Case Number:	Environment and Land Case 412 of 2019
Date Delivered:	20 Dec 2021
Case Class:	Civil
Court:	Environment and Land Court at Nairobi
Case Action:	Judgment
Judge:	Joseph Oguttu Mboya
Citation:	Martin Ng’ang’a Kanyingi v Belgravia Services (K) Limited [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 412 OF 2019

MARTIN NG'ANG'A KANYINGI.....PLAINTIFF

-VERSUS-

BELGRAVIA SERVICES (K) LIMITED.....DEFENDANT

JUDGMENT

INTRODUCTION

1. Vide Plaint dated the 19th of December 2019, the Plaintiff herein impleaded the Defendant and sought for the following Reliefs;

*i. A Declaration that the Plaintiff is in lawful occupation of the suit premises, namely**, House Number 4, on L.R. NO. 192/60, as a tenant.***

*ii. An Order for permanent injunction restraining the Defendant whether by itself or its servants or agents or otherwise howsoever from evicting the Plaintiff from the suit property known as **House Number 4, on L.R. NO. 192/60,** Wind Ridge, Karen Nairobi or interfering with the Plaintiff's quiet enjoyment of the suit premises in any manner whatsoever.*

iii. Kshs. 27,606,510.42

iv. Interest.

v. Costs.

2. Upon being served with the Plaint and summons to enter appearance, the Defendant herein proceeded to and entered appearance and thereafter filed a Statement of Defence dated the 21st of February 2020, albeit filed on the 26th of February 2020.

3. For the avoidance of doubt, the Defendant herein controverted the claims and/or allegations contained in the body of the Plaint and same further made averments, which essentially signaled that the Plaintiff's tenancy over and in respect of the suit property was terminated vide letter dated the 17th of June 2019, and that despite the lawful termination of the lease, the Plaintiff herein had continued to remain in occupation of the suit premises.

DIRECTIONS BY THE COURT

4. Pursuant to and in line with the consent to proceed and/or have the matter determined on the basis of Witness statements and documents, the Court thereafter gave further directions and granted liberty to any of the parties to file and serve additional documents, where appropriate.

5. Suffice it to say, upon the foresaid directions, the Plaintiff filed Supplementary lists and Bundles of documents dated the 18th of March 2021 and 23rd of June 2021, respectively.

6. On the other hand, the Defendant herein not only filed further lists and bundle of documents dated the 30th of April 2021, but also filed a Supplementary witness statement dated the 11th of June 2021.

7. For the avoidance of doubt, all the aforesaid documents and witness statements, which were agreed to be relied upon, by dint of the Court order made on the 8th of February 2021, form part of the Court record.

EVIDENCE BY THE PARTIES

THE PLAINTIFF'S EVIDENCE

8. The Plaintiff herein filed and relied upon a witness statement dated the 19th of December 2019 and made the following averments;

9. On or about the year 2016, the Plaintiff was looking for a house to rent and in the course of his search, the Plaintiff came across houses under the management or ownership of the Defendant on L.R. NO. 192/60, Windridge, Karen in Nairobi.

10. It was the Plaintiff's further averment that after coming across the said houses, same made inquiries from the caretaker of the premises, who thereafter informed him that House Number 5, was indeed available and could be rented to and in favor of the Plaintiff.

11. Further, the Plaintiff also averred that after some time, the caretaker of the premises alerted him that House number 5, which was hitherto available, had been taken or otherwise rented out to someone else.

12. On the other hand, the Plaintiff further stated that the same caretaker informed him that House Number 4 was available and same could be rented to the Plaintiff.

13. Pursuant to the foregoing, the Plaintiff has further stated that same therefore made arrangements with the caretaker and/or Defendant's Representatives, and therefore inspected the said House Number 4, to authenticate and/or confirm whether same was in a tenantable and/or habitable situation.

14. According to the Plaintiff, after the inspection, certain defects were noted and/or observed in the said house, and as a result of the defects, a snag list depicting the defects was prepared and agreed upon by both the Defendant's representative and the Plaintiff herein.

15. Besides, the Plaintiff avers that after the snag list was prepared, the Defendant undertook and Covenanted to carry out and conclude the repairs in terms of the snag list.

16. Be that as it may, the Plaintiff has also stated that other than the defects which were contained in the snag list agreed upon, same was also keen to carry out and/or undertake certain modifications in the said house to make the house fit his taste and own liking.

17. As a result of the intended modifications, which were clearly for the Plaintiff's own liking, the Plaintiff says that the aspects and/ or areas of concern were clearly identified and marked out.

18. Nevertheless, the Plaintiff avers that he thought that the identified areas for modification, which were to make the house to his liking, were going to be simple and normal repairs that could be carried out and/or achieved within a short period.

19. However, the Plaintiff has averred that despite the defects identified in the snag list and the other areas of modifications, the latter which were for the Plaintiff's own liking, same proceeded to and signed the lease agreement dated 1st of October 2016.

20. On the other hand, the Plaintiff has contended that the Defendant's employees and/or staff delayed in making the repairs and as a result of the delay, same implored the Defendant organization to allow same to engage and use his construction company to undertake the repairs in question.

21. It is the Plaintiff's further statement that after he mentioned the issue of engaging his own company to undertake the repairs to the Defendant's representative, namely Mr. Phillipe Cauvier, same received verbal instructions to carry out and undertake repairs

and that on the 3rd of October 2016, the Plaintiff commenced to carry out the repairs.

