



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 339 OF 2011

JAMES JUMA MUCHEMI & PARTNERS LIMITED.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....1ST DEFENDANT

TUSKER MATTRESSES LIMITED.....2ND DEFENDANT

JUDGEMENT

1. Juma Muchemi and Partners Ltd (herein “the Plaintiff”) commenced this suit vide a Complaint dated 4th August 2011 against Barclays Bank of Kenya Ltd (herein “the 1st Defendant”) and Tusker Mattresses Ltd (herein “the 2nd Defendant”). Subsequently, the claim against the 1st Defendant was resolved, and the 1st Defendant was discharged from the proceedings accordingly. This judgement therefore relates to the Plaintiff and the 2nd Defendant only.

2. The Plaintiff is seeking for the following orders against the 2nd Defendant:

- i. Special damages of Kshs.165,000,000.***
- ii. General damages for breach of the Lease Agreement.***
- iii. Costs of this suit***
- iv. Interest at Court’s rates on (i), (ii) and (iii) above from the date of filing the suit.***
- v. Any other or further remedy that the Court may deem fit to grant.***

3. Upon service of the Summons to Enter Appearance, the 2nd Defendant, entered appearance and filed a Statement of Defence and a Counter-claim dated 19th September 2011, which was later amended, and an Amended Statement of Defence and Counter-Claim filed on 1st February 2012. The 2nd Defendant is seeking for the following orders against the Plaintiff:

- a) Kshs.165,000,000 in damages***
- b) Kshs.38,175,467.00 as outstanding loan and accrued interest.***

c) Kshs.12,738,000.00 as incidental expenditure.

d) Kshs.202,500,000

e) Costs of this suit.

f) Interest on a, b, c and d at Court rates.

4. The Plaintiff filed a witness statement dated 4th August 2011, and testified in support of the case on 18th February 2016. In a nutshell, he told the Court that, he owns two adjacent properties namely L.R. No. Nakuru Municipality Block 11/649 and L.R. No. Nakuru Municipality Block 11/650, located at the junction of Nakuru-Nairobi Highway and Sakagwa Road, in Milimani Estate of Nakuru Municipality (hereinafter referred to as “suit property”).

5. That following negotiation between the Directors of the Plaintiff’s Company and the 2nd Defendant’s Company, the Parties developed Building Plans designed for a shopping Mall, whereby the 2nd Defendant would be the Anchor-Tenant. The concept and design for the Mall was created as per the instructions and requirements of the 2nd Defendant and forwarded to the 2nd Defendant prior to the commencement of the construction.

6. On 20th September 2005, before the commencement of the construction, the Parties reduced their terms of engagement into an agreement, whereby it was agreed that:

a) The Plaintiff had at the request of the 2nd Defendant agreed to develop a supermarket complete for the exclusive use of the 2nd Defendant.

b) The architecture and design of the entire complex would conform to the wishes of the 2nd Defendant and be approved by it.

c) The Plaintiff would use the agreement to obtain financial accommodation from a Bank.

d) The 2nd Defendant would lease the supermarket for at least ten (10) years.

e) The Lease would commence on the 1st day after issuance of the Certificate of Occupation.

f) That in the event the 2nd Defendant failed to take up the Lease upon completion, it would pay the Plaintiff liquidated damages of Kshs.165,000.00 within 90 (ninety) days of completion of construction.

g) All disputes relating to the agreement would be referred to Arbitration.

7. Pursuant to this Agreement, the Plaintiff sought for financing from Barclays Bank of Kenya, vide a letter dated 27th January 2006 and was granted a term loan of Kshs.198,506,250 and a debenture created in favour of the Bank to secure the Loan and repayment thereof. The said Loan amount was expected to finish the project. However, due to the rising cost of construction materials, the project was not fully developed. By a letter dated 12th March 2007, the Plaintiff requested for and was granted a further loan by the Bank in the sum of Kshs.30, 000,000 for the construction overrun costs. A further charge was created and executed to secure this borrowing. However, the 1st Defendant disbursed only Kshs.2,000,000, and that made it extremely difficult for the Plaintiff to complete the project.

8. In the meantime, the Plaintiff and the 1st Defendant had agreed that, the repayment of the Loan facilities was to be made from the rental income generated from the suit property, but that was not possible. Be it as it were, the dispute between the Plaintiff and the 1st Defendant has been settled as

aforesaid.

