REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION NO. E001 OF 2024

-BETWEEN-

KWANZA ESTATES LIMITED .....PETITIONER

-AND-

JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY.....RESPONDENT

(*Being an appeal from the Judgment of the Court of Appeal at Nakuru (Sichale, Achode & Korir, JJ.A) in Civil Appeal No. 64 of 2022 delivered on 16th June 2023)*

Representation

Prof. Tom Ojienda, SC, Mr. Wilfred Konosi & Ms. Memory Apiyo for the Petitioner
(*Konosi & Company Advocates)*

Mr. Issa Mansur, Mr. King'ori Macharia & Ms. Linda Kitur for the Respondent
(Ashitiva Advocates LLP)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] This Petition of Appeal dated 12th January, 2024, was filed pursuant to certification by the Court of Appeal (*Nyamweya, Ochieng & Korir, JJ.A*) in its

Ruling dated 15th December 2023 as one involving a matter of general public importance under Article 163(4)(b) of the Constitution. The Petitioner seeks orders setting aside the Judgment and Order of the Court of Appeal (*Sichale, Achode & Korir, JJ. A*) in ***Civil Appeal No. 64 of 2022*** delivered on 16th June 2023. The appellate court set aside the orders of the Environment and Land Court at Nakuru (*D.O. Ohungo, J.*) in ***ELCC No. E019 of 2020.***

B. BACKGROUND

[2] The parties herein entered into a lease agreement on 1st May 2010. The terms of the lease were that the petitioner agreed to lease to the respondent, Nakuru Municipality Block 9/90 and the building erected thereon, hereinafter the "suit premises" for a period of six (6) years, which expired on 30th April, 2016. After the expiry of the said lease, the parties entered into another lease agreement of the suit premises for a period of six (6) years, from 1st May 2016 to 30th April, 2022. The Respondent was to pay an increasing annual rent commencing Kshs.45,543,000/- and service charge quarterly in advance, clear of all deductions, and a 5% late payment would be incurred if the sum was not paid within 14 days.

[3] On 10th July 2020, the respondent issued a three (3) months' notice to the petitioner intimating its intention to terminate the lease and vacate the premises. Upon expiry of the notice period, on 10th October, 2020, when the respondent commenced the process of vacating the suit premises, the petitioner restrained it from removing its property from the suit premises by placing security guards and goons at the entry and exits of the premises. Further, the petitioner proceeded to serve the respondent an invoice dated 19th October, 2020 for Ksh.15,776,973/- being rent for November 2020 to January 2021.

[4] Subsequently, through a letter dated the 6th November, 2020, the petitioner instructed Messrs Pyramid Auctioneers who issued a Proclamation for Distress of Moveable Property dated the 6th November, 2020 for the sum of Ksh.15,776,973/- and auctioneers' fees of Kshs.1,577,697/-.

[5] The respondent ultimately vacated the premises on 31st January 2021 and despite vacating, the petitioner instructed Messrs Pyramid Auctioneers through a letter dated the 10th February 2021 to proclaim against the respondent's properties for recovery of rent arrears in respect of the period of February 2021 to April 2021 for the sum of Kshs.17,659,138/-. The auctioneers issued a Proclamation for Distress of Moveable Property dated the 10th February 2021 for the sum of Kenya Shillings Kshs.16,053,762/- and auctioneer's fees of Kshs.1,605,376/-. Through a letter dated 8th February 2021, the respondent gave the petitioner notice for the formal handover of the premises and invited the petitioner through a letter dated 11th February 2021 for the formal handover which was to be done on 12th February 2021. The caretaker declined to participate in the handover exercise and upon conclusion of the exercise, a report was prepared.

C. LITIGATION HISTORY

i. Proceedings before the Environment and Land Court (ELC)

[6] The respondent commenced proceedings before the Environment and Land Court (ELC) in ***ELCC No. E019 of 2020 Jomo Kenyatta University of Agriculture & Technology v. Kwanza Estates Limited*** on 17th November 2020 contending that following the execution of the lease, a series of events took place resulting in the lease being frustrated and/or rendered commercially impossible. The respondent outlined several reasons for the frustration of the lease. Firstly, a change in the law occurred with the implementation of a new placement policy by the Kenya Universities and Colleges Central Placement Service (KUCCPS). Under this policy, all students who meet the minimum entry requirements for university admission are sponsored by the government, whether they attend public or private universities, as per Section 56 of the Universities Act, 2012. This change led to a significant reduction in student enrolment, as the self-sponsored student

program was effectively diminished. Additionally, the respondent experienced a reduction, or in some cases a complete lack, of government support, which was essential for the financing of its operations. The emergence of the Covid-19 pandemic further exacerbated the situation by forcing the closure of schools and learning institutions. Finally, the respondent's Nakuru CBD campus was heavily reliant on revenue from self-sponsored students, and with the decline of this program, the campus faced a critical lack of funds to sustain its operations.

[7] The respondent further averred that the lease agreement allowed it to terminate the said agreement and also envisaged the possibility of termination prior to the expiry of the term. Through a letter dated 10th July 2020, the respondent issued to the petitioner a three-month' notice of its intention to terminate the lease and vacate the premises. Despite the notice and the respondent vacating the suit premises on 31st January 2021, the petitioner served its invoices for rent for the period November 2020 to April 2021 and even instructed auctioneers to proclaim against it for recovery of purported arrears of rent.

[8] The respondent therefore sought several declarations in relation to the lease agreement for the suit premises; that the lease had been rendered commercially impossible and frustrated due to changes in law. Consequently, they argued that the lease was terminated and that both parties were discharged from their obligations. The respondent also claimed that the lease agreement had been terminated following a notice issued on 10th July 2020, and that they had vacated the premises as of 31st January 2021, effectively ending the landlord-tenant relationship. Additionally, the respondent sought a declaration that the distress proclamations for unpaid sums and auctioneers' fees issued by Pyramid Auctioneers in November 2020 and February 2021 were unlawful. It also sought permanent injunctions to prevent the petitioner from levying distress, seizing or selling their property, and from harassing or disturbing the respondent. Lastly, the respondent prayed for costs of the suit and any other relief the court deemed appropriate.

[9] The petitioner in its defence and counterclaim dated 24th November, 2020 admitted the existence of the lease agreement, issuance of notice dated 10th July 2020 and instructions to the auctioneers. It however opined that the lease did not have a termination clause, therefore the notice of termination was void and could not validly terminate the lease. It contended that the respondent was obligated to continue occupying the premises and paying rent up to 30th April 2022. In the counterclaim, the petitioner demanded that following the purported notice of termination it stood to suffer a loss of Kshs.97,817,231/- being rent for the period up to 30th April 2022 and Kshs.64,652,250/- being the cost of restoring the premises to a tenantable state of repair, totalling a sum of Kshs.162,469,481/-.

[10] The petitioner, in addition to praying for dismissal of the respondent's suit with costs, sought a declaration that the lease remains in force, has no break clause, and that the respondent is obligated to continue paying rent for the suit premises for the entire lease period, up to 30th April 2022. Additionally, it also sought a declaration that the termination notice issued by the respondent on 10th July 2020 was null and void. The petitioner also sought for payment of Kshs.162,469,481/-, along with the costs of the suit and interest.

[11] The respondent filed a reply to the defence and defence to the counterclaim dated 14th December 2020 in which it urged the court to dismiss the counterclaim with costs.

[12] Midway through the proceedings, upon the lapse of the termination notice and in light of the proclamation for distress of its movable property, the respondent instituted proceedings at the Milimani Commercial Court in Nairobi ***CMCC No. E792 of 2021 Jomo Kenyatta University of Technology v. Kwanza Estates Limited and Joseph D.B. Kimani t/a Pyramid Auctioneers & Nairobi CMCC No. E1340 of 2021 Jomo Kenyatta University of Technology vs Kwanza Estates Limited and Joseph D.B. Kimani T/A Pyramid Auctioneers*** to protect its interest in the affected movable property. The proceedings in both ***CMCC No. E792 of***

2021 and ***CMCC No. E1340 of 2021*** were stayed on 17th March 2021 pending the hearing and determination of the suit before the ELC.

[13] On 2nd June 2021, the ELC court recorded a consent by the parties to the effect that the respondent would pay to the petitioner an all-inclusive sum of Kshs.40 million, being the cost of restoring the premises to its original state, within forty days from the day of recording the consent.

[14] The court identified three issues for determination being: whether the lease was frustrated; whether the lease was terminated through the notice dated 10th July, 2020; and whether the reliefs sought by the parties should be issued.

[15] On the first issue, the court found that by the time the parties entered into their second lease on 1st May, 2016, both the 2014 policy and the statutory provisions in the Universities Act 2012, complained of, were in place. Thus, the respondent had failed to demonstrate a change in law or operation that would discharge it from liability.

[16] The Court found that reduction in government support, a drop in enrolment for its academic programs and its Nakuru CBD Campus having incurred significant losses and claims that it could no longer support itself, were all events that may have resulted in economic hardship to the respondent and even the petitioner. Despite arriving at that conclusion, the court went on to find that this was not a reason to excuse any of the parties from further performance of their obligations under the lease. The court emphasized that parties are bound by the terms of their contracts and it is not the court's role to rewrite those contracts. The court further held that parties should be ready to live with the consequences of agreements they enter into since equity does not ordinarily allow a party to escape from a bad bargain. In view of the foregoing, the trial Court held that the lease was not frustrated.

