IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, GATEMBU & MURGOR, JJ,A)

CIVIL APPEAL NO. 215 OF 2013

BETWEEN

KENYA COMMERCIAL BANK LIMITED.....APPELLANT

AND

POPATLAL MADHAVJI & BROTHERS LIMITED.....RESPONDENT

(Appeal from a judgment and decree of the High Court Milimani at Nairobi (Kimaru, J.) delivered 29th October 2010

in

Civil Suit No. 165 of 2004 as consolidated with HCCC No. 388 of 2005, 138 & 540 of 2006 and HCCC No. 157 of 2007)

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JUDGMENT OF THE COURT

The appellant, Kenya Commercial Bank Limited, a tenant of ***the respondent, Popatlal Madhavji & Brothers Limited*** was aggrieved by the judgment of the High Court, *(Kimaru, J)* which determined that the appellant was wrong in terminating its lease agreement with the respondent, in ordering the appellant to pay rent, escalation of rent and service charge at the rate of 15% per annum for the entire period of the draft lease, and to pay the restoration costs for reconversion of the suit premises from a banking hall, back to its original state of shops and stores.

The respondent is the registered proprietor of the property known as Land Reference No. 209/2527/1, comprising a building called Mombasa House *(the building)* situated at the intersection of Monrovia Street and Muindi Mbingu Street in the Central Business district of Nairobi. In 1977, the appellant entered into a lease agreement with Narmanda Govindji Popatlal Raithatha, Virendra Govindji Popatlal Raithatha, Mahendra Govindji Popatlal Raithatha and Harish Govindji Popatlal Raithatha from 1st October 1977 for a term of 5 years and 3 months wherein the respondent agreed to lease to the appellant the ground floor *(the suit premises)* of the building. In order to establish its banking business, the appellant converted the existing shops and stores space into a banking hall. Subsequently thereto, the appellant and the Popatlal family entered into three other leases, the last of which expired on 31st September 1998.

Thereafter negotiations were commenced, this time between the appellant and the respondent to whom the property had been transferred for a lease term of 5 years and 3 months from 1st October 1998. The lease terms were set out in a letter dated 23rd December 1998 where the rent per month was specified as Kshs. 427,000, and an annual service charge was indicated as Kshs.262,200 which was payable at the rate of Kshs. 64,050 per quarter. It was the respondent's case that the lease agreement also comprised of an escalation clause which specified a rent and service charge would increase by 15% per annum upon the completion of the first year, and that it was agreed by the parties that at the expiry of the lease period the appellant would return the suit premises back to its original state, being shops and stores; that despite the tenancy terminating, on the 31st December 2003, the appellant had neither vacated the suit premises nor restored it back to its original state.

As a consequence, by way of four suits that were later consolidated, the respondent claimed Kshs. 74,064,754. 53 for rent and service charge as at 6th February 2008, when the appellant finally vacated the suit premises. The respondent also prayed for interest and costs.

The appellant admitted occupying the suit premises, but denied that it had entered into a lease agreement with the respondent for 5 years and 3 months which period commenced on 1st October 1998, and maintained that the lease agreement with the respondent was a month to month tenancy which could be terminated by either party giving fifteen (15) days' notice of termination. It stated that the tenancy terminated on the 30th June 2002, and had vacated the suit premises prior to the termination date. It complained that when it had sought to surrender the keys to

the respondent, the keys were rejected and returned back to it. The respondent was therefore estopped from demanding rent and service charge for the period after the appellant had vacated the suit premises; and instead ought to have mitigated its loss.

The appellant denied that it was obliged to restore the suit premises back to its original state, and averred that it had nevertheless commenced the repair works prior to vacating the suit premises, but the respondent had denied its contractor access to the suit premises thereby discharging it from undertaking the repairs.