9. However, the Plaintiff's witness testified that in relation to the 2nd Defendant, the claim arises out of the facts that, the Plaintiff was required ***"to develop a supermarket complex for the exclusive use by the 2nd Defendant, and out of several formal contracts, variations of contracts, as well as contracts of correspondence"***.

10. That, by Supplemental Agreement dated 30th July 2010, the Plaintiff and the 2nd Defendant agreed vide a further Agreement that:

a) The 2nd Defendant would take up the supermarket space by 1st December 2010.

b) The Kshs.38,000,000.00 advanced to the Plaintiff would be treated as advanced rent.

c) Rent at kshs.3,751,417.00 per month plus VAT of Kshs.600,226.45 for the first one (1) year.

11. The Plaintiff testified that the supermarket Mall was eventually completed and the ground and mezzanine levels of the suit property were handed over to the 2nd Defendant, upon issuance of a Certificate of part-completion by the Municipal Council of Nakuru. However, the 2nd Defendant did not pay rent even after the agreed moratorium period had expired; instead the 2nd Defendant demanded a refund of the advance rent that had been paid during the construction of the mall and allegedly coerced the Plaintiff by means of extortion, to pay back the rent; and the Plaintiff refunded a sum of Kshs.15,000,000 thereof.

12. Thereafter though the Parties considered the matter amicably and executed a formal lease agreement in relation to the suit property, after the developed property was handed over to the 2nd Defendant on 22nd November 2010. But, even then, the 2nd Defendant refused and/or failed to pay the Lease rentals deposit or due under the Lease, so far for a period of four (4) months, totaling Kshs.31,912.060, hence the suit.

13. The 2nd Defendant on its part denied the Plaintiff's claim and lodged a counter-claim as aforesaid. Its case was supported by the evidence of Mr. Stephen Mukuha Kamau, who testified to the effect that, indeed on the 20th day of September 2005, the 2nd Defendant (*as "intended Lessee"*) entered into an Agreement with the Plaintiff (*as "intended Lessor"*). It was agreed that the 2nd Defendant was to lease the suit premises for the purpose of operating a Supermarket. The said Agreement was not a *"Lease Agreement"* as alleged by the Plaintiff but an *"Agreement to Lease"*. This is informed by the fact that under paragraph 1(f) thereof, the Parties were to execute a formal Lease Agreement upon completion of the construction of the Supermarket.

14. Further, although the Plaintiff was to use the Agreement to procure a construction loan from the Bank, the project was not a *"joint venture"*, but merely a proposed Landlord/Tenant relationship. Similarly, although the 2nd Defendant was the *"Anchor Tenant"*, the Plaintiff was required to enter into separate Lease Agreements with the other Tenants. The construction was to commence immediately and be completed within six (6) months from the date of commencement of the construction. Any delay would be brought to the knowledge of the 2nd Defendant immediately. It was further agreed that the Plaintiff was to adhere to the agreed design and seek the 2nd Defendant's approval for any developments beyond the Agreement.

15. That in breach of the said Agreement, the Plaintiff unilaterally expanded the scope of the Project to include space not originally contemplated, thus greatly increasing the cost of construction and the completion period. Again, due to the Plaintiff's *"greed and apparent lack of fiscal discipline"* the Project took over six (6) years to complete, instead of the agreed period of six months. Further in breach of the supplementary Agreement, the Plaintiff failed to hand over the premises to the 2nd Defendant in a tenantable condition and within the stipulated period. That, on the 22nd November 2010, when the

Plaintiff purported to hand over the premises to the 2nd Defendant, the same was incomplete, untenable and lacked basic amenities such as washrooms, lifts, lighting, ceiling, painting. The premise was essentially a construction site with all the debris and clutter associated therewith. That it expressly agreed in the Agreement that, the party in breach thereof would pay the other liquidated damages of **Kshs.165, 000,000**. That consequent to the Plaintiff's breach as aforesaid, the 2nd Defendant incurred huge costs and substantial loss in expected operating costs, as stated and claim in the Counter-claim. In addition a sum of Kshs.35, 942,725.46 was advanced to the Plaintiff in the form of construction materials. In addition, the 2nd Defendant spent the sum of Kshs.12,738,000 in finishing fittings as it was unable to effectively take over the premises due to the incomplete state. Further, the 2nd Defendants suffered an estimated loss of up to Kshs.202,500,000 in operating income, as a result of the failure by the Plaintiff to complete and hand over the premises by 1st December 2010 as required by the Supplemental Agreement. That subsequently, the Plaintiff has since Leased out the suit premises to Naivas Supermarket retail store and also settled the debt with 1st Defendant leading to its withdrawal from these proceedings. That with the withdrawal of the 1st Defendant, all allegations of collusion against the 2nd Defendant come "a cropper and it is hard to see what is left of the Plaintiff's case".