[17] As to *whether the lease was terminated through the notice or letter from the respondent dated 10th July 2020,* the court acknowledged that receipt of the notice was admitted. The court however noted that the letter did not specify any

clause of the lease pursuant to which the notice was issued and clause 5.26 of the lease which was mentioned only addressed the respondent's obligation to restore the premises to a tenantable state of repair. The trial court, upon perusal of the lease, concluded that the lease did not contain any termination clause. The court found that the notice dated 10th July 2020 did not terminate the agreement between the parties and therefore the lease remained binding, and parties were under obligation to discharge their obligations until the end of its term on 30th April 2022.

[18] Consequently, the court dismissed the respondent's suit with costs awarded to the petitioner. It entered judgment in favor of the petitioner, declaring that the lease agreement between the parties, dated 1st May, 2016, remained in force without a break clause, obligating the respondent to pay rent up to 30th April 2022. The court further declared that the termination notice issued by the respondent on 10th July 2020 was null and void. Additionally, the court awarded the petitioner Kshs.40,000,000 for restoring the premises, as per the consent recorded on 2nd June 2021, and Kshs.71,965,138.70 for rent from 1st February, 2021 to 30th April, 2022. Costs of the counterclaim were also awarded to the petitioner, along with interest.

ii. Proceedings before the Court of Appeal

[19] Dissatisfied by this outcome, the respondent moved the Court of Appeal in ***Civil Appeal No. 64 of 2022*** citing ten (10) grounds which the appellate court abridged into three (3) as follows: whether the learned judge erred in finding that the lease agreement did not contain a break clause; whether the learned judge erred in finding that the lease agreement had not been frustrated by operation of law; and lastly, whether the learned judge erred in law and fact by awarding the petitioner Kshs.71,956,138.70/- in compensation for breach of the lease agreement.

[20] In response the petitioner filed a notice of cross-appeal, asserting that the trial judge erred in not holding that the total amount payable by the respondent

was subject to VAT of Kshs.11,514,422.20/- in terms of clause 3 (3) of the lease agreement. It was also contended that the learned judge erred for not acknowledging that the amount it sought compensation for included the VAT. The petitioner prayed for the appellate court to order the respondent to pay the VAT on the rent payable in the sum of Kshs.11,514,422.20/= in accordance with the terms of the lease agreement.

[21] The Court of Appeal identified the following issues for determination; *whether the lease agreement contained an early termination clause; whether the lease agreement was frustrated by law and circumstances; and whether the trial court ought to have included a VAT amount in the awarded rental amount.*

[22] On *whether the lease agreement contained an early termination clause*. The court noted that clauses 5.5, 5.26 and 5.27 of the lease agreement contained the phrase *"or sooner determination"*. The learned judges of appeal were of the view that the phrase *"or sooner determination"* means early termination before full term. They held that the contents of the lease should be read in context, not as separate clauses but rather as clauses that make up part of a whole. They found that Clause 5 should be read in relation to all the other clauses in which it used. The appellate court concluded that inclusion of the phrase *"or sooner determination"* in the contract made it apparent that the parties agreed to give themselves an exit window out of the agreed terms upon change of circumstances. The appellate court also found that the use of the phrase *"or sooner determination"* in Clause 7.10 acknowledged that there may arise situations where the lease may be interrupted, but excludes the payment of rent and other money owed from this break.

[23] The learned Judges of appeal concluded that from a holistic reading of the clause and the rest of the lease, the petitioner was entitled to receive the rent owed up to the time the parties terminated the contract. Any reading of the clause which would force the respondent to pay monies for the remaining lease

period other than that which accrued from the usage of the premises would be unfair and would amount to unjust enrichment.

[24] Regarding *contra proferentem rule* and ambiguity in the phrase *"or the sooner determination"* the Court of Appeal held that since the respondent had not raised the issue at the trial court, it was precluded from raising the same at the appellate stage.

[25] On *whether the lease agreement was frustrated by the circumstances and the law,* the appellate court took note that the respondent was aware of the change in law and policy as well as the implementation of the government directives prior to signing the impugned lease agreement. The court also took note of the fact that the respondent was able to maintain its Nakuru CBD campus without a hitch until the year 2020, when it appears that the campus ran out of funds following the closure of the universities by the government directive due to the Covid-19 pandemic. The court took cognizance of the fact that the government-mandated lockdown affected all institutions in the country and the effect it had on all businesses. The court found that, like other institutions of higher learning, the respondent was affected by the lockdown and subsequently closed its doors for the period the respondent was unable to use the property subject to the lease agreement and was therefore unable to generate any income from the intended purpose of the contract. Due to the foregoing, the appellate court concluded that the Covid-19 pandemic was a *force majeure e*vent that caused the respondent undue difficulty in continuing with the lease agreement in accordance with its purpose and making the payments thereupon as agreed. The appellate court also noted that despite this, the respondent continued to make payments in good faith as required until January, 2021 long after seeking to be released from the lease agreement vide a letter dated 10th July, 2020. The court held that the petitioner's requirement for the respondent to continue performing the contract in the face of such unforeseen and unavoidable circumstances, not caused by any act and/or omissions on the part of the respondent was absurd, unfair and unjust. The

court concluded that it was the petitioner's own actions of restricting the respondent's exit that curtailed its own chances of entering into business arrangements with other entities. For these reasons, the appellate court arrived at the conclusion that the trial court erred in condemning the respondent to make rental payments for the entire duration of the Lease, when it was no longer using or benefiting from the premises due to forces beyond its control. Subsequently, the appellate court chose not to belabour the issue of VAT on the amount payable, thereby finding that the cross-appeal was not merited. Consequently, the court allowed the respondent's appeal and ordered the respondent to pay the costs of restoration of the suit premises to its original state at an all-inclusive price of forty million (Kshs.40,000,000/-). in the following terms;

i. *The respondent shall pay the cost of restoration of the suit premises to its original state at an all- inclusive price of forty million (Kshs. 40 million).*

ii. *Each party shall bear its own costs.*

C. PROCEEDINGS BEFORE THE SUPREME COURT

[26] Aggrieved by the aforementioned judgment, and pursuant to the leave granted, the petitioner raises the following grounds of appeal;

1. *The Learned Judges of the Court of Appeal erred in law in holding that the inclusion of the clause "or sooner determination" in the contract made it apparent that the parties agreed to give themselves an exit window out of the agreed terms upon change of circumstances and that any reading of the clause which would force the Respondent to pay monies for the remaining lease period other than that which accrued from the usage of the premises would be unfair and would amount to unjust enrichment.*

2. *The Learned Judges of the Court of Appeal erred in law in holding that the phrase "or sooner determination" in the clauses in the lease, was to allow the parties to opt out of the lease agreement prior to the fixed term of the lease.*

3. *The Learned Judges of the Court of Appeal erred in law in failing to hold that the lease had no break clause entitling any of the parties to determine the lease midway before the expiry of the full term.*

4. *The Learned Judges of the Court of Appeal erred in law in holding that the Covid-19 was a force majeure event that caused the Respondent undue difficulty in continuing with the lease agreement in accordance with its purpose and making the payments thereupon agreed yet the issue of force majeure was not pleaded or argued in the superior court.*

5. *Learned Judges of the Court of Appeal erred in law in holding that the lease between the Petitioner and Respondent was frustrated thus relieving the Respondent of its obligations under the lease yet the Respondent had agreed to perform part of its obligations under the lease by restoring the premises to a tenantable position.*

6. *The Learned Judges of the Court of Appeal erred in law in not allowing the Petitioner's cross-appeal.*

7. *The Learned Judges of the Court of Appeal erred in law in allowing the Respondent's Appeal and dismissing the Petitioner's cross appeal and in not awarding the Petitioner costs of the appeal and cross appeal.*

[27] Consequently, the petitioner seeks the following prayers from the Court:

(i) *An Order allowing the Petition of Appeal*

(ii) An Order setting aside the judgement of the Court of Appeal and substituting it with an order dismissing the Respondent's Appeal with costs and allowing the Petitioner's cross-appeal with costs.

(iii) An Order that the Respondent bears the costs of the Petition of Appeal.

(iv) Any other Order that this Honourable Court may deem fit to grant.

[28] In response, the respondent filed a Replying Affidavit sworn on 29th January 2024 by **MaryAnne Mwihaki Wanyoike,** the respondent's acting Chief Legal Officer. She avers that the Court lacks jurisdiction to hear and determine the points of law as raised since the petitioner seeks to introduce new issues that were neither certified by the Court of Appeal nor raised for determination at the ELC or the appellate stages. Further, she contends that the petitioner raises factual points and seeks a re-evaluation of the evidence submitted by the parties despite the constitutional jurisdiction of the Supreme Court being restricted to points of law.

[29] The respondent contends that the Court of Appeal correctly determined that the lease agreement contained a break clause, allowing for its termination before the expiration of the lease term. As to whether the lease was frustrated by the Covid-19 pandemic, the respondent maintained that the Court of Appeal found that the pandemic met the threshold for a frustrating event, referencing the principles laid out in ***Charles Mwirigi Miriti vs Thananga Tea Growers Sacco Ltd [2014] eKLR.*** The respondent also contended that the Court of Appeal did not err in dismissing the petitioner's cross-appeal, as the issue of V.A.T. on rent was not originally pleaded in the trial court and was improperly introduced during the appeal. Lastly, the respondent supported the Court of Appeal's decision to dismiss the cross-appeal and to not award costs to the petitioner, asserting that the appellate court's decision was correct, as the cross-appeal introduced issues that were not previously addressed in the trial court.