22. The Plaintiff further averred that in the course of carrying out the repairs, he informed and kept the Defendant's representatives abreast and posted of the status of the repairs/renovations and also the monies that were spent.

23. Besides, the Plaintiff herein has further averred that in the course of carrying out the repairs, he also wrote a letter to the Defendant's representative, whereby same pointed out in the same letter dated the 3rd of October 2016, that the repairs which were to be undertaken were the landlord's obligation and therefore the lease should only commence when all the works were concluded.

24. The Plaintiff further averred that his letter under reference, namely the letter dated 3rd of October 2016, was received by one, Asumpta, for and on behalf of the Defendant.

25. According to the Plaintiff, the letter under reference and particularly the contents thereof, was never disputed and/ or contested.

26. On the other hand, the Plaintiff has further averred that after he commenced to carry out the repairs, using his own company, same discovered that the repairs were far more serious than what was captured and agreed upon in the snag list.

27. Be that as it may, the Plaintiff has proceeded to state that in the course of carrying out the repairs, he also found out that there were serious internal defects which affected the master bedroom, and particularly, the bathtub as well as the floor of the said bathroom.

28. The Plaintiff further testifies that as a result of the nature and seriousness of the defects noted, same called and informed the Defendant's representative, Mr. Phillipe, who agreed and/or promised to send an architect, to authenticate the extent and nature of the defects, which had been discovered by the Plaintiff.

29. Nevertheless, the Plaintiff avers that the Defendant's representative, did not send the architect as promised or at all.

30. To the contrary, the Plaintiff has stated that the Defendant's representative surprised him when he was notified that the repairs he was undertaking were unlawful and in violation of the terms of the lease signed on the 1st of October 2016. For clarity, the information pertaining to the impugned violation was disseminated vide the Defendant's letter dated the 21st of December 2016.

31. It is the Plaintiff's further averment that upon receipt of the letter dated 21st December 2016, he responded thereto vide his letter dated 22nd December 2016, which raised various issues and that the repairs which were being complained of, were necessary because of the poor workmanship, for which the Defendant was responsible.

32. According to the Plaintiff, his letter dated 22nd December 2016, was not responded to and thus the repairs continued until the year 2017, albeit with the knowledge and concurrence of the Defendant.

33. It is the Plaintiff's further position that same finally moved into and took possession of the suit premises in November 2017, which is approximately 11 months after the signing and execution of the lease agreement.

34. Be that as it may, the Plaintiff has stated that during the entire period, when same was not in occupation of the premises, same continued to and indeed paid the requisite monthly rents, as well as the security, which was demanded by the Defendants and which was in any event, a term of the lease agreement signed on the 1st of October 2016.

35. It is the Plaintiff's further statement, that in his humble view the duration which was taken while carrying out the repairs, amounting to a period of 11 months was to be compensated by extension of the lease period.

36. On the other hand, the Plaintiff has also testified that on or about January 2017, a discussion and/or an arrangement arose, between himself and one of the Defendant's representatives, whereby the Plaintiff expressed his desire to purchase the suit premises and that after various negotiations, the purchase price was agreed **at Kshs. 85,000,000 only.**

37. Nevertheless, the Plaintiff has proceeded to state that the intended sale and for which an agreement was indeed prepared, fell through and/or collapsed.

38. It is the Plaintiff's further position that despite the fact that the repairs and renovations, which were carried out in respect of the suit premises, were known to the Defendant, the Defendant herein revisited the issue vide their letter dated 17th day of June 2019 and indeed purported to terminate the lease between the parties.

39. It was the Plaintiff's further statement that upon receipt of the Defendant's Advocate letter dated the 17th day of June 2019, expressing the Defendant's desire to terminate the tenancy, same responded to the said letter through his own advocates vide letter dated 6th August 2019, whereby the Plaintiff reiterated and/or pointed out that the suit premises were not in a habitable state at the time or point of the handover.

40. Be that as it may, the Plaintiff further averred that the Defendants upon receipt of his advocate's letter dated 6th August 2019, responded thereto and insisted that the tenancy relationship between the Plaintiff and the Defendant had been terminated and the terms of the letter dated 17th day of June 2019, terminating the lease remained in force and was effectual.

41. Based on the flurry of correspondence exchanged between the Plaintiff and the Defendant, it is the Plaintiff's further statement that a meeting was arranged between the Plaintiff's and Defendant's representative to iron out the issues of dispute namely, the alleged violation of the lease agreement as well as costs incurred by the Plaintiff during and in the course of the various repairs to the suit premises.

42. However, the Plaintiff has further stated that the meeting, which was held by the parties, did not resolve the issue of the cost of the repairs.

43. To the contrary, the Plaintiff has averred that even though the issue of cost of the repairs had not been agreed upon, the Defendant's herein issued another termination notice vide letter dated 22nd November 2019, whereby the Defendant reiterated the previous notices and indicated that the tenancy would be terminated by the 30th November 2019 and also stated that the issues of the repairs would be treated separately from the issue of tenancy.

44. Other than the foregoing, the Plaintiff further stated that the Defendant herein further sent a letter dated 28th November 2019 through the Defendant's Advocate whereby the Defendant repeated and remained adamant that the repairs which were carried out and/or undertaken by the Plaintiff were never authorized by the Defendant and therefore the claim based on same, was unfounded.

45. Be that as it may, the Plaintiff has stated that the repairs which were carried out were with the knowledge and understanding of the Defendants and in the premises, the expenses incurred were with the Defendant's express approval.