16. The 2nd Defendant filed witness statements made by P.M. Kamau, Paul Ndung'u and Frank Kamau, all dated 26th May 2014 in addition to the evidence of Stephen Mukuha on 6th June 2016, though these other witnesses did not testify.

17. At the conclusion of the hearing of the case, the Parties filed independent issues for determination. The Plaintiff's issues were filed on 7th May 2014, and the 2nd Defendant's, on 27th May 2014. The Plaintiff filed written submissions on 24th June 2016 and identified the following issues for determination:

- ***Which party as between the Plaintiff and the 2nd Defendant breached the Agreement dated 20th September 2005 as supplemented by the Supplemental Agreement dated 30th July 2010?***
- ***Is the Party in breach of the Agreement in (a) above liable to pay the agreed liquidated damages in the sum of Kshs.165,000,000.00 or any other sum whatsoever?***
- ***Is the 2nd Defendant entitled to claim the sum of Kshs.38,175,467.00 in alleged outstanding loan, Kshs.12,738,000.00 in alleged incidental expenditure and Kshs.202,500,000.00 in alleged lost operating income?***
- ***Which party is liable to the costs of the suit and the counterclaim?***
- ***Is any interest payable on any sums and if so, at what rate, by whom and for what period?***

18. The 2nd Defendant similarly filed submission and basically concurred with the above issues raised by the Plaintiff. However, it abandoned its claim for the sum of Kshs.202,500,000.00 in favour of the claim for the agreed liquidated damages arguing that from the evidence of Stephen Mukuha, the two figures are essentially meant to cover the same thing.

19. I shall now deal with the 1st issues raised as to whether any of the Parties breached the Agreement dated 20th September 2005, and the supplementary Agreement dated 30th July 2010. I have considered the Agreement dated 20th September 2005, and note that it was mutually executed by both Parties. The first salient and pertinent issues that arise therefrom, and from the submissions of the parties is whether: the Parties entered into a "***Lease Agreement***" or an "***Agreement to Lease***". This issue was raised by the 2nd Defendant in their submissions. The Plaintiff did not respond to this issue in its submissions. I have however read through the subject Agreement. It makes reference to the parties as "*the Lessor*" and "*the Lessee*". I have also considered clause 1(f) thereof, which was drawn to the Court's attention by the 2nd Defendant. It provides that the Lessor shall:

“Upon completion of the construction of the supermarket cause to be prepared a Standard Lease for the Supermarket for execution by both parties, which shall be duly registered at the Lands Registry at the Lessee’s costs”.

20. It is therefore evident from the above clause that the Parties were to execute a ***“Standard Lease Agreement”*** upon completion of construction of the supermarket. The question is: What is the legal effect of referring to the Parties in the Agreement of 20th September 2003 as a Lessor and Lessee? In my opinion it renders the said Agreement to be recognized as a “Lease Agreement”. It is therefore immaterial that a subsequent Lease was to be formally executed.

21. Be it as it were, let me revert back to the core issue raised by the Parties herein: the breach of the Agreement dated 20th September 2005. The Plaintiff argues that the 2nd Defendant breached the Agreement, by refusing to pay rent and abandoning the premises after hand over. The 2nd Defendant on its part blames the Plaintiff for the delay in completion of the construction of the supermarket causing it losses.

22. I shall now deal with issue of the date of completion of the construction project and/or the Supermarket complex. I find that, under paragraph 1(b) of the Agreement dated 20th September 2005 the Parties agreed that, the Lessor shall ensure;

“That construction of the supermarket is commenced as soon as possible and completed within six (6) months from the commencement of construction subject to there being no unforeseen circumstances leading to delay on site, which circumstances shall be notified to the Lessee promptly and every effort made to ameliorate the same, and, to hand over the Supermarket to the Lessee immediately thereafter in good and clean condition, cleared of all unused building materials, plant and equipment and temporary structures used in or in connection with the construction of the Supermarket.