In the judgment, the learned judge concluded that a lease agreement which commenced on 1st October 1998 for a period of 5 years and 3 months existed between the respondent and the appellant, since the respondent had partly performed the terms of the lease, and the appellant had remained in possession of the suit premises and was paying rent to the respondent in accordance with the terms of the lease; that whether or not the draft lease was unsigned or unregistered did not negate the appellant's obligations.

The learned judge also found that the appellant had agreed to the escalation in rent and service charge of 15% per annum effective from 1st October 1999 until termination of the lease, and in so finding awarded the respondent Kshs. 18,543,641.40 being unpaid rent and service charge.

As to whether the appellant was required to restore the suit premises back to its original state, the court found that the original agreement of 1st October 1977 provided for restoration, which the appellant was compelled to abide by. The court ordered the appellant to pay restoration costs of Kshs. 6,431, 019. 65.

Concerning the period after the lease terminated on 31st December 2003, the court held that the respondent was not entitled to rent and service charge for the period after the appellant vacated the suit premises.

The appellant was aggrieved by the trial court's decision and brought this appeal on the grounds that the learned judge was wrong in finding that a lease agreement existed between the appellant and the respondent for a term of 5 years 3 months from 1st October 1998, since the terms of the lease were yet to be agreed upon by the parties; in disregarding the mandatory requirements of ***section 107*** of the ***Transfer of Property Act*** that a lease of an immovable property for a term exceeding one year can only be made by a registered instrument; in relying on the appellant's letter to the respondent's advocate dated 11th July 2000 as proof that the appellant had agreed to the escalation of 15% of rent and service charge effective 1st October 1999, and in concluding that the respondent was entitled to charge the escalation of 15%; in finding that the appellant was liable to pay rent for the period after the notice of termination expired on 30th June 2002, and in finding that Kshs. 18,543,641.40 was payable to the respondent for the period upto 31st December 2003 when the lease expired.

Pertaining to the restoration work, the appellant faulted the learned judge for finding that the respondent and the Popatlal family had remained the same entity notwithstanding that the Popatlal family had transferred the property to the respondent, a limited liability company which subsequently became the registered proprietor from 25th November 1999, and for concluding that the terms of the 1977 lease required the appellant to restore the suit premises back to its original state. The appellant further faulted the court for awarding the respondent Kshs. 6,431,019.65 as restoration and renovation costs, yet no evidence was called to rebut the respondent's evidence, and failing to appreciate that the appellant had sought to restore the suit premises to its original condition. Finally the appellant complained that the learned judge failed to appreciate that the respondent's remedy lay in a suit against the appellant, and not in the refusal to take back the suit premises.

The respondent also filed a cross appeal wherein the grounds specified were whether the respondent was entitled to rent for the period between 1st January 2004 and 6th February 2008 when the court ordered that the respondent take possession of the suit premises; whether the court failed to appreciate that the appellant had not provided evidence that the respondent ought to have mitigated its losses by taking over possession of the suit premises prior to 6th February 2008; that the court ought to have awarded the respondent mesne profits for the period between 1st January 2004 and 6th February 2008; and that the court failed to award interest on rent and service charge from the date of filing suit, and interest on restoration costs of Kshs. 6,431,019.65 should have been awarded from the date of judgment.

Mr. D.K. Musyoka, learned counsel for the appellant submitted that after the last lease agreement for the period 1st July 1993 between Mrs. Popatlal and the appellant lapsed, negotiations were commenced for a new lease for the period 1st October 1998 to 31st December 2003, but which negotiations did not culminate in a signed lease agreement. It was explained that the draft lease remained unsigned as the appellant did not agree to inclusion of a provision allowing for rent escalation of 15% per annum; that thereafter due to a restructuring of the appellant's business it instead terminated the tenancy by a letter dated 30th June 2002.