46. In view of the foregoing, the Plaintiff has therefore laid a claim to be refunded the total monies which were spent towards the repairs in question amounting to Kshs. 22,780,715.42 Only, inclusive of the Wages, that were paid to the workers.

47. Besides, the Plaintiff has also sought for refund of Kshs. 4, 500,000, Only, which was paid to the Defendant on account of deposit and rents for the period of 13 months, being the period when the Plaintiff did not take possession of and/ or occupy the suit premises.

THE DEFENDANT'S EVIDENCE

48. On her part, the Defendant herein has filed a witness statement through one of its representatives, namely Phillipe Cauvier, dated the 22nd of February 2021, which is similarly a lengthy statement.

49. Nevertheless, it is the Defendant's position that on or about June 2016, the Plaintiff herein expressed an interest in renting one of the Defendant's houses situate on L.R. NO. 192/60, known as Windridge, Karen.

50. Based on the interest of the Plaintiff to rent one of the houses under the management of the Defendant, a bundle of

correspondence were exchanged vide email, leading to a consensus that the Plaintiff would be allowed to rent House Number 4.

51. Based on the foregoing, the Defendant's witness has averred that a joint inspection was thereafter arranged and the Plaintiff was able to view and inspect the premises in question.

52. It is also the Defendant's representative's position, that during the course of the viewing/inspection, certain defects were noted in the premises and a snag list, containing the defects was thereafter prepared and signed/agreed upon by both the Plaintiff and the Defendant's representative,

53. It is the Defendant's witness further position that after preparation of the snag list, the Defendant herein proceeded to and carried out the itemized defects, which were remedied and concluded.

54. As a result of the completion of the repairs, which were pointed out and agreed upon between the Plaintiff and Defendant, the Defendant's witness further stated that a formal lease agreement was signed and executed by the parties on 1st of October 2016.

55. It is the Defendant's witness statement that as at the time of the execution of the lease agreement, on the 1st of October 2016, the house was in a habitable/tenantable condition therefore the Plaintiff was at liberty to take possession albeit at his pleasure.

56. It is the Defendant's witness statement that all the repairs that fell within the mandate of the Defendant were carried out and/or undertaken to the satisfaction of the Plaintiff and it is based on the situation, that the Plaintiff agreed and indeed signed the lease agreement.

57. On the other hand, the Defendant's witness has further averred that other than the defects which were agreed on in the snag list, the Plaintiff herein also sought to carry out some modifications to the house albeit to suit his own taste and/or liking. But the witness has pointed out that those were not part of the defects captured in the snag list.

58. On the other hand, the Defendant's witness has further stated that when the Plaintiff proceeded with the various repairs, which had been pointed out by the Plaintiff to be for his own liking, the Plaintiff proceeded deep to injure the walls of the premises and as a result of the activities by the Plaintiff, the Defendant was constrained to issue a notice to the Plaintiff identifying breach and/or violation of the terms of the lease agreement.

59. It is the Defendant's witness further statement that the Plaintiff did not desist from carrying out the works in the suit premises and as a result of the reluctance by the Plaintiff to stop the offensive works, the Defendant further issued a lease violation notice on **the 21st of December 2016.**

60. Be that as it may, the Defendant's witness has further averred that somewhere in January 2017, the Plaintiff herein expressed a desire to purchase the suit premises and based on the expression of interest, discussions were held between the parties, culminating into an agreement on the purchase price. For clarity, the purchase price was agreed at the sum of Kshs. 85,000,000 Only.

61. Nevertheless, the Defendant's witness has further stated that the Sale agreement fell through and/or collapsed, because the Plaintiff was not keen to comply with the terms of the sale agreement.

62. Based on the foregoing, the Defendant's witness stated that the Plaintiff remained in occupation of the suit premises based on the Lease Agreement, which had been extended on 1st of October 2018, for 2 years, and not as a purchaser or owner of the suit premises.

63. On the other hand, the Defendant's witness has pointed out that though the Plaintiff remained in occupation of the suit property as a tenant, same continued to violate the terms of the Lease Agreement and this led to the issuance of termination notices, including the notice dated the 17th day June 2019, as well as the notices dated 22nd August 2019 and 22nd November 2019, respectively.

64. It is the Defendant's witness further position that the extensive repairs and/or renovations which are being claimed by the Plaintiff herein, were outside the agreed snag list and in any event, related to Plaintiff's request to make the house befit his own

liking and taste.

65. It is the Defendant's statement that the repairs in question were neither approved nor authorized by the Defendant and therefore no legitimate claim can lie against the Defendant.

66. On the other hand, the Defendant's witness has also stated that the Plaintiff herein ceased to be a lawful tenant in the suit premises effective the 30th of November 2019, when same was issued with a Notice of termination which brought the entire tenancy to an end.

67. Consequently, the Defendant's witness avers that the Plaintiff is thus a trespasser in the suit property.

68. In any event, the Defendant's witness has further stated that the suit property was indeed sold to and transferred in favor of a third party, namely Mr. John Mahinda Gaita, who became the lawful owner in respect of the suit property with effect from the 26th of November 2019.

69. Finally, the Defendant's witness has stated that the repairs which the Plaintiff is claiming refund for, were neither authorized nor approved by the Defendant and the Defendant herein is a duly incorporated company and therefore, any actions for and on behalf of the company, must be under the hand/seal of the company and not otherwise.