23. It further provided that, the date of completion would be advised by the Lessor once the tender for construction had been awarded, finance arranged and building approvals obtained to enable the Lessee to make appropriate plans for taking over the building. However, it is also evident from the evidence adduced by the Parties that, the construction of the project did not materialize within the six (6) months as contemplated. The Plaintiff in its pleadings attributes the delay heavily to, insufficient funds advanced by the 1st Defendant. However, the 2nd Defendant argued that the delay was caused by expanded scope of the project by the Plaintiff to include space not originally contemplated thus greatly increasing the cost of construction and the completion period. The Plaintiff allegedly added an extra floor (or storey) that was not originally contemplated, got “greedy” for more space and lacked “fiscal discipline”.

24. Obviously whatever may have been the cause of the delay in completion of the construction within the stipulated initial period of six months, the cause is not attributed to the 2nd Defendant. Be that as it may, the Parties, subsequently executed a supplementary Agreement dated 30th July 2010, which extended the completion period for the construction providing under clause 6 inter alia that:

“The Lessor undertakes to complete the construction of the Apple House at his own cost within the Four (4) months period provided at Clause 4 hereinabove, to a level sufficient to attract other tenants to occupy the lettable area not taken up by the Lessee. The constructions works to be completed by the Lessor are set forth in the First Schedule hereto”.

25. Thus, the construction should have been complete by 30th November 2010. The question is this: was the construction completed by that date. The Plaintiff testified that the construction was completed before 30th November 2010, and the property handed over to the 2nd Defendant on 22nd November 2010. The Plaintiff produced a document dated 22nd November 2010 headed *“Handing Over of Tusker Mattress Supermarket Space in Apple Mall Nakuru”*, and signed by both parties. A letter from the law firm of J. M. Njage & Co. Advocates of the even date was allegedly, also sent to the 2nd Defendant notifying them of

the handing over of the premises to P.M. Kamau, the 2nd Defendant's General Manager Operations. That similarly enclosed, in a letter dated 24th November 2010 was completion Certificate for the Mezzanine Floor, to enable the 2nd occupy the supermarket. That the same letter indicates that, the property was complete to a level sufficient to attract other tenants to occupy lettable areas in compliance with clause 6 of the Supplementary Agreement. That, it's upon the hand over that the Parties executed a formal Lease Agreement (produced in the Plaintiff's bundle of documents at pages 140 to 177). However, I have looked at the said formal Lease Agreement and note that, it is not dated. The 2nd Defendant faults the said formal Lease Agreement terming it as "invalid", for reasons that:

- *It is clear that the construction was never completed as contemplated in the Supplementary Agreement and a Certificate of Occupation was never issued for the Lease to take effect.*
- *The Plaintiff in its own pleadings at paragraph 32 of the Complaint states that, as at 30th November 2010 the property was in an "incomplete state" Contrary to the brazen and blatant lie by the Plaintiff that the property was handed over to the 2nd Defendant on 22nd October 2010, in a complete state.*
- *The Plaintiff makes it abundantly clear at Paragraph 34 of the Complaint that, as at 2nd February 2011 and indeed all the way until the filing of this suit, it was unable to render a Lease of the premises to the 2nd Defendant as the 1st Defendant, Barclays Bank of Kenya, the Chargee had withheld its requisite consent to Lease.*
- *The purported lease is not only irregular on the face of it but it was also denounced by the 2nd Defendant through the evidence of Stephen Mukuha who explained that the Parties were unable to enter into a Lease for a number of reasons, namely;-*
 - *The property was never completed and made tenantable*
 - *The property had become subject to foreclosure by the bank through public auction*
 - *The bank had refused to grant the requisite consent to Lease.*

