ltd (2012) eCLR in support of this position.
44. On the second issue, Counsel submitted that the defendants are liable for breach of contract which contract existed between the Plaintiff and the 2<sup>nd</sup> Defendant who acted as an agent of the 1<sup>st</sup> Defendant hence binding it. Counsel cited the following decisions to support this issue; Jackline Njeri Kariuki – Vs- Moses Njung'e Njau (2021) eCLR, Fidelity Commercial Bank Limited –Vs- Kenya Grange Vehicle Industries Limited (2017) ECLR, Prudential Assurance Company of Kenya Limited –Vs- Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005 and Hyrdo Water Well (K) Limited –Vs- Sechere & 2 others (sued in their representative capacity as the officers of Chae Kenya Society) (Civil Suit E212 2019) (2021) KEHC 22 (KLR) (Commercial and Tax) 10 August 2021) Judgment.
45. On whether the Plaintiff is entitled to the reliefs sought, Counsel submitted that the Plaintiff had established a prima facie case in that the Plaintiff has a legal right over the 1<sup>st</sup> Defendant's premises being shop number 3 which arose after the 2<sup>nd</sup> Defendant acting under instructions of the 1<sup>st</sup> Defendant and having authority from the court to manage properties of the 1<sup>st</sup> Defendant herein offered for lease the suit property herein to the Plaintiff and the Plaintiff paid consideration inform of 1<sup>st</sup> quarter rent and security deposit. Counsel submitted that the Plaintiff paid a security deposit of Kshs 669,650/- 1<sup>st</sup> quarter rent with V.A.T of Kshs 719,650/-, 1<sup>st</sup> quarter service charge of Kshs 8,700/- and legal deposit of Kshs 50,000/-.
46. On special damages, it was submitted that the Plaintiff incurred expenses in improving and maintaining the premises evidenced by the list of documents dated 1<sup>st</sup> July 2020.



47. On general damages, Counsel submitted that the Plaintiff had suffered damages as a result of the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and has been able to prove the same in its case.

**1<sup>st</sup> Defendant's written submissions.**

48. The 1<sup>st</sup> Defendant filed written submissions dated 23<sup>rd</sup> January 2023. Counsel outlined three issues for determination by the court;

- i. Whether there existed a Landlord Tenant Relationship between the Plaintiff and the Defendant.
- ii. Whether on the evidence and material placed before court, the Plaintiff has satisfied the conditions upon which a temporary and/or permanent injunction can be granted.
- iii. Whether the Plaintiff is entitled to special and general damages as claimed in its plaint dated 1<sup>st</sup> July 2020.

49. Counsel while outlining the six elements of a contract that make it a legal and binding document, the six elements being, offer, acceptance, consideration, capacity to contract, intention of both parties to carry out their promise and the object (legally and enforceable terms and conditions) submitted that there was no consent neither was there an agreed term between the Plaintiff's and the 1<sup>st</sup> Defendant in whatsoever way as to constitute a contractual agreement between the two parties.

50. It was also submitted that at no point were there instructions forwarded to the Plaintiff with the intention of wanting them to make payments to the 1<sup>st</sup> Defendant. Counsel cited the decision of Judge M.J. Anyara Emukule in Bid Insurance Brokers –Vs- British United Provident Fund (2016) eKLR where the Learned Judge observed the following: -

“In the absence of a written contract between the Plaintiff and the Defendant, the court cannot find that either the Plaintiff or the Defendant “openly expressed” at the time the verbal agreement was entered into, that it could only be terminated by either for either good reason by giving notice which would be reasonable in the circumstances prevailing at the time of such termination and considering the total value and status of the business transacted. I consequently find and hold that in the absence of any evidence of such express tem, there was no such express tem.”

51. It was also submitted that there was no lease agreement executed between the Plaintiff and 1<sup>st</sup> Defendant and in the absence of such an agreement then there can never have been any breach of terms that never existed and which would not adequately be compensated by an award of damages.