Counsel faulted, the learned judge for awarding rent of Kshs.18,543,641.40, from July 2002 to 31st December 2003, inclusive of the 15% escalation per annum on the rent and service charge for reasons that no binding lease existed between the parties; that a periodic tenancy had come into existence which entitled the appellant to terminate the tenancy on 30th June 2002. Furthermore that, following termination, the respondent ought to have mitigated its loss by taking possession of the suit premises instead of seeking to claim vacant possession after the appellant had already vacated the suit premises.

As regards the restoration costs awarded of Kshs. 6,431,019.65, it was submitted that the learned judge misdirected himself when he concluded that the appellant agreed to convert the suit premises back to its original state of eight shops, since no such provision was included in the draft lease; that the appellant's only obligation was to yield up possession and to remove the strong room and repair as set out in clause 1 of the draft lease agreement.

Mr. Omuga, learned counsel for the respondent begun by withdrawing the respondent's cross appeal. Counsel was of the view that the issues for consideration were whether or not there was a binding lease between the 1st October 1998 and 31st December 2003; and whether pursuant to the lease, the appellant was required to restore the suit premises to its original state of eight shops.

Counsel went on to submit that the appellant had agreed to an escalation of rent of 15% per annum, but had declined to enter into the lease because it was undergoing restructuring.

It was further submitted that the appellant undertook to carry out the restoration works, but this was stopped as approval from the Nairobi City Counsel had not been sought or obtained; that as a consequence, the respondent was unable to take over possession of the suit premises until 2008 following a court order.

Referring to ***section 108 (m)*** of the ***Transfer of Property Act***, counsel asserted that the provision required a lessee to restore the premises at expiry of the lease, and furthermore, that the unsigned lease at clause (m) provided for restoration of the suit premises. Counsel contended that, though the sum for the restoration works was not pleaded, the Quantity Surveyor's bill of quantities was admitted in evidence, and that this was an issue left for the court's determination. In support of this counsel relied on the case of ***Odd Jobs vs Mubia [1970] EA 476*** to support the contention that a court may allow evidence to be called and determine an unpleaded issue if it appears from the evidence that it was a matter left for the court's determination.

Having regard to the circumstances of the case, we are of the view that the following issues arise;

> *i) Whether the lease agreement between the appellant and the respondent was a five year and three month lease or a month to month tenancy;*
>
> *ii) Whether the appellant's notice of 25th March 2002 validly terminated the lease with the respondent;*
>
> *iii) Whether the lease agreement provided for a 15% escalation of the rent and service charge during the period of the tenancy; and*
>
> *iv) Whether upon termination of the tenancy, the appellant was liable to restore the suit premises back to that state they were in prior to taking them over under the initial lease.*

We have considered counsel's submissions and examined the record of appeal. Our mandate on a first appeal is set out in ***rule 29 (1)*** of this Court's Rules namely to re-appraise the evidence and to draw inferences of fact. We remain guided by the principles enunciated in ***Selle vs Associated Motor Boat Company Ltd [1968] EA 123*** that requires that we be slow to interfere with the decision of the trial court unless we are satisfied that the judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifestly clear from the case as a whole that the judge was overtly wrong in the exercise of discretion and occasioned injustice by such wrong exercise.

Bearing the above in mind, we turn to consider the issue of whether a five year and three month lease existed between the appellant and the respondent.

The appellant has argued that by the time it terminated the tenancy arrangement with the respondent, there was no written or registered lease agreement between the appellant and the respondent, so that its tenancy with the respondent was from month to month and could be terminated by either party giving fifteen (15) days' notice of termination.