26. I equally note that despite the above averments by the 2nd Defendant; the 2nd Defendant has not denied "signing" the said "Lease Agreement". It suffices to note that under the law a person who signs or endorses a document, is bound by it and generally liable on it unless otherwise proved. Even then that said document is undated. The issue is this: what is the legal effect of undated contractual document. The law of contract provides that, if a Contract does not specify the effective date, then the Contract goes into effect on the date it was signed by the person to whom it was offered for a signature. [See: Willinston on Contracts 6iL – 4th Edition 2009 – 2010]. With the signature of the offeree, both parties will be deemed to have accepted the terms of the Contract, making the contract binding on both of them. If on the other hand, the Contract clearly specifies its effective date, then the contract is valid from the effective date regardless of whether the signatures are dated. (Reference: In Re Gallagher 2:12 – BK – 10213-NB, 2012, WL 2900 477). In the case of Kirkland V. Knox, 230F.806, 808, 4th cir 1916, an undated Contract provided a limited term of ten years from the "date of the lease and sale" to cut timber, leading to a dispute over the termination date of those rights. The Court approximated the date of the Contract holding the contract was probated (the process that occurs to enforce a will) since the other evidence, – the amount deposited for the probated contract and the testimony of one of the witnesses – supported this theory). In a nutshell, a contract is binding when both parties have accepted the contract. Therefore, if a Court is to determine the effective date of contract that is completely undated, the Court has to look at the surrounding circumstances to determine approximately when the contract went into effect. (See Kirkland Vs Knox, 230. F. 806, 808 (4th cir.1916)). In addition to the undated documents, the Court may also look at the behavior of the Parties, finding the Contract to be effective when the Parties proceed as though they were under the terms of the Contract. (Reference: Re King Enterprises, Inco. 678 F.2d, 73, 76 (8th Cir. 1982)).

27. In view of the legal principles above and in considering the facts herein, it is clear to the Court that both parties herein executed the subject Agreement. In fact, the 2nd Defendant does not deny executing the said Lease Agreement. In the same vein, the 2nd Defendant does not dispute the alleged hand over and makes reference thereto under Paragraph 22D of the Amended Statement of Defence and Counter-claim and states:

“The technical hand-over of the supermarket premises by the Plaintiff to the 2nd Defendant on 22nd November 2010, and the execution of the invalid Lease for the Supermarket premises some times in December 2010, was an ingenious ruse by the Plaintiff to cover-up its failure to complete the suit premises, deliver a valid Lease of the supermarket premises, and to put the 2nd Defendant in vacant possession”.

28. To revert back to the key issue under consideration as to whether any of the Parties or which party if any, breached the Agreement(s) entered into by the parties, I find and hold that, the Plaintiff did not complete the construction of the project within the six (6) months, that is, by 30th July 2010. As at that point, the Plaintiff was in breach of the Agreement dated 20th September, 2005. However as aforesaid, the Parties entered into another supplementary Agreement dated 30th July 2010, extending the period of completion of the project by four (4) months. The determining date is therefore 30th November 2010. The question of breach can only be determined by taking into accounts the Supplemental Agreement. Recital E thereof clearly stipulates that the Parties did not wave their rights under the Agreement dated 20th September 2005. It states:

“Without waiver of either Parties’ rights to seek redress for any injury suffered on account of any breach or failure by the Lessor to complete the aforesaid Supermarket Complex within time or reasonable time, and at the request and instance of the Lessee, the Parties have negotiated and agreed on further mutual terms supplemental to, and in addition, to the aforesaid Agreement”.

29. In my understanding thereof, the 2nd Defendant had a right to treat the Agreement dated 20th September 2005 as breached and sue for Kshs.165,000,000 when the construction was not completed within six (6) months. It did not. As Recital E clearly states, the parties negotiated and agreed on further mutual terms supplemental to, and in addition, to the aforesaid Agreement. Under the doctrine of Estoppel, when the 2nd Defendant agreed to extend the period of construction by a further four 4 months, the 2nd Defendant led the Plaintiff to believe that, the 2nd Plaintiff had waived its rights to sue for breach of Contract, due to non-completion of the project within 6 months was waived. In the same vein, the principles of Equity stipulate that; “He who goes to Equity must go with clean hands”. The Plaintiff having failed to initially complete the construction within the initial period of six (6) months, and 2nd Defendant having offered to indulge them by extending the Construction period by a further period of four months, (without “consideration” from the Plaintiff), the Plaintiff cannot be heard to claim the 2nd Defendant breached the Contract. The principle of Equity looks on that done which ought to be done. Similarly, he who seeks Equity must do Equity. Where a contract contains specific terms and conditions both parties require to strictly conform. Breach of contract results from failure without any legal excuse on the part of a party to perform his promise in accordance with the terms of the Contract.