52. Counsel also submitted that the prayers sought for injunction cannot be granted because the Plaintiff has failed to satisfy the principles of injunction as cited in the case of Giella –Vs- Cassman Brown & Company Limited (1973) EA 358 and repetitively cited in all the other cases.

53. On whether the Plaintiff is entitled to special and general damages, Counsel submitted that the 1<sup>st</sup> Defendant was never part of the agreement between the Plaintiff and the 2<sup>nd</sup> Defendant and he never received any monies as claimed by the Plaintiff.

54. The 1<sup>st</sup> Defendant concluded its submissions by submitting that the Plaintiff was not entitled to the reliefs sought since there was no written agreement and none was produced by the Plaintiff. The court was urged to dismiss the suit with costs.



### **The 2<sup>nd</sup> Defendant's submissions.**

55. The 2<sup>nd</sup> Defendant filed written submissions dated 3<sup>rd</sup> February 2023. Four issues were outlined for consideration by the court;
- i. Whether there was any lease between the Plaintiff and the 2<sup>nd</sup> Defendant.
  - ii. Whether the 2<sup>nd</sup> Defendant was acting as an agent of the 1<sup>st</sup> Defendant.
  - iii. Whether the Plaintiff demanded or the 2<sup>nd</sup> Defendant denied refunding the rent deposit.
  - iv. Whether the Plaintiff is entitled to the reliefs sought and who bears the costs.
56. On whether there was any lease, Counsel referred to the ruling delivered on 18<sup>th</sup> March 2021 by Justice S. Okongo and submitted that none existed and hence no claim for damages could not lie.
57. It was also submitted that the 2<sup>nd</sup> Defendant was appointed as court appointed managers for the 1<sup>st</sup> Defendant and not agents of the individual directors since the 1<sup>st</sup> Defendant has 8 directors and thus the two (2) directors of the 1<sup>st</sup> Defendant (John Kaguma Maina and Charles Kanyuya Maina) are the ones who interfered with the occupation and leasing of the suit premises as it were. It was also submitted that the 2<sup>nd</sup> Defendant being the court appointed managers and in line with the said court order have been managing the properties of the 1<sup>st</sup> Defendant and as such there created principal agent relationship. Counsel further submitted that the 2<sup>nd</sup> Defendant offered to lease the suit shop to the Plaintiff and the Plaintiff met all the conditions that it had set out in the letter of offer. However, the Plaintiff's occupation of the shop was interrupted by the 2 directors (John Kaguma Maina and Charles Kanyuga Maina) which resulted to the filing of various suits.
58. Counsel submitted that in view of the foregoing, the 2<sup>nd</sup> Defendant should not be faulted for the wrongs committed by the 1<sup>st</sup> Defendant who unfortunately failed to sort out tenancy issues as was directed by the Business Premises Rent Tribunal order of 29<sup>th</sup> May 2020.
59. On the issue of refund of rent, it was submitted that the 2<sup>nd</sup> Defendant is ready and willing to refund the same. The same had not been refunded earlier because the Plaintiff had not reached out to them.
60. On whether the Plaintiff is entitled to the prayers sought, Counsel submitted that the prayer for permanent injunction cannot be granted since its overtaken by events and special damages have also not been proved hence cannot also be granted. The court was urged to dismiss the suit with costs.

### **Analysis and Determination.**

61. I have carefully perused and considered the pleadings filed, testimony of the witnesses and the following key issues arise for determination: -
- i. Whether the letter of offer dated 3<sup>rd</sup> November 2016 was binding upon the parties.
  - ii. Whether the 2<sup>nd</sup> Defendant was acting as an agent of the 1<sup>st</sup> Defendant.
  - iii. Whether the Defendants are liable.
  - iv. Whether the Plaintiff is entitled to the reliefs sought.