According to ***Virendra Godviji Raiththa (PW1)*** a director of the respondent, the suit premises that were leased to the appellant from 1st October 1977 comprised 8 shops of which, three were on Muindi Mbingu Street, and five on Monrovia Street. The witness stated that the appellant demolished the partitions of the shops and converted the suit premises into a banking hall, strong room, stationary stores and book room. A lease was drawn up and signed by Mrs. Narmanda Popatlal, the executrix of the estate of Govindji Popatlal Raithatha (deceased). The period of the lease was 5 years and 3 months renewable. It was further stated that on 30th September 1998, when the last of the leases expired, the appellant expressed its intention to continue leasing the suit premises. The respondent's lawyers were instructed to draw up a lease, which was duly prepared and which the witness says he signed. The draft was subsequently forwarded to the appellant to sign, but the bank neither signed nor returned the agreement to the respondent. The lease was for a period of five years and three months and was to expire on 31st December 2003. The appellant continued paying rent and service charge in terms of the draft lease despite the fact that it had not been signed. On 3rd January 2001, the appellant wrote to the respondent to terminate the lease, but the termination was rejected as the lease period was yet to expire.

On cross examination, Mr. Raithatha stated that the lease for the period 1977 to 1982 was made between Mrs. Popatlal and the appellant. It was confirmed that the respondent was not a party to that lease, or the subsequent leases for the periods 1983 to 1988, or from 1988 to 1993, or the from 1993 to 1998. It was explained that during the period of the lease from 1993 to 1998, the building changed hands and was transferred from Mrs. Popatlal to the respondent who then became the registered owner. The witness testified that;

> *"Upto September 1998, the Plaintiff is not the Lessor. The Plaintiff does not feature in any of the leases. The plaintiff became the registered owner of the suit property on 25th/11/1995. The Lease (No. 4) was registered on the 29/10/1996."*

Mr. A.G.N Kamau who testified as PW3 stated that;

> *"The plaintiff was incorporated in October 1999. The subject matter of the negotiation was the same. The original owners were the directors of the new company – The previous lease expired on 30/9/1998 – There was an existing lease because the tenant continued remaining in the premises – the tenancy was there but there was no formal document because we were negotiating – I insist that there was a tenancy of five years and three months – it was not a month to month tenancy. The previous owner had a lease*
>
> *– KCB dragged their feet so that they could move out without signing lease. The company took over the sitting tenant – By 6/12/2000, there was no formal written lease. (Page 18) – There was a tenant-landlord relationship which was not reduced into*

writing."

In support of the above evidence, the title of the building shows that it was registered in the name of Mrs. Popatlal on 17th June 1980, and thereafter, the 4 subsequent leases were made between the appellant and Mrs. Popatlal.

On 25th November 1999, the building was transferred to the respondent company. Essentially, four important facts can be discerned from this evidence.

First, the building was initially registered in the name of Mrs. Popatlal as the executor of her late husband's estate. Second, all the signed and registered leases between 1977 and 1998 were made between Mrs. Popatlal and the appellant. Third, the building was thereafter transferred to the respondent on 25th November 1999. And fourth, no lease agreement between the respondent and the appellant was signed or registered.

As concerns the previous leases, what becomes apparent, is that, since the respondent was not a party then, it was not entitled to benefit from the terms of those agreements. This is because under the doctrine of separate legal personality enunciated in the celebrated case of ***Salomon vs Salomon (1897) AC 52***, the respondent was a separate legal entity from Mrs. Popatlal who signed those leases, and was not privy to those agreements, including the heads of agreement to lease of October 1977, it could not enforce the terms thereunder. We will revert to this issue later.

As to whether a lease agreement existed, the record shows that in a letter dated 23rd December 1998, addressed to the appellant, the respondent set out the agreed terms in respect of a 5 years and 3 months lease effective 1st October 1998 as follows;

"

CIV/105/93

23.12.1998

N.M. MBUI

MANAGER GROUP PREMISES

KENYA COMMERCIAL BANK

8TH FLOOR

KENCOM HOUSE

NAIROBI

Dear Sir,

Re: RENEWAL OF LEASE

L.R. NO. 209/2527/1 – MUINDI MBINGU STREET

We refer to the above matter, to previous correspondences hereto and to your letter to us dated the 16th ultimo whose contents have been duly noted.