30. The Plaintiff details out how the Plaintiff was frustrated in completing the construction due to lack of finance. Paragraph 13 of thereof states;

“The Plaintiff avers that the failure by the 1st Defendant to disburse the second loan is the cause of the delay and the sole cause of the Plaintiff’s default in that the building failed to attract any rents because of non-completion and become a white elephant for the next five (5) years whilst the 1st Defendant continued to charge extortionate penalties and interest”.

31. It is also not clear from the Plaintiff when the premises was completed and handed over to the 2nd Defendant. Under Paragraph 23 of the Plaintiff, the premises were allegedly handed over to the 2nd Defendant on **10th February 2010**, upon issuance of the Certificate of Part Completion by the Municipal Council of Nakuru. Yet at pages 10 of the Plaintiff’s submission, it submitted, the premises was duly and fully constructed and handed over to the 2nd Defendant on **22nd November 2010**. Under Paragraph 25 of the Plaintiff, the Plaintiff pleads that, the Plaintiff and the 2nd Defendant eventually entered into a Lease Agreement effective from **1st day of December 2010**. In their submission, at page 10 the Plaintiff

submits, that a Formal Lease was negotiated between the Parties and executed by both parties and does not state when. Obviously the Plaintiff is mixed up on the relevant dates of hand over of the Property and execution of the Formal Lease Agreement. But I have already made a finding on these issues here before.

32. All in all, I find that, none of the Parties herein can sustain their respective claims for breach of contract and/or for damages in lieu thereof for a sum of Kshs.165,000,000 for reasons stated above, more specifically the Plaintiff, due to the initial delay in construction as aforesaid, entitling the 2nd Defendant to sue for breach and the 2nd Defendant due to the subsequent execution of a supplementary Agreement indulging the Plaintiff to extend the completion date. Even the Plaintiff laments that the 2nd Defendant refused to occupy the premises and pay rent. But evidence herein reveals that the suit property was at the eminent risk of realization by the 1st Defendant, in whose favour the property had been offered as a security for a loan facility. No one can in their normal senses occupy a property under eminent danger of repossession and/or sale. The 2nd Defendant therefore had a legitimate and reasonable cause to shy off from taking the premises. It cannot therefore be accused of breach of contract, when the Plaintiff and 1st Defendant caused the resultant circumstances leading to the breach. Similarly, the particulars of breach on the part of the 2nd Defendant in the Plaint are not indicated as done for the 1st Defendant. This was very critical in view of the second prayer in the Plaint for damages for breach of the Lease Agreement. All the same having found that none of the Parties can be held liable for the breach of contract, the issue of who is liable to pay the agreed liquidated damages of Kshs.165,000,000 does not arise. I shall therefore not delve into the legal authorities and submissions tendered in support opposition thereto.

33. I shall now turn to the third issues, as to whether the 2nd Defendant is entitled to the claim in the sum of Kshs.20, 942,725.46 being the balance of the principal sum advanced to the Plaintiff in the form of the building materials. In this regard, the Plaintiff submitted that the 2nd Defendant advanced it a sum of Kshs.35,000,000 to assist in completion of the construction. On the other hand the 2nd Defendant submitted that, the sum advanced vide the Agreement dated 14th September 2007 was Kshs.20,000,000 in form of construction materials, which sum was payable on or before 15th November 2007 with interest at 13% per annum and in default the sum was to attract interest at 18% per annum. That, the sum was increased vide the supplementary Agreement of 30th July 2010 to Kshs.35,942,725.46. The Plaintiff has repaid Kshs.15,000,000 leaving the balance claimed. However, the Plaintiff submitted that, it was agreed between the parties under clause 3 of the said Supplementary Agreement that, the balance owed to the 2nd Defendant, the sum of Kshs.12,504,726 being the equivalent of three (3) months' rent, shall be apportioned as the Lessee's security deposit to secure performance of its obligations under the lease and the balance thereof, together with accrued interest presently due and payable by the lessor to the lessee, shall be applied towards advance payment of rent payable by the Lessee under the aforesaid lease. As such there was accord and satisfaction as between the Parties in regard to this claim. The 2nd Defendant however, maintained that the Plaintiff should pay the money owed to it and that a finding to that effect should not be difficult, for "to hold otherwise would amount to unjust enrichment by the Plaintiff at the expense of the 2nd Defendant".