### **Issue No. i Whether the letter of offer dated 3<sup>rd</sup> November 2016 was binding upon the parties.**

62. On the first issue, the letter of offer dated 3<sup>rd</sup> November 2016 was signed by T. Mutisya on behalf of the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant as the manager of the said premises made the offer to the Plaintiff on



the terms and conditions that were set out in the letter of offer dated 3<sup>rd</sup> November 2016. The Plaintiff accepted the offer on 6<sup>th</sup> November 2016 and paid to the 2<sup>nd</sup> Defendant security deposit in the sum of Kshs 669,650/- and the 1<sup>st</sup> quarter rent in the sum of Kshs 776,796.90. The lease that was offered to the Plaintiff was for a term of 6 years with effect from 1<sup>st</sup> December 2016. After accepting the offer and making the said payments, the Plaintiff was given access to the suit property so that it could carry out renovations and partitioning of the same for commencement of business on 1<sup>st</sup> December 2016.

63. The letter of offer dated 3<sup>rd</sup> November 2016 was signed by the 2<sup>nd</sup> Defendant and accepted by the Plaintiff. The 1<sup>st</sup> defendant submitted that the letter of offer given to the Plaintiff was not binding in that the 2<sup>nd</sup> Defendant made it clear that it was going to recommend to the 1<sup>st</sup> Defendant to grant the Plaintiff a lease which was not done. However, based on the said offer letter which was accepted by the Plaintiff, the Plaintiff paid rental deposit and was given access to the suit property so that it could carry out renovation and partitioning of the same for commencement of the business on 1<sup>st</sup> December 2016. However as soon as the Plaintiff started renovation and partitioning works, the directors of the 1<sup>st</sup> Defendant locked up the premises and denied it access to the suit property.
64. In the instant case, It is not disputed that the Plaintiff and the 2<sup>nd</sup> Defendant entered into negotiations for leasing a shop at the 1<sup>st</sup> Defendant's premises. I have carefully considered the said letter offer and even though there was no lease, the said letter was binding upon the parties having been signed by the 2<sup>nd</sup> Defendant and accepted by the Plaintiff and it was upon the same that the Plaintiff moved into the premises. There was no evidence that the same was rescinded by either party.
65. Chitty on Contracts, 24th edition, volume 1 at page 21, paragraph 41 states that -
- “In order to decide whether the parties have reached an agreement, it is usual to inquire whether there has been a definite offer by one party and an acceptance of that offer by the other. In answering this question, the courts apply an objective test: if the parties have to all outward appearances agreed in the same terms upon the same subject matter neither can generally deny that he intended to agree.”
66. In the case of Benjamin Ayiro Shiraku v Fozia Mohammed [2012] eKLR where Havelock J (as he then was ) citing Denning LJ in the case of the Combe v Combe (1951) 2 KB 215 stated that:
- “the principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave a promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word.”
67. In the case of Steadman -vs- Steadman (1976) AC 536 at 540 where the court held that:
- “If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid, he will not then be allowed to turn around and assert that the agreement is unenforceable.”(Emphasis mine).
68. The Plaintiff in this case took possession of the premises and incurred costs in partitioning the same and in the circumstances the equitable principles that “equity sees as done what ought to be done” and



“equity looks at intent and not form.” Is applicable. In view of the foregoing, it is the finding of the court that the letter of offer created obligations which were binding to the parties.