This is to confirm the following issues were agreed between your MR. S.K. TOWETT, MR. MUGO and our client MR. RAITHATHA in a meeting held on the 16th ultimo:-

(i) The new rent agreed is a sum in the order of shillings FOUR HUNDRES TWENTY SEVEN THOUSANDS (READ KSHS. 427,000/=) per month with effect from the 1st October, 1998.

(ii) The term shall be a period of five (5) years three (3) months.

(iii) Your Bank shall surrender 200 sq ft facing Muindi Mbingu Street to our client the landlord in consideration whereof our client shall construct an extension for your Bank measuring approximately 200 sq ft, which extension shall be constructed in accordance with the approved plans.

(iv) The other terms and condition shall remain as per the previous lease agreement.

Urgently confirm that we may now proceed to prepare the formal lease. Yours faithfully,

A.G.N. KAMAU

CC: V.G.P. RAITHATHA P.O. BOX 30625 NAIROBI"

In a letter dated 30th June 2000, the appellant replied as follows;

"*KENYA*

COMMERCIAL *8TH FLOOR*

BANK LIMITED *KENCOM HOUSE* *TELEGRAMS KENHO NAIROBI*

MOI AVENUE *TELEX 23085*

P.O BOX 48400 *TELEPHONE 339441*

NAIROBI, KENYA *FAX NUMBER 216405*

Email: kcbhq@form-form-net.com

GENERAL MANAGER

YOUR REF: *OUR REF:*

DATE *30 June, 2000*

M/S AGN Kamau Advocates

P.O Box 42852

NAIROBI

Dear Sirs,

LEASE ON MUINDI MBINGU BRANCH

We have perused the above lease and return the same for the following amendments:-

a) Page 3:- The quarterly payments are due in January, April, July and October in each year.

b) Annual increase of rent and service charge of 15% be deleted as it was not part of the agreement between the landlord and ourselves. Your letter of 23 December, 1998 is attached herewith for your easy reference.

c) Clause (B):- The Branch pays own electricity. However, the other mentioned services are under service charge and should be eliminated.

d) A Clause for the landlord to account for the service charge paid by having the service charge account audited at the end of the year should be included.

e) The items for which the said service charge is being paid should be serialized under a separate clause.

Yours faithfully,

E.C. ABUOGI

Ag. MANAGER, GROUP PREMISES

For: GENERAL MANAGER

CC: Popatlal Madhavji & Bros Ltd P.O Box 30425

NAIROBI"

These letters are clear that negotiations for a fresh lease had commenced between the respondent and the appellant. But after reviewing the draft lease agreement drawn by the respondent's Advocate, Mr. Kamau, the appellant asserted in a letter dated of 30th June 2000, that the 15% escalation on the rent and service charge be deleted as this had not been agreed between the parties. Further correspondence showed that the appellant later recanted on the 15% annual escalation of service charge, but the issues of the rent escalation remained outstanding and unresolved. Thereafter, the draft lease was forwarded to the appellant to sign, but instead, in a letter of 30th June 2002, the appellant notified the respondent of its intention to terminate the tenancy due to a restructuring of the organization. The result was that a lease agreement was neither signed by the appellant, and nor was it at any time registered; therefore a registered lease could not be found to be in existence.

This notwithstanding, the respondent has argued that, even though a registered lease did not exist, an agreement to lease existed by virtue of the letter of 23rd December 1999 which set out the terms of the tenancy.