[30] In response to the respondent's replying affidavit, the petitioner filed a replying affidavit sworn on 5th February 2024 by **Geoffrey Makana Asanyo** the petitioner's Managing Director. He avers that the court's jurisdiction has been properly invoked and that the petitioner does not seek re-evaluation of the evidence. Given the nature of the purpose for which the premises were leased, the parties agreed not to have a break clause, had the parties intended to have a break clause such clause would contain the requirement for serving the notice, the period of the notice and the method by which it must be sent and deemed received. He also argues that the doctrine of frustration operates to completely discharge a party and since the respondent had agreed to restore the premises, the doctrine of frustration was not available to it.

[31] He further argues that the Covid-19 pandemic was not a *force majeure* event; the Court of Appeal used frustration and *force majeure* interchangeably, thus arriving at the wrong conclusion. Further, that the Court of Appeal erred in introducing the issue of *force majeure* yet it was neither contained in the lease agreement nor pleaded or argued at the ELC, or before it.

[32] He lastly reiterates that the ELC erred in not awarding VAT despite Clause 3.3 of the Lease provided for the same and the Court of Appeal ought to have decided on that issue.

D. PARTIES SUBMISSIONS

i. Petitioner's Case

[33] The petitioner relies on its written submissions dated 25th March 2024 and filed on 26th March 2024. On *Ground 1, 2 and 3* of the appeal on the break clause in the lease, the petitioner submits that the respondent's claim was purely based on the doctrine of frustration and not on the basis that the lease had a break clause. It is contended that had the parties intended to give themselves a window to terminate the lease before the expiry of the full term, they would have indicated the period of notice required and manner of terminating the Lease Agreement. It is argued that the drafting of the break

clause and break notice should be precise and detailed to avoid any misinterpretation and confusion. The petitioner relies on the England and Wales Court of Appeal case of ***Friends Life Ltd vs. Siemens Hearing Instruments Ltd 2014*** EWCA Civ 382 where a poorly drafted break notice was deemed inadequate as to what was required under the break clause and therefore invalid. The petitioner urges that a holistic reading of the lease would reveal that the parties never intended to have a break clause so as not to interrupt activities in the middle of a semester. It is submitted that the Court of Appeal failed to consider its earlier decision in the case of ***Kenya Commercial Bank Limited vs. Popatlal Madhavji & Another*** [2019] eKLR thus causing uncertainty on how a lease without a break clause should be terminated. The petitioner also contends that the appellate Court also erred in relying on the Indian High Court at Calcutta decision in ***Sri Ashwin Bhanulal Desai vs. Bijay Kumar Manish Kumar*** (2019) in interpreting the meaning of the phrase "sooner determination" when that phrase was used in circumstances totally different from the case at hand.

[34] On *Grounds 4 and 5* on the application of *force majeure* and the doctrine of frustration, the petitioner submits that the Court of Appeal correctly set out the principles that govern the invocation of the doctrine of frustration in the cases ***Five Forty Aviation Limited vs. Erwan Lanoe*** [2019] eKLR and ***Charles Mwirigi Miriti vs. Thananga Tea Growers Sacco Ltd*** [2014] eKLR to the effect that if frustration is proved, it discharges the parties from all obligations under a contract. But despite this, the court arrived at an erroneous conclusion, that a party can plead frustration but be willing to perform part of the contract that has been frustrated. It is also submitted that the appellate court fell into error when it held that the respondent was aware of the change in policy before signing the Lease Agreement but held that the government-mandated lockdown affected all institutions in the country and the effect it had on all businesses, hence the respondent was not generating any income from the intended purpose. The petitioner contends that the effects of Covid-19 was

temporary and all learning institutions resumed normal learning after the government lockdown. It is adamant that the respondent cannot escape liability because all it did was to move from one premises to another within Nakuru city.

[35] The petitioner further urges that *force majeure* was intentionally left out of the Lease Agreement by the parties. Further, that for a party to successfully invoke *force majeure,* he must show that, first the event that gave rise to the non-performance of the contract falls within the definition of *force majeure*. Second that the non-performance was caused by the relevant event and lastly that he was not aware, at the time of entering the contract, that the circumstances giving rise to the *force majeure* were likely to occur. It is argued that *force majeure* cannot be invoked if a contract does not contain such a clause. Consequently, it is submitted that the appellate court erred in holding that Covid-19 was a *force majeure* event that caused the respondent undue difficulty in continuing with the Lease Agreement.

[36] It is also contended that the Court of Appeal, by introducing the doctrine of *force majeure*, erred in rewriting the contract for the parties contrary to the principles established in ***Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd*** [2017] eKLR and ***National Bank of Kenya Limited vs. Pipe Plastic Samkolit (K) Ltd*** [2011] eKLR.

[37] The petitioner urges the Court to consider decisions made by courts on the effect of the Covid-19 pandemic in relation to contracts in other jurisdictions. It cites, the Supreme Court of Canada in ***Porter Airlines Inc. vs. Nieuport Aviation Infrastructure Partners GP***, 2022 ONSC 5922, where the court found that the consequences of the pandemic did not engage the *force majeure* clause entitling a party to relief from its obligations under an agreement. Similarly, American decisions in the cases of ***1140 Broadway LLC vs. Bold Food, LLC,*** 2020 WL 7137817 (N.Y. Sup. Ct. Dec. 3, 2020), ***35 East 75th Street Corp. vs. Christian Louboutin L.L.C*** 2020 WL 7315470 (N.Y. Sup. Ct. Dec. 9, 2020), and ***The Gap Inc. vs. Ponte Gadea New York*** LLC 2021 WL 861121 (S.D.N.Y. March 8, 2021) have held that the common law

doctrines of impossibility of performance and frustration of purpose, which historically have been narrowly applied by courts, will not benefit parties seeking to avoid their contractual obligations due to the Covid-19 pandemic. Equally in this regard the petitioner cites the South African case of ***Slabbert N O & 3 Others vs. Ma-Afrika Hotels t/a Rivierbos Guest House*** (772/2021) [2022] ZASCA 152 (04 November 2022) and the Irish High Court decision in ***Kenneth Treacy vs. Lee James Menswear Limited and James O'Regan*** [2022] IEHC 600.

[38] On *Grounds 6 and 7* the petitioner reiterates its contention that the Court of Appeal failed to consider and pronounce itself on the provisions of Clause 3.3(b) of the Lease which provided that the respondent was liable to pay VAT on the rent payable.

i. Respondents' Case

[39] The respondent relies on its written submissions dated 24th May 2024 and filed on 27th May 2024. The respondent submits that the appeal exceeds the parameters of leave granted by the Court of Appeal hence the Court lacks jurisdiction to entertain the same. The respondent relies on the decisions in ***Muriithi (Suing as the Legal Representative of the Estate of Mwangi Stephen Muriithi) vs. JanMohammed SC, (Suing as the Executrix of the Estate of Hon. Daniel Toroitich Arap Moi) & Another*** Petition No. 41 of 2018 [2023] KESC 61 KLR, and ***Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others*** [2012] eKLR to urge the Court not to consider any issues beyond the parameters so defined.

[40] On *the legal implication of Covid- 19 on contractual obligations, and whether the pandemic is a force majeure event capable of discharging a party from its contractual obligations,* the respondent submits that the Court of Appeal dealt with the implications of the Covid-19 pandemic as a frustrating event and not a *force majeure* event. Further, that the Court of Appeal at paragraph 39 of its Judgment when it arrived at the conclusion that Covid-19

was a force majeure event, took the form of a general statement and was not made in reference to any clause in the Lease Agreement. The termination of the Lease Agreement by the respondent was premised on the agreement having break clauses and performance of the contract being frustrated by *inter alia,* the outbreak of Covid-19.

[41] The respondent contends that the crux of the dispute is on who should bear the burden of risk of a Lease Agreement in view of the outbreak of Covid-19. It submits that the risk allocation in business interruption is generally covered in "Boilerplate clauses" either as a *force majeure* clause and/or a material adverse change (MAC) clause. None of the clauses were incorporated in the lease agreement hence the respondent sought recourse by invoking the common law doctrine of frustration. The respondent relies on the decision ***In re: CEC Entertainment, Inc, No 20-33162, 2020 WL 7356380 (Banker SD Tex Dec 14, 2020)*** and ***35 E. 75th St. Corp vs. Christian Louboutin LLC***. (2020 NY Slip Op 34063 [U], *3-4 [Sup Ct, NY County, Dec.9. 2020] where the courts held that the doctrine of frustration is applicable where there is no risk allocation in boilerplate clause.

[42] The respondent further submits that it entered into the Lease agreement for the sole purpose of teaching and training self-sponsored students and was therefore entirely dependent on the revenue generated from this to pay its rent. This would have continued provided the respondent was able to use the premises for the assigned purpose uninhibited by unforeseen intervening factors and forces beyond its control. It is urged that the occurrence of the Covid-19 pandemic and subsequent measures taken by the government to impose lockdowns on all learning institutions, was not only unforeseen but also without any fault or election or either party in the agreement, thus frustrating the performance of the Lease Agreement. To this end, the respondent submits that the doctrine of frustration was applicable to its circumstances and cites the following decisions to buttress this point: ***Taylor vs. Cladwell*** (1863) 32 LJ QB 164, ***Alliance Concrete Singapore Ltd vs. Sato Kogyo (S) Pte***

Limited (2014) SGCA 35, ***Davis Contractors Ltd vs. Farehum*** U.D.C (1956) AC 696, ***Charles Mwirigi Miriti vs. Thananga Tea Growers Sacco ltd & Another*** [2014] eKLR, ***Five Forty Aviation Limited v Erwan Lanoe*** [2019] eKLR, ***UMNV 2015-207 Newbury, LLC vs. Caffe Nero Ams Inc,*** No 20184 CV01493-BLS2, 2021 WL 956069, 267**,** ***Development LLC vs. Brooklyn Babies and Toddlers*** LLC No. 510160/2020[Sup Ct, Kings County, Mar. 15, 2021]**,** ***Fitness Int'l LLC vs. National Retail Props*** LP, 25 Wash. App. 2d 606, 524 P.3d 1057,1065 (2023) *and* ***AGW Sono Partners, LLC vs. Downtown Soho, LLC, 343 Conn 309, 336, 273, A. 3d 186 (2022)***.

[43] It also submits that Covid-19 was an unforeseeable and externally caused global pandemic which fundamentally disrupted business operations and frustrated the purpose of countless agreements. In this regard it cited the case Supreme People's Court of China's ***"Guiding Opinions on Several Issues concerning the Proper Hearing of Civil Cases Involving the Covid-19 Pandemic"*** and ***International Plaza Associates LP vs. Amorepacific*** US, Inc. 2020 N.Y. Slip Op. 34521 (N.Y. Sup Ct. 2020) which guidelines explicitly state that the Covid-19 pandemic and the related government measures for its prevention and control can be classified as *force majeure* event.

[44] As to *whether frustration only acts to partially discharge a party from its obligations*, the respondent urges that the frustrated contracts are governed by the English Law Reform (Frustrated Contracts) Act (1943) as a statute of general application listed in the first schedule to the Law of Contract Act, 1961. It contends that this statute provides the available remedies in case of frustration of a contract, including complete discharge from contractual obligations.

[45] The respondent cites the decisions in ***Davis Contractors (supra)*** and ***Five Forty Aviation Limited vs. Erwan Lanoe (supra)*** where it was held that the immediate consequence of sufficiently proving frustration of a

contract is that both parties are relieved of the burden of further performance and any liability for not performing.

[46] It submits that by offering to restore the suit to its original tenable state pursuant to Clause 5.26 of the Lease Agreement, the respondent relinquished its rights and based on the doctrine of estoppel, the Court of Appeal could not arrive at a different conclusion. In this regard it relies on the Court of Appeal decision in ***748 Air Services Limited vs. Theuri Munyi*** (2017) eKLR.

[47] In response to the Petitioner's grounds of appeal the respondent first submits that the issues herein relate to a private relationship between the parties and has no bearing on the public interest. On Ground 1 the respondent submits that the phrase "sooner determination" is clear and unambiguous and ought to be interpreted in its ordinary and literal meaning, if there is an ambiguity the said clauses ought to be interpreted against the petitioner who is the drafter and owner of the Agreement. It also opined that the decision in ***Kenya Commercial Bank vs. Popatlal Madhavji and Another*** [2019] eKLR is distinguishable to this case because it did not provide avenues for "sooner determination" and that the Court in the case was limited to determining whether the long-term lease therein was valid or not despite lack of its registration. The respondent equally urges the Court to find that whereas the lease agreement was for a fixed term, guided by the doctrine of *pari materia,* the Court ought to consider that the provisions of Section 57 (4) of the Land Act Cap 280 which provides that in a periodic tenancy, where no provision is made for giving of notice to terminate the tenancy, the relationship could be terminated by either party giving notice of the tenancy period.

[48] On *Grounds 2* it reiterates that the effects of Covid-19 was dealt with by the Court of Appeal as a frustrating event and not based on any *force majeure* clause. On *Ground 3* the respondent reiterates that the issue of VAT was not raised in the trial court and the Court of Appeal rightly so dismissed the petitioner's cross-appeal; in this regard the respondent cites ***Samson Gwer & Others vs. Kenya Medical Research Institute*** S.C. Pet. 12 of 2019 [2020]

eKLR and ***Adetoun Oladeji (NIG) vs. Nigeria Breweries*** PLC SC 91/2002. On *Ground 4* the respondent urges that the Court of Appeal did not err in allowing the respondent's appeal and dismissing the Petitioners cross-appeal.

[49] It lastly urges that the petition herein lacks merit and the same ought to be dismissed with costs to the respondent.

E. Issues for Determination

[50] In certifying the matter as involving general public importance, the Court of Appeal in its Ruling stated as follows:

> *"16. We have considered the nine (9) questions identified by the applicant to demonstrate that this matter is of general public importance, and to be determined by the Supreme Court cited hereinabove. The applicant places emphasis on the question of whether Covid-19 pandemic is a Force Majeure event capable of discharging a party from its contractual obligations, and whether frustration only acts to partially discharge a party from its obligations as was held by this court. ...*
> ***17.In our view, the issue of Covid-19 pandemic and its effect on parties and their contractual obligations is one that requires the intervention and input of the Supreme Court, as it transcends the applicant, determination of which has a significant bearing on the public interest, the pandemic having affected the general public. We also find that there is a substantial question of law raised that the Supreme Court needs to clarify and settle the jurisprudence on the legal effects of Covid 19 on contractual obligations, in light of the various positions taken in the decisions determined in comparative jurisdictions that were cited by the Applicant."*** (Emphasis ours)

[51] From our consideration of the pleadings, the findings of the two superior courts below, upon hearing the submissions by the parties and perusal of the

record of appeal as well as the certification decision by the Court of Appeal, the following issues have crystallized for determination by this Court:

i. *Whether the respondent pleaded force majeure or frustration in order to be discharged from its agreement with the appellant?*

ii. *Depending on the answer to (i), whether the Covid-19 pandemic constituted grounds for discharging the respondent from its contractual obligations under the lease agreement?*

iii. *Whether the appellant is entitled to the reliefs sought?*

F. Analysis

i) Whether the respondent pleaded force majeure or frustration in order to be discharged from its agreement with the petitioner?

[52] In addition to the written submissions, Prof. Ojienda SC, Counsel for the petitioner submitted that the Court of Appeal misdirected and erroneously rewrote the terms of the lease in the interchangeable use of frustration and *force majeure* and the eventual finding that Covid-19 was a *force majeure* event. He submitted that parties are obligated to comply with the terms of their contracts and cannot unilaterally plead the effect of Covid-19 to depart from the terms of their contracts. He further contended that a party cannot use the plea of *force majeure* to depart from a contract unless they first prove that the contract provided for such a clause, or its possibility, and second that the supervening event was *inter alia* unforeseeable, insurmountable and external. It was urged that pursuant to Section 107 of the Evidence Act, the onus was on the respondent to demonstrate how Covid-19 frustrated its performance and obligations under the lease and it failed in this duty. He argued that there was no evidence submitted to the extent that the effects of the Covid-19 pandemic were sufficient to vary, to nullify or lead to a departure from the terms of the lease.

[53] Counsel further pointed out that the respondent did not cease to exist, rather it simply avoided its obligations under the lease and moved to another building about 100 meters away from the site of the contract. Mr. Konosi, the petitioner's Counsel highlighted several decisions from various jurisdictions including ***Kenneth Tracy Vs. Lee James Men's Wear Limited, Broadway LLC Vs. Blood Food LLC*** and ***East 75 Street Corporation Vs. Christian Lofting*** from the United States and the case of ***Gap Inc. Vs. Ponte Gadea*** **and** ***Porter Airlines*** from the Supreme Court of Canada to demonstrate that the courts have generally found that Covid-19 would not assist parties in avoiding their contractual obligations.

[54] Mr. Issa Mansur, Counsel for the respondent, submitted that there is distinction between *force majeure* and frustration. *Force majeure* is a contractual clause where the parties provide in a contract if the events specified in the clause occur, then performance is suspended or excused. Frustration on the other hand is by operation of law and has existed since 1864. For frustration to apply, there must be a supervening event that radically changes what was contemplated by the parties such that the performance is radically different. It is the performance of the contract that is frustrated and the frustration must not have been caused by one of the parties. A party in a claim of frustration pleads the facts and the courts decide whether the party has established frustration and whether further performance is discharged.

[55] He argued that the Court of Appeal in the case of ***Charles Mwirigi Miriti vs. Thananga Tea Growers Sacco Limited & Another*** **[2014] eKLR** set out five tests for a party to prove that the doctrine of frustration applies. It is this test that Mr. Mansur argued the trial court properly set out but then went off tangent and applied the principle that the courts in this Country cannot interfere with the contracts entered into by the parties. He urged that the Court of Appeal on the other hand properly considered the principles, applied them to the facts and reversed the decision of the Environment and Land Court. In the comparative analysis, Mr. Mansur highlighted that the

doctrine of frustration is applied differently between the American and the English position.

[56] The terms *"force majeure," "frustration,"* and *"act of God"* are frequently used interchangeably. However, it is important to note that while they are similar, as both *force majeure* and frustration result in discharging parties from contractual obligations, they are not one and the same. On the other hand, ***Black's Law Dictionary, 11th Edition***, at page 43 defines an "act of God" as follows:

> *"An overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood or tornado. The definition has been statutorily broadened to include all natural phenomena that are exceptional, inevitable and irresistible, the effects of which could not be prevented or avoided by the exercise of due care or foresight."*

[57] *Force majeure* is defined at page 788 as follows:

> *"[Law French "a superior force"] (1883) An event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (eg. floods and hurricanes) and acts of people (eg. riots, strikes and wars)*
>
> *Force majeure clause – a contractual provision allocating the risks of loss if performance becomes impossible or impracticable esp. as a result of an event or effect that the parties could not have anticipated or controlled."*

[58] While frustration is defined at page 812 as follows:

> *"1. The prevention or hindering of the attainment of a goal, such as contractual performance.*
>
> > ***Commercial frustration*** *An excuse for a party's non-performance because of some unforeseeable and uncontrollable circumstance. Also termed economic frustration.*

Self induced frustration. *A breach of contract cause by one party's action that prevents the performance. The phrase is something of a misnomer since self-induced frustration is not really a type of frustration at all but is instead a breach of contract.*

Temporary frustration. *An occurrence that prevents performance and legally suspends the duty to perform for the duration of the event. If the burden or circumstances is substantially different after the event, then the duty may be discharged.*

2. ***Contracts.*** *The doctrine that if a party's principal purpose is substantially frustrated by unanticipated changed circumstances, that party's duties are discharged and the contract is considered terminated. Also termed frustration of purpose."*

[59] We find the decision in ***Pankaj Transport PVT Limited v SDV Transami Kenya Limited*** [2017] eKLR by *the High Court (Ogola J.)* to be of persuasive value as it expounded the doctrine of *force majeure* quite aptly. The doctrine of *force majeure* has its origin in French law where there are express *force majeure* provisions in the French civil code which excuse contractual performance where events have happened outside the parties' control which could not have been foreseen at the time of contracting and which could not have been avoided by appropriate measures. The doctrine of *force majeure* has expanded to include events caused by both human actions and natural occurrences, defining situations beyond the control of parties that prevent them from meeting contractual obligations. Further, the interpretation the courts give is dependent on the choice of wording and events delineated by the parties in their contract.

[60] Notably, in ***Davis Contractors Ltd v Fareham Urban District Council (1956) 696 at 729 [Pages 9-50]***, it was highlighted that such

events can hinder performance without fault from either party. Similarly, McCardie J in ***Lebeaupin v. Richard Crispin & Co. (1920) 2 KB 714***, *[Pages 51-63]* noted that "*force majeure"* is frequently used in commercial contracts without a clear definition. Under French law, a party may be excused from performance if they can show the event was unforeseeable and insurmountable.

[61] A notable aspect of the *force majeure* doctrine is that while English Common law and American jurisprudence recognize similar principles, courts will enforce the *force majeure* doctrine only when it is explicitly stated in contracts. Put another way, if a provision is not made contractually by way of a *force majeure* clause, a party will only be able to rely on the very stringent provisions of the common law doctrine of frustration. Under English law, contractual performance will be excused due to unexpected circumstances only if they fall within the relatively narrow doctrine of frustration. This doctrine will apply by default unless the parties agree on something different in their contract.

[62] A summation of the above distinction leads us to the conclusion that *an act of God* refers specifically to the natural events that occur and can neither be prevented nor controlled by people. *Force majeure* applies to contracts to excuse further performance due to both natural disasters and human-caused events such as wars or strikes that prevent a contract from being fulfilled. It must be written into the contract, specifying what kinds of events would apply. Frustration is a common law doctrine which is implied into contracts to allow the discharging parties from further performance due to unforeseen event which makes it impossible to carry out the contract's main purpose, essentially altering the situation so much that the contract no longer makes sense.

[63] As demonstrated hereinabove the paths *force majeure* and frustration take are different. It is therefore crucial to determine which of the two was pleaded by the respondent and to do so , we have to examine the record.

[64] The respondent in its letter dated 10th July, 2020 wrote to the petitioner seeking to be discharged from the Lease Agreement. In particular the respondent stated that the intervening circumstances had made it financially untenable for it to continue with its tenancy. We reproduce part of the letter herein below:

> *"As you may very well aware, Jomo Kenyatta University of Agriculture and Technology (JKUAT) like all other Public Universities in Kenya has been going through dire financial constraints in the recent times due to drastic fluctuations in Government support as well as a declining uptake of Programmes at the Campuses*
>
> *This has been aggravated by the reduction of self-sponsored students following a Government directive on absorption of self-sponsored students as Government of Kenya students. Our Nakuru CBD campus was 100% dependent on self-sponsored students hence the unprecedented decline in student numbers.*
>
> *The recent closure of the University on 18th March, 2020 due to the Covid-19 pandemic as directed by the Government has further aggravated the cash-flow challenges the University is facing noting that most of the University income is pegged on revenues obtained from Academic operations.*
>
> *The two issues highlighted above are unprecedented happenings that the Education sector had not foreseen. Consequently, the University found it financially untenable to continue with the tenancy at Kwanza House.*
>
> *We therefore wish to notify you of our intention to terminate the lease agreement and vacate the said premises upon the expiration of a notice period of Three (3) months from the date of this letter.*

We undertake to restore the building to a tenantable state of repair in accordance with clause 5.26 of the lease agreement which requires the Lessee to:...."

[65] The respondent in its Amended Plaint dated 29th May, 2021 at paragraphs 13 and 14 pleaded frustration out of its prevailing circumstances and at paragraph 15 pleaded particulars of frustration as follows:

"Particulars of Frustration of the Lease

a. Change in law occasioned by implementation of a new placement policy by the KUCCPS where all students who attain the minimum entry requirement for admission to the university are sponsored by Government in both the private and public universities. This was done pursuant to Section 56 of the Universities Act, 2012 (the "Universities Act").

b. Reduced student enrolment occasioned by lack of self-sponsored students on account of the move by the government to fully sponsor all students who attain the minimum entry grade of C+.

c. Reduced and/or non-existent government support which was critical to financing the operation of the Plaintiff.

d. The emergence of the Covid-19 pandemic which resulted in the closure of schools and learning institutions.

e. The lack of funds for the Nakuru CBD campus whose income and expenditure is wholly reliant on revenues obtained from academic operations from its self-sponsored students program."

[66] The trial court noted that the respondent had urged that the lease had been frustrated and/or rendered commercially impossible and that the respondent ought to be discharged from it. This frustration stemmed from

the operation of law or a change in the law in the implementation of government policy regarding placement and the Covid-19 pandemic.

[67] We note that the Court of Appeal when making a determination on the second issue of whether the lease had been frustrated by circumstances or the law, from paragraphs 38 to 43 analyses the principles of the doctrine of frustration juxtaposed against the circumstances of the present case. At paragraph 44, the Court of Appeal introduces the concept of *force majeure* and concluded as follows:

> *"Consequently, it is our view that the pandemic was a force majeure event that caused the appellant undue difficulty in continuing with the lease agreement in accordance with its purpose and making the payments thereupon agreed."*

[68] We have perused the lease agreement between the parties and found that no force majeure clause is contained therein. Equally, there was consensus by Counsel for both parties that the lease between the parties did not contain a *force majeure clause* and that the respondent in its pleadings only pleaded frustration as opposed to *force majeure*.

[69] Consequently, it is clear to us that the question before the trial court as pleaded was on the applicability of the doctrine of frustration and not *force majeure* and the effect of the Covid-19 pandemic in the context of the contract.

ii. Whether the Covid-19 pandemic constituted a ground for discharging the respondent from its contractual obligations under the Lease agreement?

[70] The applicability of the doctrine of frustration is not new to our jurisdiction. As noted by the Court of Appeal in the present matter, the principles of the doctrine of frustration have been restated repeatedly and are now old hat. The doctrine of frustration has been applied severally by the Court of Appeal for instance in the cases of ***Kenya Airways Limited vs. Satwant***

Singh Flora [2013] eKLR, ***Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & another*** [2014] eKLR and ***Five Fourty Aviation Limited vs Richard Oloka*** [2015] eKLR. The Kenyan Courts acknowledge that the doctrine of frustration, first established in ***Taylor v. Caldwell*** 122 Eng. Rep. 309 (1863), discharges parties from a contract when unforeseen events destroy the subject matter or render performance impossible without fault from either party. Further, modern interpretation, as articulated by Lord Radcliffe in ***Davis Contractors Ltd v. Fareham U.D.C.*** (1956) A.C 696, recognizes frustration where a contractual obligation becomes radically different due to external circumstances, beyond what was originally agreed. The doctrine aims to ensure fairness and mitigate the rigidity of strict contractual obligations but must be invoked cautiously.

[71] In summary, the doctrine of frustration releases parties from their contractual obligations when an unforeseen event fundamentally alters the nature of the contract, rendering further performance impossible or significantly different from the original agreement. Key principles include limitation to narrow circumstances, and reliance on events beyond the control or fault of the invoking party, the effect of bringing the contract to an end forthwith, without more and automatically. The final principle is the effect of fully discharging the parties from further liability under the contract from the moment the frustrating event occurs. Though accepted in civil law jurisdictions, the concept of partial discharge has been rejected in common law jurisdictions. This finds footing in the treatise *Treitel on the Law of Contract*, 11th edition para 50-07 it stated that:

> *"...the contract is either frustrated or remains in force. There is no such concept as partial or temporary discharge frustration on account of partial or temporary impossibility...the concept of partial discharge in English law is restricted to obligations which are severable, whether in point of time or otherwise"*

As a matter of logic, the doctrine of frustration operates to discharge a contract, bringing it to an immediate and definitive end. Once the doctrine is applied, the contract cannot be deemed suspended or temporarily inoperative; it is terminated entirely unless the parties expressly agree to revive it through a subsequent agreement.

[72] These are the principles that the Courts have applied time and again when asked to consider the plea of applying the doctrine of frustration. However, the doctrine of frustration is not absolute. The alleging party must prove that the frustrating event occurred without their fault or contribution. Self-induced frustration, where the event results from the party's own actions or breach, cannot be relied upon to terminate a contract.

[73] Turning back to the dispute at hand, the Covid-19 virus was first identified in December, 2019 and declared a global pandemic in March 2020. This Court in the case of ***Haki Na Sheria Initiative v Inspector General of Police & 2 others; Kenya National Human Rights and Equality Commission (Interested Party)*** (Petition 5 (E007) of 2021) [2021] KESC 22 (KLR), as a matter of general public notoriety, took judicial notice of the fact that the Covid-19 pandemic was a public health emergency that affected not just Kenya, but the whole world.

[74] We acknowledge that the Covid-19 pandemic was an extraordinary and unprecedented global event that disrupted every facet of life, affecting economies, healthcare systems, and daily activities across the world. Never in modern history had governments been forced to implement such widespread lockdowns, travel restrictions, and social distancing measures to contain a virus. The scale and impact of the pandemic are often compared to the Spanish Flu of 1918, which similarly caused widespread devastation, killing millions globally. Covid-19 stood out as unique in its reach and the overwhelming strain it placed on societies, economies, and public health infrastructure, with the world grappling for solutions in real time amidst uncertainty.

[75] We equally acknowledge that the pandemic had an effect on landlords and commercial properties causing income losses due to missed rental income, increased vacancies, and depreciated property values as businesses closed or moved online. Landlords also faced legal challenges over the terms of leases as well increased costs for adopting safety measures. It is the effects of the Covid-19 pandemic on the landlords and the tenants that we are called to balance in this appeal.

[76] Both parties invited the Court to consider decisions made on the effect of the Covid-19 pandemic to contracts by courts in other jurisdictions for their persuasive value. The cases presented by both parties reflect a broad application of the doctrines of frustration and impossibility of performance in contractual disputes, particularly in light of Covid-19 related disruptions. The petitioner highlighted several decisions, including ***Porter Airlines Inc. v. Nieuport Aviation Infrastructure Partners GP***, 2022 ONSC 5922 (Supreme Court of Canada), where force majeure rather than frustration was central, and U.S. cases such **as *1140 Broadway LLC v. Bold Food, LLC***, 2020 WL 7137817, ***35 East 75th Street Corp. v. Christian Louboutin L.L.C***., 2020 WL 7315470, and ***The Gap Inc. v. Ponte Gadea New York LLC***, 2021 WL 861121 where the New York Courts emphasized that financial hardship alone does not meet the threshold for frustration of purpose. In ***In re: CEC Entertainment, Inc***., No. 20-33162, 2020 WL 7356380, the U.S. Bankruptcy Court distinguished frustration from force majeure, holding that government restrictions alone were insufficient to discharge contractual obligations. The South African case ***Slabbert N.O. & Others v. Ma-Afrika Hotels t/a Rivierbos Guest House*, (772/2021)** [2022] ZASCA 152, found that impossibility due to government restrictions was temporary, and obligations resumed once restrictions were lifted. Similarly, the Irish case ***Kenneth Treacy v. Lee James Menswear Limited and James O'Regan*,** [2022] IEHC 600, concluded that financial hardship due to the pandemic did not absolve rental obligations.

[77] The respondent equally pointed on to several cases including ***Newbury, LLC v. Caffe Nero Ams Inc.***, No. 20184 CV01493-BLS2, 2021 WL 956069 where the Massachusetts Superior Court held that frustration was recognized when government orders temporarily rendered a lease's purpose impossible. Similarly, in ***Development LLC v. Brooklyn Babies and Toddlers LLC***, No. 510160/2020 the Appellate Division of the Supreme Court of the State of New York held that the impossibility doctrine applied because government measures directly prevented contract performance. While in the cases of ***Fitness Int'l LLC v. National Retail Props LP***, 25 Wash. App. 2d 606, 524 P.3d 1057, 1065 (2023), and ***AGW Sono Partners, LLC v. Downtown Soho,*** *LLC*, 343 Conn 309, 273 A.3d 186 (2022), the Courts in the US states of Washington and Connecticut underscored the narrow application of frustration, emphasizing that contracts remain enforceable if alternative uses or partial performance are possible. What we note from these cases is that across jurisdictions, the courts underscore the stringent criteria required to invoke frustration or impossibility to discharge contractual obligations, striking a delicate balance between fairness and contractual certainty.

[78] We see no reason to depart from the principles of the doctrine of frustration as expressed in common law and applied by the courts in Kenya. As the various courts have cautioned time and again, it is a doctrine that must not be lightly invoked by parties or lightly applied by the courts. Where parties have provided for it in their agreement, then it is for the court to look at the agreement before applying the doctrine of frustration. However, where the parties have not made provision for this doctrine, then the courts fall back on common law and the parameters we have set out in the preceding paragraphs.

[79] Applying these parameters to the current matter, we note that the Covid-19 pandemic caused an exceptional disruption to educational institutions around the world. In response, governments were grappling for solutions in real-time amidst uncertainty and Kenya was no different. The most effective solution which was replicated the world over was government-mandated

lockdowns and health measures forcing the temporary closure of all learning facilities.

[80] The virus was confirmed to have reached Kenya on 12th March 2020 with the initial cases reported in the capital, Nairobi and in the coastal area of Mombasa. On 15th March, 2020 the government directed all schools and higher learning institutions be closed from 20th March, 2020 until further notice. On 6th June, 2020, the Government announced that schools would begin to reopen gradually from 1st September, 2020.

[81] It was during this intervening period that the respondent issued its notice of termination on 10th July 2020. Among the reasons the respondent cited was the '*the reduction of self-sponsored students following a Government directive on absorption of self-sponsored students as Government of Kenya students. Our Nakuru CBD campus was 100% dependent on self-sponsored students hence the unprecedented decline in student numbers.'*

[82] The Court of Appeal noted that the change in law and policy as well the implementation of the government directives prior to signing the impugned lease agreement had not affected the respondent's operations. This was demonstrated by the fact that the respondent was able to maintain its Nakuru CBD campus without a hitch until the year 2020, when it appears that the campus ran into financial trouble following the closure of the universities by the government directive due to the Covid-19 pandemic.

[83] The principle of *pacta sunt servanda* is one of the oldest most fundamental principles of international law that requires parties to honour their agreements and obligations. This is why the doctrine of frustration is interpreted narrowly to maintain the certainty of contracts. It is only when the frustration is substantial and the contract's purpose becomes meaningless, that the courts should step in to apply the doctrine of frustration and discharge the parties. This intervention is intended to provide reprieve to a party where it would be unjust and unreasonable to hold them to their contract. Further, as is

evident from the cases we have cited and expounded on hereinabove, a party is not absolved from performing their obligations under a contract simply because it has become more expensive or more difficult.

[84] We acknowledge that the respondent entered into the contested lease agreement to teach and train self-sponsored students. Additionally, the respondent's Nakuru CBD campus was heavily dependent on income from self-sponsored students. During the lockdown, the respondent, like many other higher learning institutions, was forced to close its doors albeit temporarily.

[85] The temporary closure of institutions of higher learning by the Government caused the respondent some financial hardship. However, we are of the considered view that this did not amount to an absolute impossibility of performance in the legal sense, especially once restrictions eased and the respondent, along with all learning institutions reopened and resumed normal learning. This is well demonstrated by the fact that once it vacated the petitioner's premises, the respondent moved to another location within Nakuru City. It is a pertinent demonstration of the fact that the pandemic and lockdown measures by the government did not amount to the impossibility of performance. Further, the government restrictions did not bar the respondent entirely from teaching and training self-sponsored students, but only from using the traditional method of in-person teaching. One of the positives from the pandemic was the significant shift towards moving services online, and education was no different.

[86] As a result, we are of the considered view that financial hardship alone, even one stemming from an extraordinary event like the Covid-19 pandemic, does not automatically discharge a tenant's rental obligations. Consequently, this Court arrives at a conclusion that in the circumstances of the present appeal, the Covid-19 pandemic did not constitute a frustrating event, that would allow the respondent to be discharged from further performance under the lease.

[87] Before closing, we must address the issue concerning the respondent's notice of termination dated 10th July 2020 and subsequently vacation of the suit premises on 31st January 2021 that was in issue. We note this was not one of the issues that was certified as concerning general public importance. However, flowing from our finding hereinabove, its consideration is corollary to the main issues.

[88] The petitioner contends that the lease did not contain a termination clause, thus making the notice invalid. The respondent, in opposition, makes two key arguments. First, the respondent argues that the phrase *"sooner determination"* in the lease agreement is clear and unambiguous. It should be interpreted in its ordinary, literal sense, meaning the contract could end earlier than its full term under certain conditions. Second, the respondent using the doctrine of *pari materia*, arguing that the Court should interpret the lease in harmony with related laws. Specifically, Section 57(4) of the Land Act Cap 280 is cited. It provides that in a periodic tenancy, where no termination notice provision exists, either party can terminate the tenancy by giving notice equivalent to the tenancy period. This argument suggests that the lease agreement should be read to allow termination under similar conditions, aligning with this statutory provision.

[89] We note that Clauses 5.5, 5.27, 5.36 and Clause 7.10 of the Lease contained the phrase *"or sooner determination"* and from this, the respondent asks us to make a finding that the contract could end earlier than its full term under certain conditions. The trial court found that having perused the lease, it did not come across any termination clause. The appellate court held that the contract contents should be read in context and not as separate clauses rather as clauses that make up a whole. The Appellate Court on the hand concluded that the effect of the phrase "*or sooner determination*" in those clauses, was to allow the parties to opt out of the lease agreement prior to the fixed term of the lease and therefore, the trial Judge erred in finding that the phrase did not

amount to a break clause entitling the parties to determine the contract before the expiry of the lease term.

[90] We are minded differently. The phrase "*or sooner determination*" may hint atsome intention that there was some possibility of the Lease terminating sooner than the expiry date. However, in the absence of a termination clause, this intention failed to crystallize and to our minds, the intention is neither clear nor unambiguous. From this one phrase, we are unable find that the parties intended to give themselves an exit window out of the agreed terms upon change of circumstances and we must look elsewhere to find an answer.

[91] Commercial leases in Kenya are governed by the Landlord and Tenant (Shops, Hotel and Catering Establishments) Act which was enacted in 1965 for the purpose of *'the protection of tenants of such premises from eviction or from exploitation'*. It creates controlled tenancies defined under Section 2(1) of the Act as arising when the lease is not in writing, or if it is in writing, contains a provision for termination or is for a period of less than five years.

[92] In controlled tenancies, the law severely curtails the landlord. According to Section 4 (2), (4) and (5), the party intending to terminate the lease must issue a termination notice, providing at least two months' notice to the other party. The receiving party then has one month to respond, indicating whether they intend to comply with the notice. Additionally, the termination notice cannot take effect unless it specifies the grounds upon which the requesting party seeks the termination. Further, a tenant may challenge such notice by filing a reference with the Business Premises Rent Tribunal. In such cases, the notice will not take effect until the Tribunal determines the reference, as stipulated under Section 6(1). During this process, the tenant is entitled to remain in occupation, paying the same rent, until the reference is resolved.

[93] Mr. William Maema, a senior legal practitioner in Kenya, in an article titled *Kenya's archaic commercial leases law now ripe for repeal* published in the Business Daily on 12th June, 2018 questioned the relevancy of the Landlord

and Tenant (Shops, Hotel and Catering Establishments) Act which was enacted in 1965 in today's economy. He contended that the statute no longer serves the interests of both the landlords and the tenants. On the one hand the owners of commercial properties, through the ingenuity of their lawyers, devised ways of ensuring that the leases avoid the application of the Act to their properties. They achieve this by drafting commercial leases in way that all the elements of a controlled tenancy as defined by the Act are excluded. Two key features of this ingenuity is that such leases have no termination clause and will run for a term exceeding five years. This enables landlords to operate outside the Act with the ability to take actions which would otherwise be prohibited under the Act. On the other hand, the tenants who the statute was intended to protect are forced to enter into long-term commercial leases, which they cannot terminate on a need basis.

[94] The impugned lease in this instant appeal appears to be one such lease, which has been crafted in such a manner as to avoid the application of the Landlord and Tenant (Shops, Hotel and Catering Establishments) Act. It is likely the reason why the respondent's counsel requests the Court to apply Section 57 of the Land Act, Cap 280 Laws of Kenya. Section 57(1) (a) and (b) provides that where the term of a lease is not specified, and there is no provision of notice for termination, then it is deemed as a periodic lease, and the implied notice period is taken to be the periodic basis of payment of rent. The provisions provide as follows:

> *"(a) the term of the lease is not specified and no provision is made for the giving of notice to terminate the tenancy, the lease shall be deemed to be a periodic lease;*
>
> *(b)the term is from week to week, month to month, year to year or any other periodic basis to which the rent is payable in relation to agricultural land the periodic lease shall be for six months;"*

[95] In such cases, Section 57(4) provides that a period tenancy may be terminated by either party giving notice to the other, the length of which is to be not less than the tenancy period. As we understand it, this means that either the landlord or the tenant can end the tenancy by giving a notice period at least as long as the period of the tenancy. For example, if it's a monthly tenancy, at least one month's notice is required or for a weekly tenancy, at least one week's notice is needed.

[96] Applying this provision to the circumstance of this appeal, the respondent was to pay an increasing annual rent commencing Kshs.45,543,000/- and service charge quarterly in advance. Going by the provision in Section 57(4) of the Land Act, then the respondent should have given a three-month notice to the petitioner. On 10th July 2020, the respondent issued a three-month notice to the petitioner intimating its intention to terminate the lease and vacate the premises. That notwithstanding, the respondent did not reference or rely on this legal provision in its notice to the petitioner. Instead, its reliance on this provision appears to be a mere afterthought, used retroactively to justify the termination of the lease.

[97] Further, as we have found, the impugned lease lacked a termination clause, making the respondent's actions constitute a unilateral termination. By proceeding with a unilateral termination, the respondent effectively breached the terms of the lease, rendering the termination notice void.

[98] Finding the termination notice to be void, and the respondent having vacated the suit premises in January, 2021, thereby breaching the lease, what remedies lie to the petitioner?

iii) Whether the appellant is entitled to the reliefs sought?

[99] As we have pointed out, the lease was operating outside the ambit of the the Landlord and Tenant (Shops, Hotel and Catering Establishments) Act. We therefore look to case law to find an appropriate remedy. The Environment and

Land Court in the present appeal relied on the decision of the Court of Appeal in ***Kenya Commercial Bank Limited vs. Popatlal Madhavji & another*** [2019] eKLR where the appellate court held that termination of a lease without a termination clause is not possible and therefore the tenant was obligated to continue to occupy the suit premises for the entire period of the lease and pay the agreed rent. The Court held as follows:

> *"But having found as we have above that an agreement to lease for a period of 5 years and 3 months had resulted from the terms outlined in the letter of 23rd December 1998 and the ensuing correspondence, the appellant was bound to a lease term of a period exceeding five years, which removed it from the ambits of Cap 301. This meant that termination of the lease mid-term was not available to the appellant.* ***The consequence of this was that the notice of termination of 25th March 2002 could not validly terminate the lease, with the result, we find that, the appellant was obligated to continue to occupy the suit premises for the entire period of the lease, and to pay the agreed rent and service charge for the period upto the date of expiry,*** *that being the 31st December 2003."*

[100] The Court of Appeal, in the present appeal, held that the trial court fell into error in condemning the respondent to making rental payments for the entire duration of the lease when it was no longer using or benefiting from the premises due to forces beyond its control.

[101] We note that two cases from the High Court are also often cited when dealing with this issue. In the case of ***Chimanlal Meghji Shah & Another vs. Oxford University Press (EA) Limited [2007] eKLR***, the High Court (*Warsame J. (as he then was))* ruled that it is unconscionable for a landlord to demand full rent for the remaining part of the lease period when such lease has been terminated. This is because the landlord reserves the right to offer the same premises to a different tenant for occupation. The Court went on to hold thus:

"What happens if the tenant cannot afford to pay the rent agreed and he wants to vacate the premises? What happens if the market is depressed and due to that economic depression, the tenant is unable to meet his obligation? It is because of such circumstances that landlords of premises vacated by tenants are required to look for other tenants. The landlord cannot perpetually wait and waste the premises simply because he had a fixed lease with no termination clause."

[102] While in the case ***Indar Singh Limited vs Star Times Media Company Limited [2021] eKLR, the High Court (Majanja J.) held that a tenant cannot unilaterally terminate a fixed-term*** lease that has no termination clause. However, the defendant could not be forced to continue the occupation of the leased premises if it had decided to vacate citing the inability to meet its rental obligations. Therefore, while dismissing the plaintiff's prayers, the court held that the plaintiff's only remedy, in this case, would be a claim for damages for breach of the contract. The court specifically held as follows:

"Even if the defendant had not terminated the lease and vacated the suit property as at the time this suit was brought, I would still not have granted the injunctive orders sought by the plaintiff. ***I am in agreement with the plaintiff that a tenant cannot unilaterally terminate a fixed term lease which has no termination clause****. However, I have not come across any authority in support of the plaintiff's contention that a tenant in a fixed term lease who is unable to pay rent to a landlord can be forced by the court to continue in occupation of the leased premises if it has decided to vacate citing inability to pay rent****. In my view, the court cannot compel a tenant to continue in occupation of leased premises even if the tenant has no valid reason for vacating the premises****. The plaintiff's remedy in my view is in damages for breach of contract if it proves that the termination of the lease by the defendant was unlawful.* ***Its remedy does not lie in compelling the defendant to***

continue in occupation of the suit property against its wishes."
[Emphasis ours]

[103] The issue remaining largely unsettled, it now falls to us to find the way forward regarding how to go about the termination of a lease for a fixed term without a termination clause.

[104] We find persuasive value in the Court of Appeal's finding in the case of ***Kasturi Limited vs. Nyeri Wholesalers Limited*** [2014] eKLR where it very aptly held that: *"A tenant cannot impose or force him/herself/itself on a landlord."* The converse is equally true that a landlord cannot impose or force themselves on a tenant. This delicate balance is the cornerstone of harmonious co-existence and mutual respect in the rental world.

[105] Similarly, as *Warsame J.* (as he then was) articulated in ***Chimanlal Meghji Shah & Another v Oxford University Press (EA) Limited*** (supra) , we concur that it is unconscionable to compel a tenant to continue in occupation of a premises or for a landlord to demand full rent for the remaining portion of the tenancy when the tenancy has been terminated and the tenant vacated the premises. Both parties bear a responsibility to mitigate any losses incurred. Whereby landlords should actively seek new tenants to minimize potential financial harm, tenants must communicate any challenges that may affect their ability to fulfill their lease obligations. This mutual duty to mitigate loss underscores the importance of collaboration in navigating contractual challenges. This duty to mitigate was elaborated in ***African Highland Produce Limited v John Kisorio*** [2001] eKLR, where the Court of Appeal held that;

> *"It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect."*

[106] The duty to mitigate arises as soon as the injured party realizes an interest has been injured. They must act in the interest of both parties, provided this does not require them to suffer additional injury or engage in unreasonable expenditure or speculative litigation. Whether the actions in mitigation are reasonable depends on the specific facts of each case, with the burden of proving failure to mitigate resting on the defendant (See ***African Highland Produce Limited v John Kisorio [2001] eKLR***, citing Halsbury's Laws of England, Vol. 11, Page 289, 3rd Edn 1955).

[107] For avoidance of doubt, it is our considered finding that, where the parties are compelled to disengage without mutual agreement, resulting in the termination of the lease either by the tenant vacating the premises voluntarily or by eviction initiated by the landlord, this shall be deemed a breach of contract. Consequently, we take the position that, notwithstanding the absence of a termination clause, it would be unconscionable to compel a tenant to remain in premises they no longer wish to occupy. Equally, it would be unreasonable to claim rent for the unexpired lease term after the tenant has vacated. Therefore, the remedy for such termination is rent due up to the date of vacating and damages for breach of contract. In such a case, the remedy is for the party responsible for the breach to be liable to pay damages.

[108] It is a well-established principle of law that damages for a breach of contract aim, subject to mitigation, to restore the claimant to the position they would have been in had the breach not occurred. This principle, known as *restitutio in integrum*, underscores the compensatory nature of contractual damages. Kenyan case law has consistently affirmed this approach, as seen in ***Kenya Industrial Estates Ltd vs. Lee Enterprises Ltd*** (NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR) and ***Kenya Breweries Ltd v Natex Distributors Ltd*** (Milimani HCCC No. 704 of 2000 [2004] eKLR).

[109] However, it is equally established that general damages for breach of contract are not awardable in addition to quantified or special damages. The legal position on this issue was first stated in ***Dharamshi v Karsan [1974]***

EA 41 by the Court of Appeal for East Africa and restated several times by the Court of Appeal in subsequent cases including ***Postal Corporation of Kenya v Gerald Kamondo Njuki t/a Geka General Supplies NRB*** CA Civil Appeal No. 625 of 2019 [2021] eKLR. The measure of damages follows the rule established in ***Hadley v Baxendale*** (1854) 9 Exch.341, which holds that damages should encompass losses arising naturally from the breach itself or those reasonably foreseeable by both parties at the time the contract was formed. This principle has been adopted in Kenyan jurisprudence, as demonstrated in ***Standard Chartered Bank Limited vs. Intercom Services Ltd & Others***, NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR. Such damages are special damages, which must be specifically pleaded and proven, a requirement reiterated in ***Coast Bus Service Ltd vs. Sisco Murunga Ndanyi & 2 others*** (NRB CA Civil Appeal No. 192 of 92 (UR)) and ***Charles C. Sande v Kenya Co-operative Creameries Ltd*** (NRB CA Civil Appeal No. 154 of 1992 (UR)).

[110] Applying these principles to the present circumstances, the petitioner argued that the respondent was obligated to continue paying rent for the lease term ending on 30th April 2022, and sought Kshs.162,469,481/- in financial losses as damages. This amount included Kshs.97,817,231/- for rent due until lease expiry and Kshs.64,652,250/- for premises restoration.

[111] The respondent vacated the premises on 31st January 2021, with a year and two months (14 months) remaining on the lease. Had the respondent not vacated the property, then the petitioner would have received the rent for these 14 months. However, we cannot turn a blind eye to the inordinate period that is 14 months that the respondents would have been expected to pay rent for premises that it was not in occupation of. Therefore, invoking the principles of mitigation, we find that it was the petitioner's obligation to attempt and endeavour to market and find an alternative tenant for the suit premises rather than let the premises lie unoccupied for a period of 14 months. It is why, in exercise of our discretion, while also considering that we cannot predict the

future, we find it reasonable to limit the petitioner's claim to rent for a three-month period. We consider this time sufficient to conduct necessary renovations and actively market the premises to prospective tenants in a competitive market.

[112] Applying the principles of equity, we must strike a balance between the interests of the petitioner and those of the respondent. This is why, during our perusal of the record before the Court, the issue of the security deposit appears to have fallen through the cracks of the case. The security deposit for rent of Kshs.11,385,750 was paid by the respondent in accordance with Clause 3.3 of the initial Lease and by agreement, the same was applied to the impugned lease. Despite being raised by the respondent the issue was not given due consideration by the Environment and Land Court. The security deposit is a crucial component in commercial leases, serving as a financial safeguard for the landlord against potential losses or damages associated with tenant occupancy. Conversely, for tenants, the security deposit is a refundable asset, incentivizing them to maintain the premises and adhere to lease terms to recover the amount upon lease termination. Accordingly, we must give it due regard in crafting a remedy which balances the interests of both parties.

[113] While the petitioner sought damages for breach of contract, any such assessment should reflect reasonable mitigation efforts. Exercising our powers under Section 21 of the Supreme Court Act to make any orders or grant any relief that could have been made or granted by a court or tribunal of first instance, we make the following assessment. It is our considered opinion that the petitioner's claim of Kshs.162,469,481/- is excessive for two main reasons. Firstly, the respondent agreed to pay Ksh.40,000,000/- for restoring the premises as per the consent recorded on 2nd June 2021 before the Environment and Land Court. Secondly, under the mitigation principle, we hold the view that it would have been unreasonable for the petitioner to wait over a year without securing a new tenant. As stated hereinabove, we consider three months to be a reasonable timeframe for renovations and re-leasing efforts by the petitioner.

[114] The respondent vacated the premises on 31st January 2021, with three months remaining in the lease year ending on 30th April 2021. According to the lease, the annual rent for this period was Ksh.55,357,799/-, making the prorated rent for February, March, and April 2021 Ksh.13,839,449.75. We therefore award the petitioner three months' rent, totalling Ksh.13,839,449.75, minus the security deposit of Ksh.11,385,750/-. After deducting the security deposit, the final amount awarded is Ksh.2,453,699.75.

[115] Briefly addressing the question of VAT, on further perusal of the record, we note that the appellant failed to plead the issue of Value Added Tax in its statement of defence and counterclaim. That notwithstanding, our award pertains not to rent arrears, but rather to an award of damages. Consequently, the issue of VAT falls by the wayside.

G. COSTS

[116] In the circumstances and for the reasons given above, the appeal is partially successful. In line with our decision in ***Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai & 4 Others,*** SC Petition Application No. 4 of 2012; [2014] eKLR, we are inclined to order that parties bear their own costs. Accordingly, in this instance, we find that what commends itself to us is that we direct each party to bear its own costs.

H. CONCLUSION

[117] Consequently, and for the reasons aforesaid, the appeal is partially successful. We make the following Orders:

i. ***The petition of appeal dated 12th January, 2024 and filed on 15th January, 2024 is hereby allowed only to the following extent:***

   a. ***We hereby set aside the decision of the Court of Appeal.***

b. ***We decline to reinstate the decision of the Environment and Land Court.***

c. ***We uphold the award to the petitioner of Kshs.40,000,000/- for restoring the suit premises as per the consent recorded on 2nd June 2021 before the Environment and Land Court stands.***

d. ***We therefore award the petitioner three months' rent, totalling Kshs.13,839,449.75, minus the security deposit of Kshs.11,385,750/-, with the final amount awarded being Kshs.2,453,699.75.***

ii. ***We hereby direct that the sum of Kshs.6,000/= deposited as security for costs in the appeal be refunded to the petitioner***.

iii. ***Each party to bear their own costs of the Appeal.***

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **6th** day of **December** 2024.

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M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....	.....
S. C. WANJALA	**NJOKI NDUNGU**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
I. LENAOLA	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a
true copy of the original

REGISTRAR
SUPREME COURT OF KENYA