**Issue No. ii Whether the 2<sup>nd</sup> Defendant was acting as an agent of the 1<sup>st</sup> Defendant.**

69. The Plaintiff contended that the 2<sup>nd</sup> Defendant herein was appointed to be the manager of the properties registered under the umbrella of Ambassadeur Investment (K) Ltd, the 1<sup>st</sup> defendant herein, with effect from 1<sup>st</sup> June 2012 vide the High Court Order issued on 29<sup>th</sup> May 2012 therefore any acts committed by the 2<sup>nd</sup> defendant, holds the 1<sup>st</sup> Defendant vicariously liable. The 2<sup>nd</sup> defendant is the agent of the 1<sup>st</sup> defendant herein, therefore the 1<sup>st</sup> Defendant is estopped from denying their agent and estopped from denying accounting for all the acts of the 2<sup>nd</sup> defendant. The Plaintiff also referred to several cases in support of the said position.
70. On this issue, the 2<sup>nd</sup> Defendant conceded that indeed being the Court appointed managers and have been managing the properties of the 1<sup>st</sup> Defendant and as such there created principal – agent relationship. It was also contended by the 2<sup>nd</sup> Defendant that being Court appointed managers they offered to lease the suit shop to the Plaintiff and the Plaintiff met all the conditions that it had set out in the letter of offer. It was also submitted that after Judgment was delivered in BPRT No. 980 of 2016, the 2<sup>nd</sup> Defendant tried to reach out to the 1<sup>st</sup> Defendant to sought out the tenancy issues as directed in but the 1<sup>st</sup> Defendant was unwilling to allow the Plaintiff to take possession of the premises.
71. In view of the foregoing and having considered the evidence that was tendered herein together with the following authorities cited by the Plaintiff in his submissions; Lucy Nungari Ngigi & 132 others v National Bank of Kenya & 150 others [2016] Eklr; Garnac Grain Co. Inc –vs- HMF Faure and Fairclough 7 [1967] 2 all ER 353 and P.N Mashru Transport Limited-vs- Rashyian Apparels Limited [2016] Eklr, it is indeed the finding of this court that the 2<sup>nd</sup> Defendant herein was acting as an agent of the 1<sup>st</sup> Defendant herein.

**Issue No. iii Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are liable.**

72. The Plaintiff testified that pursuant to the letter of offer dated 3<sup>rd</sup> November 2016 which he executed on 6<sup>th</sup> November 2016 wherein he sought to lease shop no. 3 belonging to the 1<sup>st</sup> Defendant on Land Reference No. 209/8688 Nairobi he made payment on 4<sup>th</sup> November 2016 of two cheques drawn in favour of the 2<sup>nd</sup> Defendant of Kshs 669,650/- and Kshs 719,650/- being deposit and first instalment of rent all adding upto Kshs 1,389,300/-. The electricity bill was also charged to reflect its name and the Plaintiff was allowed access to the said premises. The Plaintiff also averred that it contracted the services of a contractor to carry out partitioning, designing, fixing and fitting of the said shop at a cost of Kshs 8,791,600/- It was also stated that the Plaintiff contracted the services of Wasso Security Services Limited from the time of taking over the shop on 12<sup>th</sup> November 2016 upto 29<sup>th</sup> May 2020 incurring a cost of Kshs 5,633,579.20.
73. During trial the Plaintiff testified and adduced evidence to the effect that after carrying out substantial works into the premises the 1<sup>st</sup> Defendant locked up the premises and denied it access to the suit property. As a result of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants actions, which were considered malicious, unlawful and resulted in irreparable loss and damage to the Plaintiff. It was submitted that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are liable for breach of contract which contract existed between the Plaintiff and the 2<sup>nd</sup> Defendant who acted as an agent of the 1<sup>st</sup> Defendant hence binding it.



74. From the evidence that was adduced herein and having considered the foregoing, it is the finding of this court that indeed the 1<sup>st</sup> and 2<sup>nd</sup> Defendants cannot escape liability for their actions against the Plaintiff herein and in the circumstances, they are deemed to be liable.

**Issue No. IV Whether the Plaintiff is entitled to the reliefs sought.**

75. The Plaintiff testified that he took possession of the suit premises and had undertaken improvements on the same. It is on the basis of this that the Plaintiff claims special damages of Kshs. 15,902,879.20 together with costs and interest. The Plaintiff also sought for an order of permanent injunction against the Defendants and also an order for specific performance to directed to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to execute a lease agreement in respect to the suit premises.