So did the letter of 23rd December 2000 give rise to an enforceable agreement to lease between the respondent and the appellant? The answer to this question, is to be found in ***Chapter V*** of the ***Transfer of Property Act*** 1962 which was the relevant law at the time, and governed leases of immovable property. In particular, ***Section 106*** provided for the duration of certain leases in the absence of written contract or local usage. It stipulated that;

> ***"In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of the lessor or lessee, by a six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable on the part of either lessor or lessee, by fifteen days notice expiring with the end of a month of tenancy".***

In seeking to explain the purport of ***section 106*** of the ***Transfer of Property Act,*** this Court in the case of ***Mega Garment Limited vs Mistry Jadva Parbat & Co. (Epz) Limited [2016] eKLR*** succinctly put it thus;

> ***"The time-honoured decision of this Court in Bachelor's Bakery Ltd v Westlands Securities Ltd (1982) KLR 366 which has been followed in a long line of subsequent decisions elucidates the status of an unregistered lease. It reiterates and confirms the firmly settled law, first, that a lease for immovable property for a term exceeding one year can only be made by a registered instrument; that a document merely creating a right to obtain another document, like the one in this dispute, does not require to be registered to be enforceable; that such an agreement is valid inter partes even in the absence of registration, but gives no protection against the rights of third parties. That exposition of the law hold true in this case."***

Therefore, by virtue of the existence of the agreement to lease in the terms spelt out in the letter of 23rd December 1998, a valid, binding and enforceable agreement for a fixed term period of 5 years and 3 months came into existence as between the parties, and we so find.

This leads us into the next issue, which is whether the tenancy was validly terminated. The appellant has argued that, since the draft lease remained unsigned and unregistered lease, it became a controlled tenancy within the ambits of ***section 4*** of the ***Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301***, and therefore, it was entitled to terminate the tenancy with one month's notice.

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.

Turning to the claim for annual escalation of 15% for service charge and rent, it is instructive that the letter of 23rd December 1998, which set out the lease terms only provided for the amount payable annually as rent and service charge. It did not provide for any rent escalation. The draft lease agreement, on the other hand provided as follows;

> *" ...annual rent of Shillings FIVE MILLION ONE HUNDRED TWENTY FOUR THOUSAND (KSHS. 5,124,000/=) payable in advance by equal quarterly payments of SHILLINGS ONE MILLION SEVEN HUNDRED AND EIGHT THOUSAND (Kshs. 1,281,000/=) clear of all deductions by the Lessee to the Lessors together with the annual service charge of Shillings Two Hundred Fifty Six Thousand Two Hundred (Kshs 256,200/=) payable in advance by equal quarterly payments of Shillings Sixty Four Thousands and Fifty (Kshs. 64,050/=) SUBJECT TO the said annual rent and annual service charge being increased at the rate of fifteen per centum (15%) per annum the first of such payment to be made on the first day of October One Thousand Nine Hundred and Ninety Nine (now past) and thereafter quarterly in advance on the First day of JANUARY, MAY, SEPTEMBER, JANUARY, in each year during the term hereby created.*

Similar provisions were to be found in the previous lease agreements.

But as seen in the appellant's letter of 30th June 2000 set out above, the appellant indicated that the *"Annual increase of rent and service charge of 15% be deleted as it was not part of the agreement between the landlord and ourselves. Your letter of 23rd December 1998 is attached herewith for your easy reference"*. It further proposed that, the draft agreement be amended to incorporate the fact that the appellant paid its own electricity, and sought to have other service charge items removed from the lease. The respondent was also requested to provide accounts for service charge paid, which account would require to be audited at the end of each year, and finally, the appellant requested that service charge paid be serialized under a separate clause.

What followed was a letter of 7th July 2000 by Mr. Kamau which stated thus;

> *"(a) We are in agreement with your remarks as per paragraph (a) of your letter under reference and have accordingly effected the requisite amendment to the lease document.*
>
> *(b) As regards paragraph c, d, and e of your letter under reference please note that the terms and conditions of the current lease were negotiated and agreed to be 'terms and conditions shall remain as per the previous lease agreement"(see our letter to your Bank of 23rd December 1998 in this regard) and were accordingly incorporated on this basis."*

The letter concluded by stating that the request in respect of paragraphs (c), (d), and (e) amounted to an attempt to renegotiate new terms and conditions which were already agreed upon. It should be noted that no mention was made in the letter of the concerns raised in 'paragraph (b)' of the appellant's letter.