70. As pertains to the claim for refund of Kshs. 4,500,000 Only, representing the security deposit and rent for a duration of 13 months, being the period which the Plaintiff claims not to have been in possession of the suit premises, it is the Defendant's witness position that the claim therein is misconceived and thus not payable.

71. Based on the foregoing, the Defendant has sought that the Plaintiff's suit be dismissed with costs to the Defendant herein.

SUBMISSIONS

72. After the consent entered into on the 8th of February 2021, where the parties agreed to proceed on the basis of the witness statements and the bundles of documents, the parties also agreed to file and exchange written submissions.

73. Pursuant to the foregoing, the Plaintiff filed two sets of written submissions, the first one dated the 16th of April 2021 and the latter dated 8th June 2021.

74. On her part, the Defendant filed her written submissions on the 30th of April 2021.

75. For clarity, the submissions herein form part of the record of the Court and same shall be considered and utilized, as and where appropriate.

ISSUES FOR DETERMINATION

76. Upon reviewing the totality of the pleadings filed by the parties herein, the witness statements and the bundle of documents which were agreed upon as well as the written submissions exchanged between the parties, **the following issues are germane for determination;**

i. Whether the Plaintiff is a lawful tenant or a trespasser in the suit premises.

ii. Whether the suit premises were in a tenantable state as at the 1st of October 2016 or otherwise.

iii. Whether the repairs and/or works that were undertaken and/or carried out by the Plaintiff were authorized and approved by the Defendant.

iv. Whether the Plaintiff is entitled to the Reliefs at the foot of the Plaint.

ANALYSIS AND DETERMINATION

ISSUE NUMBER ONE

Whether the Plaintiff is a lawful tenant or a trespasser in the suit premises.

77. It is common ground that the Plaintiff herein was searching for a suitable house to rent and/or occupy and in the course of searching for his dream house, the Plaintiff identified House Number 4, situate on the suit property which was under the management and/or ownership of the Defendant.

78. It is also settled that having identified the suit premises, as the ideal house for his occupation, the Plaintiff reached out to and/or engaged the Defendant's representative and/or caretaker, with a view to inspecting the suit premises.

79. Upon the inspection of the suit premises, the Plaintiff was satisfied therewith, (subject to certain defects) which shall be addressed hereinafter, and which form the basis for the Second issue for determination.

80. Suffice it to say, that after the various endeavors between the Plaintiff and the Defendant, a formal Lease agreement was crafted and thereafter executed by both parties on the 1st of October 2016.

81. It is also not in dispute that at the time of execution of the Lease agreement, both parties thereto read, understood or otherwise appreciated the terms and import of the Lease agreement.

82. Suffice it to say, that the relationship between the Plaintiff and Defendant was captured and/or contained in a written document, namely, the lease dated the 1st of October 2016 to which either party was bound.

83. Pursuant to the lease agreement, the Defendant granted to and in favor of the Plaintiff a lease term of 2 years commencing 1st of October 2016 and terminating on even date in October 2018.

84. Nevertheless, what is important is that the initial lease dated the 1st of October 2016, and the subsequent lease which was negotiated and entered into on the 1st of October 2018, contained clauses for termination of the Lease, in the event of breach and/or violation of the terms and conditions of the lease agreement.

85. According to the Defendant herein, the Plaintiff was in breach of various clauses of the Lease agreement and as a result of the breach, the Defendant issued and served three sets of termination notices, which were duly received and acknowledged by the Plaintiff.

86. For clarity, the termination notices were issued as hereunder;

i. Letter dated 17th June 2019.

ii. Letter dated 20th August 2019.

iii. Letter dated 22nd August 2019.

iv. Letter dated 22nd November 2019.

v. ***Letter dated 28th November 2019****.*

87. It is important to note that all the foregoing letters were received and acknowledged by the Plaintiff, and same were indeed responded to as hereunder;

i. Letter dated 6th of August 2019.

ii. Letter dated 23rd August 2019.

iii. Letter dated 227th August 2019.

iv. Letter dated 18th November 2019

v. Letter dated 26th November 2019.

88. Suffice it to say, that the termination letters which were issued by and on behalf of the Defendant, were premised and/or founded on the breach of the terms of the lease agreement and indeed same, identified the offensive works by the Plaintiff as the basis of the violations complained of.

89. It is conceded that the Plaintiff herein upon receipt of the termination letters, wrote back and answered the contents of same.

90. Nevertheless, the question that needs to be addressed is whether the terms of the Lease Agreement that were signed and executed between the parties provided a clause for the letters by the Plaintiff herein and whether the response by the Plaintiff would be deemed to neutralize and/ or negate the termination notices.

91. In my humble view, the breaches that were pointed out in the termination notices, could only be remedied by rectification and thereafter execution of an addendum, to confirm rectification and rescission of the termination notice. This was not done.

92. On the other hand, the termination notices which were issued by the Defendant and which were geared towards terminating the tenancy, have also not been challenged, impeached and/ or impugned. For clarity, neither of the said notices is the subject of the instant suit.

93. Owing to the foregoing, it is therefore my finding and holding that the validity, legality and effectiveness of the notices to terminate the Plaintiff's tenancy have not been questioned, challenged and/ or impugned, or at all.

94. In the premises, it is convenient to assume that having not been challenged, the Plaintiff herein impliedly agreed to and/or concedes to the effectual termination of his tenancy in the suit premises.

95. Notwithstanding the foregoing, it is my observation that a termination notice, which is issued in accordance with the contractual document, in this case the Lease Agreement, takes effect unless same has been rescinded by the Issuer, in this case, the Defendant and/or challenged before court of law.

96. Consequently, and premised on the foregoing, the Plaintiff herein ceased to be a lawful tenant in the suit premises effectively from the 30th of November 2019, in terms with the termination notice issued on the 22nd day of November 2019, which merely reiterated the previous termination notices issued, namely, the one dated the 17th day of June, 2019.

97. Assuming that I am wrong in the foregoing observation, (*which I believe not*), there is also evidence that the suit property was indeed sold to one Mr. John Mahinda Gita, who thereby became the registered owner of the suit property by virtue of the lease executed on the same 26th November 2019 and which was produced before the court as an exhibit, at pages 206-239 of the Defendant's bundle of Documents.

98. In so far as the suit premises have since been sold and transferred in favor of a 3rd party, who now holds the title to and in respect thereof, is not possible to sanction the Plaintiff's claim to be a lawful tenant in the suit premises, as against the Defendant

herein, who has since passed over Ownership of the premises.

99. Suffice it to say, that the Plaintiff herein did not contest the fact that the suit property was indeed sold and transferred in favor of one John Mahinda, who is therefore the effective owner and/ or Proprietor thereof.

100. Besides, I have also not come across any document and/or averment that the Plaintiff herein has entered into and/or executed any Lease agreement with the current registered owner of the suit premises to warrant a claim for being a Lawful tenant in the suit premises.

101. Based on the foregoing, I find and hold that the Plaintiff is not lawfully in occupation of the suit premises as a tenant or at all. Consequently, and in this regard, I decline to make a declaration in the manner sought in the Plaint.

ISSUE NUMBER TWO

Whether the suit premises were in a tenantable state as at the 1st of October 2016 or otherwise.

102. After the Plaintiff herein identified the suit premises as the ideal house for purposes of his renting and after engaging the caretaker of the suit premises, the two sides agreed to and indeed carried out a joint inspection of the suit premises.

103. It is also common ground that after the joint inspection was carried out, the parties prepared a snag list which contained the details of the defects that were noted and agreed upon, and the details of the defects which were identified and agreed upon are contained vide the email correspondence, exchanged between the Plaintiff and the Defendant's Representatives at pages 27-31 of the Plaintiff's own bundle.

104. Suffice it to say, that the Defendant herein proceeded to and undertook the repairs in terms of what was agreed upon and contained in the snag list. Essentially, that is the import of the email correspondence and exchange between the Plaintiff and Defendant Representative at the foot of pages 27-31 of the Plaintiff's bundle.

105. On the other hand, it is important to note that after the issue of the snag list had been addressed or better still, ceased to be an issue of concern, the Plaintiff herein by himself and out of his own volition, indicated that there were some other repairs and/or modifications, outside the snag list but which were meant to suit the Plaintiff's own taste, life and/or lifestyle.

106. For clarity, see the Plaintiff's own statement at Paragraph 9 where the Plaintiff states as hereunder;

"……...there were some modifications that I wanted to make to the house for my own liking. These were clearly identified and marked out."

107. From the foregoing statement, it is evident that there were other defects that were noted and captured in the snag list, which were to be done and were indeed done by the Defendant as the landlord.

108. On the other hand, it is also important to note that after the exchange of the email correspondence between the Plaintiff and Defendant's representative, which have been alluded to in the preceding paragraph, the issue of the repairs was terminated and ceased to be an agenda and parties thereafter moved to preparation of the lease agreement.

109. Similarly, vide the email correspondence, the Plaintiff herein thereafter requested for the Lease document, which was sent and/or dispatched unto him, and after he read through same, the Plaintiff expressed satisfaction with the terms and the conditions therein.

110. In fact, the only other comment the Plaintiff had, was that in lieu of 2-year lease, he proposed that same be made a 3-year lease and implored the Defendant to adjust the duration of the lease.

111. Nevertheless, the Defendant's representative wrote back to the Plaintiff on the issue of duration of the lease and confirmed that the Defendant's leases are circumscribed to 2 years and that when the time lapses, the Defendant would be amenable to renewal/extension. ***(See pages 32-34 of Plaintiff's own bundle).***

112. Based on the exchange, which now concerned the duration of the lease as opposed to repairs and upon being convinced on the duration of the lease, the Plaintiff remarked as hereunder;

"I have gone through the list and I would like to request we do a 3-year lease as we had agreed earlier. The rest is okay with me, and if this is agreeable by all parties, you can let me know when the document is ready for signing. Please note we are short of time."

Kind Regards,

Martin.

113. From the foregoing, it is evident that the Plaintiff was satisfied with the terms of the intended lease save for the duration and indeed asked for the final copy for his execution and signing.

114. Certainly, a final copy of the lease document was indeed generated and same was thereafter shared with the Plaintiff herein, who proceeded to and executed the lease agreement without any reservation or at all.

115. Having duly executed the lease agreement dated the 1st of October 2016, the Plaintiff is taken to have confirmed that the defects, which were in the suit premises and which was being rented out to and in favor of the Plaintiff had been attended to and same was therefore in a tenantable status, and the execution thereof could only confirm as much, no less no more. ***See clause 12(k) of the agreement.***

116. In any event, once parties to a contract execute the contract, it is taken that same are bound by the said contract and that whenever a dispute does arise, the dispute can only be resolved by interpreting the contract document, relying on and/or utilizing the statutory canons for interpreting a written contract, deed and/or document.

117. In support of the foregoing observation, I can do no better than to quote the holding of the Court of Appeal in the case of **The Speaker, Kisii County Assembly & Others vs James Omariba Nyaoga [2015] Eklr** where the Court 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, Halsbury'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."

118. In my humble view, having executed the lease agreement, the Plaintiff herein cannot *ex post facto*, now be heard to contend that the suit premises were not tenantable and/or inhabitable at the point in time, when same executed the contract and duly accepted that the premises were consumable.

119. To accept the contention and/or position by the Plaintiff herein as captured by the unilateral letters propagated by the Plaintiff, would be tantamount to allowing the Plaintiff to alter the terms of the lease agreement, albeit through the backdoor.

120. **To my mind, the law frowns upon such conduct and I am not on my own, prepared to commit a travesty to justice. Consequently, I find and hold that the suit premises, were in a tenantable state, when the Lease Agreement was executed and that much, is attested to by Clause 12k, thereof.**

ISSUE NUMBER THREE

Whether the repairs and/or works that were undertaken and/or carried out by the Plaintiff were authorized and approved by the Defendant.

121. Prior to the execution of the lease agreement, the parties herein conducted a joint inspection pertaining to and/or concerning the suit premises, which was the basis of the intended tenancy between the parties.

122. Subsequently, a snag list, containing all the identified defects, was agreed upon and the Defendant was thereafter mandated to undertake the repairs beforehand.

123. It is important to note and recall that the repairs which were contained in the snag list were to be carried out and were indeed carried out by the Defendant and none was delegated to the Plaintiff or at all.

124. Thereafter, the parties executed the lease agreement dated 1st of October 2016 which defined the clauses governing the lease, and in particular clause 10(g) provides as hereunder;

"Not to make nor permit to be made alterations in or addition to the said premises nor to erect any fixtures therein nor drive any nails, screws, bolts or wedges in the floors, walls or ceilings thereof without the consent in writing of the landlord first obtained and on termination of the tenancy, to make good the removal of any such nails, screws, bolts or wedges."

125. The foregoing clause barred and/or otherwise forbade the Plaintiff, as the tenant, from carrying out and undertaking any alterations and/or adjustments to the suit premises or at all.

126. To my mind, the Plaintiff could however carry out and/or undertake any adjustments, alterations or additions to the suit premises albeit with the consent, permission, authority or sanction of the Defendant, provided that such sanction is reduced into writing and signed by the parties chargeable thereto with the document.

127. On the other hand, the Plaintiff herein was also at liberty to enter into and sign an addendum with the Defendant whereby certain repairs, additions or adjustments would be allowed and such a document would become an addendum to the lease agreement.

128. In respect of the subject matter, there is no further agreement, document and/or addendum to the lease agreement which varied and/or superseded the contents of clause 10 (g) of the Lease agreement and which therefore would have allowed the Plaintiff to do the impugned adjustments.

129. In support of the foregoing holding, I restate and adopt the observation by the Court of Appeal in the case of **National Bank of Kenya Ltd vs Pipeplastic Samkolit Ltd & Another [2001] eKLR** where the Court observed as hereunder;

"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".

130. As far as alterations, adjustments and/or additions to thee suit premises were concerned, the Plaintiff herein was bound by the terms of the lease agreement. Consequently, the Plaintiff could not carry out any such alterations, unless same procured and/or obtained the requisite approval in writing.

131. On the other hand, the Plaintiff has also contended that the alterations to the suit premises, were carried out with the approval of the Defendant.

132. Having made the foregoing assertion, the Plaintiff was thereby obliged to tender evidence of such approval, which in any event, could only be in writing and dully signed by the Defendant or his authorized agents.

133. At any rate, it is important to note that the Defendant being a limited liability company, same can only act or authorize instructions in writing and not otherwise. Perhaps, I need to add that the Defendant, as a company has no mouth to verbalize any instructions or acceptance.

134. In short, the burden of proving that any approvals were issued for purposes or undertaking the alterations or adjustments, laid on the Plaintiff and not otherwise. ***(See Sections 107 and 108 of the Evidence Act, Chapter 80, Laws of Kenya.)***

135. On the other hand, it is also important to take cognizance of the decision in the case of **Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi [2014] eKLR** where the Court stated as hereunder;

"On perusing the judgment and hearing Mr. Mwangi, what comes through clearly and was repeated several times over, was the position that since the appellant did not deny the facts stated in the affidavits of the 1st respondent then he was deemed to have admitted those facts. With respect, that was entirely a wrong approach to this case and the entire practice of civil litigation.

. Whether or not the appellant had not denied the facts by affidavit or defence , when the 1st respondent came to court, he was bound by law and practice to lay the evidence to support existence of the facts he pleaded. That is what we understand Section 108 of the Evidence Act to be demanding of a party like the 1st respondent that:

"The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side."

136. The Plaintiff herein on whom the burden of proof laid, did not avail the requisite approval and in this regard, my answer to whether any approval was given is in the negative.

137. Notwithstanding the foregoing, it is also important to observe that the massive adjustments or works that were carried out by the Plaintiff in the premises, without approval of the Defendant, were the basis of the various notices which were issued to and against the Plaintiff, details which were enumerated while discussing issue number one herein before.

138. In any event, the impugned works which were carried out by the Plaintiff herein were also the base of the Defendant's letter issued on the 26th of December 2016, whereby the Defendant indicated that the activities which were being undertaken by the Plaintiff were neither authorized nor sanctioned by the Defendant herein.

139. On the other hand, the Defendant also pointed out to the Plaintiff that the offensive works had also not received approval from the Nairobi City County Government, in compliance with the provisions of the *Physical Planning Act, now repealed and replaced by Physical and Land Use Act 2019.*

140. Suffice it to say, that the lease violation notice dated 21st December 2016, was duly received by the Plaintiff and was responded to by the Plaintiff's own letter dated 22nd December 2016 at pages 57 and 58 of the Plaintiff's bundle. However, the major point is that the said lease violation notice was neither withdrawn nor rescinded.

141. If anything, the lease violation notice dated 21st December 2016, has also not been challenged or impugned by any court proceedings, let alone the subject proceedings.

142. Based on the foregoing, it is difficult to understand the foundation and/or premise upon which the Plaintiff can bravely contend that his activities were duly approved and/or sanctioned by the Defendant.

143. Unfortunately for me, I have rumbled through the Documents running up to 211 pages, as well as the subsequent Supplementary bundles by the Plaintiff, but I have found none. Perhaps if any existed, it was withheld from the court.

ISSUE NUMBER FOUR

Whether the Plaintiff is entitled to the Reliefs at the foot of the Plaint.

144. The Plaintiff herein has sought for a declaration that same is lawfully in occupation of the suit premises as a tenant. However, the same Plaintiff is the one who has availed to court various copies of the termination notices including, but not limited to the letters ***dated 17th June 2019, 20th August 2019, 22nd August 2019t, 22nd November 2019, 28th November 2019 as well as 10th December 2019. See pages 101, 103, 105, 111, 113 and 115 of the Plaintiff's own bundle.***

145. In the premises, the prayer for the declaration sought, is certainly made in vacuum.

146. On the other hand, the Plaintiff has also sought for an order of permanent injunction to issue against the Defendant herein from interfering with the Plaintiff's occupation, possession and use of the suit premises.

147. Assuming that at the time the suit was filed, the Defendant was still the registered owner of the suit premises, can a tenant whose tenancy has been terminated in accordance with the lease agreement, accrue and/or attract an order of permanent injunction against the registered owner of the property"

148. To my mind, the issuance of such an order would amount to an absurdity. In this regard, I would not be disposed to grant such an order.

149. Nevertheless, it would take proof of a very special and peculiar circumstance to warrant an order of permanent injunction, to issue against the registered owner of the suit premises either at the instance of a defaulting tenant or a trespasser. However, none has been proven in respect of the subject matter.

150. For this bold proposition, I take refuge in the decision in the case of **Nguruman Ltd vs Jan Bonde Nielsen & 2 others [2014] eKLR,** where the Honorable Court observed as hereunder;

"It must also be remembered that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable grounds to do so. The 1st respondent's 50% claim of shares in the appellant company, the resources he used for architectural design, to construct the camp, the airstrip, to grade the road network, US $ 1,917,333 alleged advanced to the 2nd and 3rd respondents, and US $ 14 million allegedly used in the management and development of the camp, are all matters that can be resolved by arithmetical calculation and a refund made, if proved at the trial."

151. Other than the foregoing, the Plaintiff has also sought payment of Kshs. 27,606,51-.42 Only, comprised of 22,780,715.42 only being cost of the repairs, Kshs. 325,750 Only, being wages and Kshs. 4,500,000 Only, being security deposit and rents for 13 months during which the Plaintiff was not in occupation of the suit premises.

152. To start with, the document upon which the claim for Kshs. 22,780,715.42 Only, is founded is contained on the letterhead of M/s Misot Africa Ltd, at Page 017 of the list of Documents dated 19th December 2019.

153. Having looked at the said document, it is worthy to point out that same is neither signed nor authenticated by the originator. Consequently,it is difficult to understand when or by whom it was generated.

154. Besides, it is important to note that the letterhead thereof speaks to a limited liability company, namely, *M/s Misot Africa Ltd*,

who is alleged to have incurred the expenses even though, same is neither executed by anyone.

155. However, the point that I wish to make is that the person alleged to have incurred the said expenses was neither a tenant nor the Plaintiff in respect of the subject matter. Consequently, if any such expenditure was incurred, same is outside the scope of the subject matter.

156. Notwithstanding the foregoing, the other documents that have been adverted to sustain the claim are invoices, delivery notes and cash sale receipts. Suffice it to say, delivery notes and invoices are not accounting documents and do not show payment against same.

157. However, as pertains to cash sale receipt, same are accounting documents and evidence of proof of payments made.

158. Nevertheless, before the cash sale receipts can be counted towards proving expenditure, same must comply with the law. In this regard, it is imperative to take cognizance of **Section 19 of the Stamp Duty Act, Chapter 480, Laws of Kenya;**

19. Non-admissibility of unstamped instruments in evidence; and penalty

(1) Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except—

(a) in criminal proceedings; and

(b) in civil proceedings by a collector to recover stamp duty, unless it is duly stamped.

(2) No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped.

(3) Upon the production to any court (other than a criminal court), arbitrator, referee, company or other corporation, or to any officer or servant of any public body, of any instrument which is chargeable with stamp duty and which is not duly stamped, the court, arbitrator, referee, company or other corporation, or officer or servant, shall take notice of the omission or insufficiency of the stamp on the instrument and thereupon take action in accordance with the following provisions—

(a) if the period of time within or before which the instrument should have been stamped has expired and the instrument is one in respect of which a person is specified in the Schedule to this Act as being liable for the stamping thereof, the instrument shall be impounded and, unless the instrument has been produced to a collector, shall forthwith be forwarded to a collector;

(b) in any such case, before the exclusion or rejection of the instrument, the person tendering it shall, if he desires, be given a reasonable opportunity of applying to a collector for leave under section 20 or of obtaining a certificate under section 21;

(c) in all other cases, unless otherwise expressly provided in this Act, the instrument shall, saving all just exceptions on other grounds, be received in evidence upon payment to the court, arbitrator or referee of the amount of the unpaid duty and of the penalty specified in subsection (5), and the duty and penalty, if any, shall forthwith be remitted to a collector with the instrument to be stamped after the instrument has been admitted in evidence.

(4) If any person is empowered or required by any written law to act upon, file, enrol or register a duplicate or copy of any instrument, and if the original of that instrument would require to be duly stamped if acted upon, filed, enrolled or registered by that person, that person may call for the production of the original instrument or for evidence to his satisfaction that it was duly stamped, and no person shall act upon, file, enrol or register any such duplicate or copy without production of the original instrument duly stamped or of evidence thereof.

(5) The penalty on stamping any instrument out of time referred to in paragraph (c) of subsection (3) shall be ten shillings in respect

of every twenty shillings and of any fractional part of twenty shillings of the duty chargeable thereon and in respect of every period of three months or any part of such a period after the expiration of the time within or before which the instrument should have been stamped.

20. Stamping out of time

(1) Where an instrument is chargeable with stamp duty under this Act and should have been stamped before a certain event or before the expiration of a certain period, but has not been so stamped, a collector may give leave for the stamping of the instrument if he is satisfied—

(a) that the omission or neglect to stamp duly did not arise from any intention to evade payment of stamp duty or otherwise to defraud; and

(b) that the circumstances of the case are such as to justify leave being given.

(2) If the collector grants leave under subsection (1) for the stamping of an instrument, the instrument shall be stamped on payment of the unpaid duty including any additional stamp duty and of a penalty of one shilling in respect of every twenty shillings and of any fractional part of twenty shillings of the duty chargeable thereon and in respect of every period of three months or any part of such period after the expiration of the time within or before which the instrument should have been stamped:

Provided that—

(a) the penalty chargeable under this subsection shall not exceed one hundred per centum of the principal duty outstanding; and

(b) the collector may remit the penalty under this section up to a maximum of one million five hundred shillings, but shall not remit any penalty exceeding that amount without prior approval from the Minister.

(3) If any person applying for leave under this section is dissatisfied with the decision of the collector upon that application, that person may require his application to be referred to the Minister, whose decision thereon shall be final for all purposes.

(4) Upon any application for leave under this section, the collector, or the Minister, may require sworn or other evidence in support of the application.

(5) When an instrument has been stamped by leave under this section it shall be deemed to have been duly stamped.

(6) Notwithstanding the provisions of this section, no bill of exchange or promissory note shall, except as provided in sections 21, 22, 34 and 36, be stamped after execution.

(7) In this section, "collector" does not include the Senior Collector of Stamp Duties.

159. To my mind, the various receipts which have been produced are neither accompanied by the ETR receipt nor the revenue stamp. Consequently, the same are legally inadmissible for purposes of proving expenditure.

160. Thirdly, the Plaintiff has also claimed wages from various months namely January to August 2017. However, the document relating to wages is a sheet of paper, which does not contain the details of persons paid wages, who paid them and what is the source of the subject document at page 211 of the Plaintiff's bundle.

161. In my humble view, Special damages having been particularly pleaded, must be specifically proved. However such proof cannot be achieved by throwing a non-authentic document, on the face of the Court.

162. Fourthly, the other claim by the Plaintiff relates to Refund of security deposit, as well as Rents for 13 months, being the period the Plaintiff is said not to have been in occupation of the suit premises.

163. As pertains to this claim, I have found and held in the Second issue hereinbefore, that the premises were tenantable and were handed over to the Plaintiff, upon the execution of the Lease Agreement and hence the Plaintiff could enter upon and occupy at his pleasure.

164. Owing to the foregoing, the Plaintiff duly and lawfully paid Rents for the said period in question, even though same was not in occupation. Such Rents were paid knowingly, lawfully and willingly and are thus not Refundable.

165. In respect of the Security paid to the Defendant ,at the execution of the Lease Agreement, same was to be held during the subsistence of the tenancy and is thus refundable to the tenant upon termination of tenancy.

166. In this regard, the claim for Refund of security is legitimate.

FINAL DISPOSITION

167. In conclusion, my findings are as hereunder;

i. ***The Plaintiff's suit vide Plaint dated 19th December 2019 be and is hereby dismissed, save for the aspect touching on refund of the security paid at the commencement of the lease agreement dated 1st October 2016.***

ii. The Defendant be and is hereby ordered to refund the security amount paid to the Defendant, and refund thereof to be made within 60 days from the date hereof.

iii. The Plaintiff shall vacate the suit premises, namely House Number 4, on L.R. NO. 192/60 and grant vacant possession to the Defendant and/or Defendant's nominee within 90 days from the date hereof.

iv. In default to vacate and handover vacant possession, the Defendant and/or Defendant's nominee shall be at liberty to apply for eviction orders.

v. Cost of the suit be and are hereby awarded to the Defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2021.

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI.

In the Presence of;

June Nafula Court Assistant