76. During trial it became evident that the Plaintiff is no longer in the said premises and hence therefore the orders sought for injunction and specific performance cannot be granted.

77. In respect to the prayers for special damages of Ksh 15,902,879.20 the Plaintiff had broken down the same as follows; Security deposit of Ksh 669,650/-, 1<sup>st</sup> Quarter rent of Ksh 719,350/-, Legal Deposit of Ksh 50,000/-, 1<sup>st</sup> Quarter Service Charge Plus VAT of Kh 8,700, Cost of Security guarding services from December 2016 to May 2020 of Ksh 5,633,579.20 and Partitioning and Renovation expenses of Ksh 8,791,600/-.

78. In proving its claim for special damages, the Plaintiff adduced documentary evidence of payments made in respect to Security deposit of Ksh 669,650/-, 1<sup>st</sup> Quarter rent of Ksh 719,350/-, Legal Deposit of Ksh 50,000/-, 1<sup>st</sup> Quarter Service Charge Plus VAT of Kh 8,700/-. The said payment was also not disputed by the 2<sup>nd</sup> Defendant who even had its director testify that they were ready to refund the same. The Plaintiff also produced a copy of the security guarding services from Wasso Security Guarding Services Limited dated 12<sup>th</sup> November 2016 together with invoices and a copy of the statement schedule of accounts dated 15<sup>th</sup> May 2020 which indeed confirmed that payment was made for Ksh 5,633,579.20 for provision of security services from December 2016 to May 2020.

79. In respect to the portioning and renovation expenses, the Plaintiff only produced a copy of the construction contract from Peach point International Limited dated 6<sup>th</sup> November 2016 but no single invoice or receipt was produced to support the same.

80. The law on specific damages is well spelt out. Special damages must not be only be specifically pleaded but must be strictly proved. In the case of Hahn –Vs- Singh (1985) KLR 716, the Court of Appeal held that: -

“special damages must not only be specifically claimed (pleaded) but must also be strictly proved .....for they are not the direct natural or probable consequence of the act complained of and many not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

81. In view of the foregoing, the claim on partitioning and renovation expenses of the premises has not been sufficiently proved. The same is declined. I therefore find that the Plaintiff is only entitled to the special damages of Ksh Security deposit of Ksh 669,650/-, 1<sup>st</sup> Quarter rent of Ksh 719,350/-, Legal Deposit of Ksh 50,000/-, 1<sup>st</sup> Quarter Service Charge Plus VAT of Kh 8,700, Cost of Security guarding services from December 2016 to May 2020 of Ksh 5,633,579.20 which have been proven.

82. The Plaintiffs also prayed for interest on the claim for special damages. Section 26 of the Civil Procedure Act provides as follows:



- 1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.
  - 2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.
83. In the circumstances, I will proceed to award interest at court rates on the sum of Ksh 7,081,279.20 which will be applied from the time of filing this suit until payment in full.
84. On the issue of costs, I direct each party to bear own costs.

**Final orders**

85. Having carefully considered the evidence herein and further owing to the analysis of the issues herein, the Plaintiff's suit partially succeeds. In conclusion, I enter judgement in favour of the Plaintiff against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the following terms.
- a. Special damages of Ksh 7,081,279.20.
  - b. Interest on (a) above at court rates from the time of filing suit until payment in full.
  - c. Each party to bear own costs of the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29<sup>TH</sup> DAY OF MARCH 2023.**

**E. K. WABWOTO**

**JUDGE**

In the presence of: -

Mr. Lakicha for the Plaintiff.

Mr. Mbakaya for the 1<sup>st</sup> Defendant.

Ms. Lucheveleli h/b for Mr. Mwangi for the 2<sup>nd</sup> Defendant.

N/A for the 3<sup>rd</sup> Defendant.

Court Assistant; Caroline Nafuna.

**E. K. WABWOTO**

**JUDGE**