In a subsequent letter of 11th July 2000 the appellant wrote back to Mr. Kamau confirming that it was, *"…agreeable to the provisional service charge of sh. 64,050/- per quarter and an increase of 15% p.a. provided that our request on (d) and (e) in our letter dated 30th June, 2000 is complied with"*.

When Mr. Kamau's letter of 7th June 2000 and the appellant's letter of 11th June 2000 are analysed, it becomes apparent that the parties expressly agreed to an escalation in service charge, but no agreement was reached regarding the escalation of the rent. Mr. Kamau's letter was distinctly silent on the issue. So that by the time the appellant vacated the suit premises, the rent escalation question remained unresolved.

The cross examination of ***Abdul Malik Gulamhussein Adatia (PW2)*** the respondent's accountant and bookkeeper lends further support for this summation thus;

> *"In July 2000, the bank agreed to pay the reduced service charge of 64,050/- per quarter. They also agreed that the amount would be increased by 15% per annum. The letter deals with the service charge issue only and not the rent increment…The reduction was in respect of the service charge and not the rent. The bank agreed to pay a rent of Kshs. 427,000/= per month"*.

As such without any evidence to the contrary to show that the appellant had agreed to the rent escalation, we are satisfied that, the appellant agreed to pay rent at the agreed flat rate of Kshs. 427,000 per month effective 1st October 1998 for the entire term of the lease (and without a 15% escalation), and was to pay service charge of Kshs. 64,050 per quarter, with an increase of 15% per annum for each year of the lease. Such that, while we agree with the learned judge that the appellant was liable to pay the 15% escalation on service charge, we do not agree that annual escalation on the rent was expressly agreed. We therefore find that the learned judge was wrong in awarding 15% rent increment from 1st October 1999 to 31st October 2003.

The final issue was whether the appellant was obligated to restore the premises back to its original state. In this regard, the learned judge concluded that the lease agreement of 1st October 1977 made provision for the appellant to restore the suit property back to its original state, and in so finding awarded the respondent a sum of Kshs. 6,431,019,65 being the restoration and renovation costs assessed by the Quantity Surveyor.

The respondent's submission was that ***section 108 (m)*** of the ***Transfer of Property Act*** makes it a mandatory requirement for the lessee to restore the property to the condition it was at the commencement of the lease, we take the view that the provision is not applicable to the circumstances of this case. The provision specifies that;

> ***"In the absence of a contract or local usage to the contrary, the lessor an lessee of immovable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased—***
>
> > ***"(m) The lessee is bound to keep, and on the termination of the lease to restore the property in as good condition as it was at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or resistible force…"***

From the above, it is clear that, the provision limits the requirement of restoration to only those cases where no contract or local usage exists to the contrary. In this case, we have already found that an agreement to lease already existed between the parties, so that, by virtue of the existence of that agreement, the strictures of ***section 108 (m)*** were rendered inapplicable to the circumstances of this case.

That said, we turn to the lease terms of the respondent's letter of 23rd December 1998 and the draft lease agreement. The aforementioned letter did not incorporate any provision requiring the appellant to restore the suit premises to its original state, and, clause (l) of the draft lease merely specified that the lessee was to;

> ***"… yield up the demised premises at the expiration or termination of the term hereby created with all the fixtures and fittings thereto (other than the strong room door partitions fixtures and fittings installed in the demised premises with consent of the Lessors pursuant to sub-clause I (g) hereof which shall remain the property of the Lessee) in such repair condition and decorations as shall be in strict accordance with the covenants and provisions in that behalf hereinbefore contained;"***

Again, similar provisions are to be found in the previous leases. In effect, what the appellant was being called upon to do was to *"…yield up the demised premises at the expiration or termination of the term hereby created with all the fixtures and fittings thereto (other than the strong room door, partitions, fixtures, and fittings installed in the demised premises…"* The provision did not specify that the appellant was to restore the suit premises back to its original state of eight shops.