34. In my considered opinion, the Plaintiff refunded part of the sum advanced, and still owes the balance. The 2nd Defendant did not cause or contribute to the delay in the completion of the construction. The handing over was affected by the intervening enforcement of the Chargee's right of sale. The 2nd Defendant did not take physical possession of the Premises therefore payment of rent and or withholding of the balance of the said sum does not arise. I have already found that none of the Parties can blame the other for breach of the contract. None directly benefited from the Agreement(s) executed between them. The alleged accord and satisfaction is a concept of purchase of a release from an obligation. How was the Plaintiff released from the obligation to refund the sum claimed? I find there is no legal or moral basis upon which the Plaintiff can withhold or refuse to refund the sum of Kshs.20, 942,725.46 claimed is the balance of the sum advanced. It has already refunded Kshs.15,000,000 thereof. I therefore order that, the sum is payable as claimed and should be paid accordingly.

35. As regards the interest accruing thereto, I find that in the Supplementary Agreement dated 30th July

2010, the parties recognized and conceded that the interest accrued on the principal sum was Kshs.10,050,000 as at 30th July 2010. Therefore, the principal sum payable under the supplementary Agreement of 14th September 2007, as at 30th July 2010 is Kshs.20,000,000 although under clause 1(iii) of the Supplementary Agreement should be Kshs.20,942,725.46 , but under clause 1(iv) thereof, it is indicated as Kshs.20 million. I therefore give the figure of Kshs.20,000,000 and Kshs.10,050,000 as interest totaling Kshs.30,050,000. Having signed the supplementary Agreement, the Plaintiff is duly and legally bound to pay the stated accrued interest.

36. I shall now move to the issue of Kshs.12,738,000 as the incidental expenditure amount. The Plaintiff relied on the case of ***Hahn Vs Singh Civil Appeal No. 42 of 1983 (1985) KLR 716*** to submit that, special damages must not only be pleaded but must strictly be proved. In response, the 2nd Defendant submitted it incurred the incidental expenditure claimed by way of transport costs, mobilization and security of fixtures and fitting that could not be fitted in the Mall as it remained incomplete. However, the 2nd Defendant conceded that, it will leave the issue to the justice and wisdom of the Honourable Court, having failed to specifically prove this claim. I uphold the trite law that, special damages must be specifically pleaded and strictly proved. The 2nd Defendant having failed to do so, the claim must and hereby fail.

37. Finally, as previously indicated herein, the claim of Kshs.202, 500,000 in lost operating income was abandoned by the 2nd Defendant through its submission. I uphold the same and make no orders in respect of the same. The claim is treated and deemed withdrawn and/or abandoned.

38. I shall now consider the issue of interest. I have found in favour of the 2nd Defendant in the sum of Kshs.30,050,000. The other interest demanded is Kshs.7,182,742 as being interest accrued on the loan as at 10th September 2011, is not supported and thus not awarded. This is informed by the fact that, whereas the 2nd Defendant relies on clause 9 of the 14th September 2007 Agreement, Clause 1(iv) of the 30th July 2010 Agreement only recognized interest of Kshs.10,050,000. In addition, to the above interest agreed on by the Parties the only other interest I order and award is on the said sum of Kshs.30,050,000 awarded, and I award interest thereon at Court rates from the date of this judgement until payment in full.

39. In summation, I find that the Plaintiff has failed to prove any of its claim in the Plaintiff and I dismiss it. I enter judgement in favour of the 2nd Defendant in the sum of Kshs.30,050,000 (being the sum of Kshs.20million, a loan granted to the Plaintiff by the 2nd Defendant under the Agreement of 14th September 2007) and accrued interest of Kshs.10,050,000; plus interest at Court rates as aforesaid.

40. In the interest of justice, I order each Party shall bear its own costs.

41. It is so ordered accordingly.

Dated, delivered and signed on this 24th day of May 2017 at Nairobi.

G. L. NZIOKA

JUDGE

In Open Court in the presence of:

Mr. Gachoka for Mr. Nyaanga for the Plaintiff

Ms. Kirege for Mr. Kanchori for the Defendant

Teresia – Court Assistant