Related to this is the appellant's further complaint that, the learned judge misdirected himself in awarding Kshs. 6,431,091.65, yet such amount had not been claimed, and did not arise from the respondent's pleadings. In other words, the sum claimed which was in the nature of special damages was not specifically pleaded, prayed for or proved.

This Court has variously stated that in the consideration of an award for special damages, it is trite law that special damages, must be specifically pleaded and proved. In the case of ***Hahn vs Singh 1985 Kenya Law Reports 716***, it was stated thus,

> ***"……special damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves"***

In the case of ***Galaxy Paints Co. Ltd V Falcon Guards Ltd (2000) EA 885*** it was held that;

> ***"The issue of determination in a suit generally flowed from the pleadings and a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination. Unless pleadings were amended, parties were confined to their pleadings. Gandy V Caspair (1956) EACA 139 and Fernandes V People Newspapers Ltd (1972) EA 63."***

This proposition was upheld by the Supreme Court in the case of ***Raila Amolo Odinga& Another vs IEBC & 2 others [2017] eKLR*** when it expressed itself thus;

> ***"In the absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have the opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other. Therefore it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings…"***

We have considered all four plaints, and are satisfied that no claim for special damages for restoration costs was specifically pleaded. There was also no amendment of the pleadings to incorporate the claim for restoration costs. Additionally, the respondent's submissions in the High Court make no reference to the question of restoration costs, as can be seen from the following excerpt;

> ***"From my above analysis of the evidence and the law, I submit that the Plaintiff has established on a balance of probabilities that:***
>
> ***i) A tenancy relationship was created between itself and the defendant for a period of 5 years and 3 months to run form 1st October, 1998 and 31st December, 2003; as***
>
> ***ii) The parties were, therefore, bound by the terms as agreed and then incorporated in the lease (which incorporated the agreed terms) of the lease which provided that the defendant would pay rent and service charge on quarterly basis;***
>
> ***iii) There was no provision for termination of the lease prematurely; and,***
>
> ***iv) Since the Bank continued to remain in possession and occupation (without any discussion or negotiation or variation) until 6th February, 2009 it was on the terms and conditions including 15% of annual increment of rent and services charges."***

The same submissions conclude with *"…the defendant is liable to pay the Plaintiff rent until the end of the day on 6th February, 2008, although the Plaintiff limits its claim to 31st January, 2008 which comes to the sum of Kshs. 74,063,754.53. The Plaintiff prays that judgment be entered against the defendant in this sum plus interest from 1st February, 2008 until payment in full ..."*. Again no demand was made for the restoration costs.

It is therefore evident that, respondent's case was at all times limited to a claim for rent and service charge arrears, and in finding that the appellant was required to pay for the restoration costs that were neither pleaded nor proved, the trial court misdirected itself and went beyond the mandate set out by the parties in the pleadings. In our view, the court was precluded from venturing into areas not raised in the pleadings. This amounted to an unfair ambush on the appellant who then did not have had an opportunity to prepare its case in to answer the allegations. We also find that in so doing, the learned judge was wrong to award Kshs. 6,431,091.65 for restoration costs to the respondent.

In view of the aforegoing, the appeal is allowed in part, and we make the following orders;

1. **The award for rent for the period 2002 to 31st December 2003 is upheld;**

2. **The award for 15% escalation of rent effective 1st October 1999 to 31st December 2003 is disallowed;**

3. **The award for service charge for the period 2002 to 31st December 2003 and 15% escalation is upheld.**

4. **The award of Kshs. 6,431,091.65 for restoration of the suit premises is disallowed; and**

5. **Since both parties have succeeded in the appeal in part, each party to bear its own costs.**

Dated and delivered at Nairobi this 22nd day of March, 2019.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR