REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT

MILIMANI COMMERCIAL COURTS, NAIROBI

HCCC NO. 1133 OF 2002

ANNE MUTHONI KIBIRO……..1ST PLAINTIFF

DAVID KIBIRO GATHOGA…….2ND PLAINTIFF

-V E R S U S

KENYA BROADCASTING CORPORATION……..DEFENDANT

J U D G E M E N T

By a plaint dated and filed in court on 18th October, 2002, the plaintiffs pray for judgment against the defendant for:

(a) The payment to the first plaintiff of the sum of Sh.6,423,429.60 being the mesne profits accrued up to and including the month of October 2002, and such other amounts of mesne profits as shall have accrued at the time vacant possession is finally given.

(b) The payment to the second plaintiff of the sum of Sh.3,001,391.85 being the amount of the water bills outstanding as of August, 2002 and such further amounts as shall have accrued at the time vacant possession is finally given to the first plaintiff. (c) Further and in the alternative and without prejudice to (b) above, an order requiring the defendant to pay directly to the Nairobi City Council and the Kenya Power and lighting Co. Ltd. respectively, all outstanding water and electricity bills and such further water and electricity bills as shall have accrued at the time vacant possession is given, and to supply to this Honourable Court evidence of such payments.

(d) An order requiring the defendant to carry out all necessary repairs to the suit property, and thereafter to deliver vacant possession of the suit property to the first plaintiff.

(e) An order requiring the defendant to replace all the 37 water meters now missing from the suit property or in the alternative, payment to the first plaintiff such an amount of money as this Honourable Court shall determine to be the market value of the missing water meters.

(f) Interest on (a) and(b) above at commercial rates.

During the hearing of the suit, this clause was amended to read-

“Interest on (a) and (b) at commercial rates from the date of the filing of the suit till payment in full.”

(g) Costs of and incidental to this suit

(h) Such other or further relief that this Honourable Court may deem fit and just to grant.

On 14th November, 2002, the defendant filed in court a defence dated 30th October, 2002. In that defence, the defendant states that the second plaintiff is a stranger to the lease agreement giving rise to this suit. Otherwise the defendant admits that there was a lease agreement between the first plaintiff and the defendant for one year starting from 1st April, 2001 and ending on 31st March, 2002. However, it was not a party to the arrangement between the plaintiffs whereby the water accounts were opened in the name of the second plaintiff with the permission of the first plaintiff. The defendant further denies breaching any alleged term in the lease agreement regarding the opening and maintenance of water and electricity accounts. Before the expiry of the lease, all repairs and paintings of the interior parts of the premises were done and the plaintiff was duly informed of the defendant's intention not to continue using the premises beyond 1st April, 2002. The defendant also denies owing the first plaintiff any rent arrears, and also denies any knowledge of loss of water meters whose loss, if any, cannot be attributed to the defendant. The defendant then states that it moved out of the suit premises on 31st March, 2002 and cannot therefore be held responsible for electricity bills up to and including 30th September, 2002. Finally, and without prejudice to the foregoing, the defendant avers that other orders relative to water bills, meters and electricity are too vague to be implemented as no specific period as to which they relate is given, and thereupon prays that this suit be dismissed with costs.

In a reply to the defendant's statement of defence, the first plaintiff avers that it was only after the defendant was served with the plaint and summons to enter appearance that it belatedly removed its staff from the suit premises and commenced repairs, which repairs were still in progress on the date of filing the reply to the defendant's statement of defence on 15th November, 2002. The plaintiffs also maintain that the defendant is liable to pay rent, settle water and electricity bills fro the period up to the time when it finally hands over vacant possession of the suit premises to the first plaintiff. Arising out of the above pleadings, the respective advocates for the parties filed a statement of agreed issues on 12th September, 2003. These issues are as follows:-

1. Was it an express term of the lease agreement that the defendant was to open and maintain water and electricity accounts in respect of the suit property in its name and its own expense?

2. Did the defendant open its own water and electricity accounts in the leased premises? If not, did it consume water and electricity on the suit premises in the name of the second plaintiff? If the answer is yes, is the defendant liable to settle the bills for the consumption during the period of the lease?

3. Was the defendant a party to the arrangement between the plaintiffs wherein the second plaintiff permitted the first plaintiff to open water accounts in the second plaintiff's name?

4. Did the defendant before the expiry of the lease carry out all repairs and painting of the interior parts of the premises?

5. Did the first plaintiff when informed by the defendant of its intention not to continue using the premises beyond 1st April, 2002 demand to be given notice of 2 months before she would take over her premises?

6. Did the defendant vacate or hand over vacant possession of the leased premises to the first plaintiff immediately upon expiry of the lease agreement on 31st March, 2002? If not, is the defendant liable to pay mesne profits at double rate of the monthly rent to the first plaintiff for the period from 1st April, 2002 up to the time vacant possession was given? 7. Was the defendant liable to provide security to the leased premises during the period of the lease?

8. Were water meters missing from the leased premises when vacant possession was finally given to the first plaintiff? If yes, is the defendant liable for the loss and value of the missing water

meters?

9. Is the plaintiffs' claim in respect of the water bills, meters and electricity bills too vague to be implemented as no specific period to which they relate is pleaded in the plaint?

10. Who should pay the costs of and incidental to this suit?

At the hearing of this suit, four witnesses gave evidence for the plaintiffs, including the two plaintiffs themselves. In a nutshell, the first plaintiff who was P.W.1 testified that she was the registered proprietor of the suit premises. These were first leased to the defendant for two years from 1st March, 1997 with a provision for a further period of one year from 1st April, 1999, and thereafter for another period of 1 year from 1st April, 2000. Then on 12th July, 2001 the premises were leased out for a further period of 1 year from 1st April, 2001 with a provision for renewal. By a letter dated 12th February, 2002, the defendant wrote to the first plaintiff advising that it did not wish to renew the lease upon its expiry on 31st March, 2002. On that day, the defendant did not hand over the premises and never handed over until 25th November, 2002. She therefore claims mesne profits with effect from 1st April, 2002 up to the time when the premises were handed over to her. She also claimed replacement of some 37 water meters which went missing from the leased premises. In cross examination, she admitted that the water accounts were in the name of the second plaintiff, who is her husband, but all the leases were entered into between the defendant and herself.

P.W.2, a Mr. Robert Kagiri Mwihia, said he was a director of the company which managed the leased property on behalf of the proprietor. Initially, before the defendant took possession of the premises, there was no water connection. However, the defendant insisted that all the 37 flats be connected with water before the tenancy commenced. An account was then opened in the name of David Kibiro, the second plaintiff, and the defendant refunded the deposit paid as it was the defendant's responsibility to pay for water. At the beginning there were no water meters, but after these were installed, the relevant documents were handed over to the defendant and the flats were occupied.

Whenever water bills were received, Mr. Kibiro would pass them on to the witness who would in turn forward them to the defendant for payment. By the time the premises were handed back to the landlady, the first plaintiff, the water meters in respect of the 37 flats were missing.

In cross examination, the witness could not confirm whether the defendant was told that the water meters would be in the name of the second plaintiff. At the beginning there were no water meters, and the witness could neither tell when they finally became available, nor did he personally check to confirm that they were installed.

The next witness for the plaintiff was Mrs. Catherine Kagiri who testified as P.W.3. She informed the court that the deposit receipts for water were in the name of the second plaintiff, and this situation arose because there were no water meters. The original water deposits were handed over to the defendants because they needed to convert the account into their name. As the property managers, they used to forward the water bills to the defendant for settlement, but she would not know whether the bills were settled or not. However, it was known to the defendant that the water receipts were in the name of David Kibiro, the second plaintiff. The witness further testified that by the time the premises were handed over to the defendant, there were no water meters. However, in the course of their managing the property, she got to know that water meters had been connected but she could not tell exactly when that was done. Any billing would, nevertheless, have related to the period after the installation of the meters.

The last witness for the plaintiffs was the second plaintiff himself, Mr. David Kibiro Gathoga. He stated in his evidence that at the time the parties were negotiating for the lease, the property was not connected to water and other amenities. Before the property was occupied, the defendant requested that the premises be connected with water. He paid the deposit and water was connected. The accounts were opened in his name. Water meters were not installed at that time but the defendants were the ones to pay the bills. The connection was temporary so that the defendant would eventually convert the accounts into their name. When the premises were handed over to the defendant, the witness also handed over the

deposit receipts against which the defendant refunded his deposit in the sum of Ksh.22,300.00 During the interim period, the defendant was to settle the bills. But the witness could not remember the date when the meters were installed in the premises. After the defendant took possession, the second plaintiff started receiving water bills from the Nairobi City Council. Upon receipt of the bills he would hand them over to the management agents who were supposed to forward them to the defendant for settlement. The water accounts were never converted into the name of the defendant. Instead the defendant started and continued consuming water in the second plaintiff's name. As of August, 2002, the outstanding amount was Ksh.3,001,395.85. The accounts are still running and they are not closed and cannot be closed unless and until the outstanding bills are paid. The defendants were in the premises for five years and all that time they consumed water on credit in the second plaintiff's name. He has therefore sued them so that they can clear the water bill incurred by them over the years.

In cross examination, the witness said he could not remember when the meters were installed, and he was not the one who procured their installation. When referred to plaintiffs exhibit No.9, which lists the water bills as at August, 2002, the witness admitted that the same does not show the meter numbers, the account date, or the date of reading.

He also testified that he had no bills for 1997,1998 or 1999, or 2000, or 2001. But he was seeking an order that the defendant should clear the bill either by paying directly to Nairobi City Council or by giving the second plaintiff the money to go and pay.

Mr. Zachary Ochako, the defendant's Administration Manager, gave evidence as D.W.1. He testified that there was only one water meter in the premises before and immediately after the defendant entered the premises. He also said that by 20th February, 2002, just before the lease expired on 31st March, 2002, water accounts had not been opened for each and every flat. If such accounts had been opened, the issue of clause 4 in the lease agreement would not have arisen. Water was never disconnected for non payment, and after expiry of the lease, the defendant could not replace the 37 meters because they were never there. In the alternative, the meters belonged to the Nairobi City Council. In cross examination the witness said that the defendant was supposed to open its water account, and as long as the defendant's staff were in occupation, it was the defendant's responsibility to pay for the water. Although the bills were duly forwarded to the defendant, it did not settle any bills forwarded to it.

The second defence witness was Mr. Stanley Kipsang Kamoing, an accountant with the defendant. He testified that all the rents due to the landlady had been paid and that there was no outstanding account. He also averred that the monthly rent during the last quarter was Ksh.458,816/40 per month from April, 2001 to 31st March, 2002, and that there was no rent deposit paid by the defendant to the landlady.

After hearing the witnesses, both counsel made extensive written and oral submissions. By this time it had become clear that the first plaintiff had abandoned her claims for an account of electricity, and also on account of repairs to the premises. This left the issues of the water bills, the mesne profits, and the water meters. With regard to the water bills, the first issue is whether it was an express term of lease agreement that the defendant was to open and maintain water and electricity accounts in its name and at its own expense. In paragraphs 5,6, and 7 of the plaint, the plaintiffs state that at the time of leasing the suit property to the defendant, the first plaintiff who is the wife of the second plaintiff had, with the permission of the second plaintiff, already opened water accounts in respect of the suit property in the second plaintiff's name. It is also their case that it was an express term of the lease agreement that the defendant was to open and maintain water and electricity accounts in respect of the suit property in its name and at its own expense during the period of the lease. They also maintain that in breach of the said lease agreement, the defendant failed and or neglected to open its own water accounts and had been consuming water on the suit property using accounts in the name of the second plaintiff.

In its defence, the defendant admits that there was a lease agreement between the first plaintiff and the defendant for one year starting from 1st April, 2001 and ending on 31st March, 2002. Paragraph 5 of the defence then reads-

"The defendant is and was not party to the arrangement between the plaintiffs set forth

under paragraph 5 of the plaint."

This paragraph is patently contradictory. Then in paragraph 6 of its plaint, the defendant denies in toto the allegations contained in paragraphs 6 and 7 of the plaint and states that should that have been the case, such water accounts should have been closed by the first plaintiff.

The first issue between the parties is resolved by paragraph 4 of the lease agreement between the parties. It states-

> **"The lessee shall open and maintain water and electricity accounts in its name and at its expense in respect of the said premises…"**

This clause settles that issue. In spite of the defendant's denials, I therefore find that it was an express term of the lease agreement that the defendant was to open and maintain water and electricity accounts in its name and at its expense in respect of the lease premises.

The second issue is whether the defendant opened its own water accounts on the suit premises. If not, did it consume water on the suit premises in the account names of the second plaintiff? If so, is the defendant liable to settle the bills for the water consumption during the period of the lease? The evidence before the court is clearly that the defendant did not open its own water accounts on the lease premises. On 5th March, 1997, P.W.3, Catherine Kagiri, a director of the company which was the plaintiffs managing agents of the lease premises, addressed a letter to the managing director of the Kenya Broadcasting Corporation. The said letter read in part-

> **"3. (a) Since Nairobi City Council (NCC) does knot have sufficient water meters for each flat, the landlord should provide a copy of the letter from NCC claiming that they will be charging a standing charge of Ksh. Three Hundred(Ksh.300/=) monthly for each flat's water consumption.**
>
> **(b) The landlord should also provide the original receipts received form Nairobi City Council for the deposit payment of Ksh. Twenty Two Thousand Two hundred (22,200/=) for new accounts for the 37 flats.**
>
> **(c) In the case where the above two provisions have not been finalised between Cammine Ltd. and Kenya Broadcasting Corporation, the Landlord can be submitting the water bills to the corporation for settlement."**

My interpretation of these provisions is that pending the installation of the water meters, the Nairobi City Council had allegedly undertaken to levy a charge of Ksh.300/= per flat per month. A copy of that letter was supposed to be handed over to the defendant in order to facilitate the payment for water consumed in the premises at the above flat rate.

Secondly, the landlord was required to provide to the defendant the original receipts for the sum of Ksh.22,200/= being the payment of deposit for the new water accounts for all the 37 flats. If the letter by the Nairobi City Council undertaking to charge a flat rate of ksh.300/= per flat per month was not availed, and if the original receipts for the new water accounts were also not availed, thereby rendering it impossible to open new water accounts for the 37 flats, then the landlord would be submitting the water bills to the defendant for settlement. It seems from the evidence that the letter form the City Council was never availed. And even though the second plaintiff was refunded the Ksh.22,200/= being the deposit for the new accounts, these accounts were not opened, at least by the time of execution of the fourth lease on 12th July, 2001. To that extent, the defendant breached clause 4 of the lease agreement by not opening its own water accounts. Instead of doing so, the defendant's officers continued to consume the water which was in the premises and which was in the name of the second plaintiff who had opened the accounts.

Under intense cross examination, Mr. Ochako, D.W.1, admitted that the landlord had been forwarding water bills to the defendant. When referred to a letter dated 13th September, 1999, in which the defendant

complained of “huge water bills which did not reflect the consumption rate”, the witness admitted that the letter does not deny responsibility for settling water bills, nor is it suggested therein that the defendant was supposed to be paying only a flat rate. In his own words, the witness said-

> **“The accounts are in the name of David Kibiro Gathoga. When bills were delivered to us they would be in the name of the person who opened the account. That is the person in whose name the bill will be coming… I agree that KBC knew that they were consuming water in the name of David Kibiro. If the bills were received and were in order, then KBC obviously had an obligation to repay and settle the bills in the same name of David Gathoga.”**

With this admission, I think that there is no need to belabour the point. The defendant did not open the water accounts as contemplated in the lease agreement. Whenever water bills were received by the landlady, they were forwarded to the defendant. At no time did the defendant deny the responsibility to settle those bills. But it did not settle them. Instead its officers continued to consume the water. That water was supposed to be paid for by somebody. In the absence of an agreement to the contrary, that somebody ought to be the person who consumed the water. In this case, it was the defendant through its officers. There was an implied obligation on the part of the defendant to pay for that water. That obligation is rooted in clause 4 of the lease which required the defendant to open and maintain a water account in its name and at its expense. Since the defendant did not take advantage of this provision, and instead it continued consuming water, which was supposed to be paid for and the account of which was in the name of somebody else, there was an obligation on their part to pay for that water.

The defence case on that point is that there was no privity of contract between the second plaintiff, in whose name the water account was, and the defendant.

The case of **SCRUTTONS LTD. v. MIDLAND SILICONES, LTD**., [1962] AC. 446 was cited as the authority for that proposition. In that case, the defendants, who were stevedores, and who were contracted by the carrier, were sued for negligently dropping and damaging a drum which contained some chemicals. Relying on the bill of lading, to which they were not parties, the stevedores claimed that their liability was limited to £500. It was held that they were third parties to the contract in the bill of lading and therefore could not take refuge under its provisions in order to claim immunity. The plaintiffs herein were quick to point out that the second plaintiff’s claim was not founded by contract, but on the tort of conversion.

In my view, that case is readily distinguishable from the present one. The facts are poles apart. We have in this case not a carrier and contracted stevedores, but residential premises of which the wife is the registered proprietor while the water account is in the name of the husband. Both husband and wife are the plaintiffs in this case, while the lesee is the defendant. Whereas the wife’s case is based squarely on the lease agreement, the husband’s claim relates to the water consumed by the tenants while it was in his account, and thereafter denying liability to pay. Being cognisant of this set up, the lease incorporated the clause which obligated the defendant to open and maintain water and electricity accounts in its name and at its expense. From this clause, the intention of the parties would seem to have been that the defendant would be responsible for the payment of water and electricity consumed in the premises. In blatant breach of this clause, the defendant never opened and maintained the water account in its name and at its expense. Instead, its officers, for whose accommodation the premises were leased, continued to consume the water in the name of the second plaintiff. It is a fact of public notoriety that in the City of Nairobi, the person under the legal liability to pay for water is the person whose name appears on the water account. By failing to open its own water account, and suffering its officers to continue consuming water the account of which was in the second plaintiffs name. I think that there was an implied undertaking on the part of the defendant that it would pay for that water. This much was acknowledged by D.W.1, Mr. Ochako, when he said under cross examination that KBC (the defendant herein) knew that they were consuming water in the name of David Kibiro, the second plaintiff, and that if the bills were received and were in order, then KBC had an obligation to repay and settle the bills in the name of David Gathoga. It is this obligation, duly acknowledged on behalf of the defendant which ought, subject to proof of quantum, to be given effect in the interests of justice. I’ll come back to the issue of quantum in the last part of this judgment.

Learned counsel for the defendant raised some interesting points of law. One was that if the plaintiff was owed any money, the same can only be claimed by the first plaintiff as per the agreement. Secondly, he also submitted that if the second plaintiff's claim is purely for payment of water bills, then he ought to have filed a separate suit against the defendant, independent from the lease agreements, but he had failed to do so. I find the first point interesting from the perspective that already, the defendant is denying liability to the second plaintiff on the ground that there was no privity of contract with him. If, on the other hand, it was the first plaintiff who had brought the claim for water bills, she would probably have been met with the response that the bills were not in her name, but in the second plaintiff's name. As for the second point, if the second plaintiff had instituted a separate suit, in all probability it would have been consolidated with that of the first plaintiff in order to save on time and costs, especially considering that the suit premises are the same, the duration of the lease is interwoven with the period over which the water was consumed, and the defendant is the same.

The next substantive issue relates to the water meters. Were there any meters or was their presence a figment of somebody's imagination? The evidence on record suggests that there were no meters at the commencement of the first lease agreement on 1st March, 1997. When the last lease agreement was entered into on 12th July, 2001 clause 4 thereof stipulated that **"the lesee would open and maintain water and electricity accounts in its name and at its expense…"** If the water meters were in place as at that time, this clause would have been superfluous. In her evidence in cross examination, the first plaintiff said that she didn't know when water was connected to the premises. According to the evidence of Mr. Robert Kagiri Mwihia, P.W.2, at the beginning there were no water meters, but after these were installed, the relevant documents were handed over to KBC (the defendant) and the flats were occupied. If by this statement the witness means that the meters were in place by the time the lessee moved its members of staff into the leased premises in 1997, such a state of affairs cannot be reconciled with clause 4 of the 2001 agreement by which it was still anticipated that the lessee would open and maintain a water account in its name. Indeed, in cross examination, the witness said that neither could he confirm whether meters were there or not at the time of the signing of the lease, nor did he know when they became available and installed. Mrs. Kagiri, P.W.3, also could not say when the water meters were actually connected, but she was certain that by the time the premises were handed over to the lessee, there were no water meters. The second plaintiff himself, Mr. Kibiro, told the court that he couldn't also remember when the meters were installed as he was not the one who procured the installation. But he paid the deposit of Ksh.22,200/= in cash, and after that it was for the City Council to install the meters. Otherwise, the witness could not tell when the City Council started billing against the meters. Given that clause 4 of the lease agreement states explicitly that the lessee would open and maintain a water account, and granted that the lease agreement was entered into on 12th July, 2001, it is logical to deduce that as of that date, no water account had been opened, and that there were no meters. Conversely, the water meters were installed, most probably, after July, 2001. This would tend to gain support from the fact according to copies of the water bills in the plaintiffs exhibits 9 and 10, the first ever reading of the meters took place on 30th September, 2001.

At the date when premises were handed over back to the plaintiffs on 25th November, 2002, the handing over notes read that **"…the water meters in respect of the 37 flats are missing."**

From the fact that there are meter readings from 30th September, 2001, it stands to reason that indeed there were some meters in the leased premises during the period of the tenancy. Indeed, plaintiffs' exhibit No.10 showing the water bill account as at 23rd Mary, 2003, shows that the water meter in flat No.3 was read on 30th April, 2003. The same applies to meters for flats Nos.12, 17,19 and 27, all of which were read on the same date.

This suggests that contrary to the plaintiffs' case that all 37 meters were missing on 25th November, 2002, some 5 meters in respect of 5 of the flats were still in place on 30th April, 2003. That was a good five months after the handing over report. Evidence by Mr. Kibiro, the second plaintiff, is to the effect that even at the time of his testimony, there was only one meter in the premises. As from 25th November, 2002, the defendant was safely out of the premises. If all 37 meters were not there on that day, from where did 5 of them surface on 30th April, 2003? Is it possible that they were all back in action by that date? In any event, to where did they disappear again by January this year when the second plaintiff said that there was only one meter in the premises? The evidence on this issue is not reliable. It betrays the

second defendant and erodes his credibility. I don't think it is fair to saddle the defendant with the consequence of the alleged loss of the meters in these circumstances. I would not hesitate to dismiss outright the prayer for an order requiring the defendant to replace all the 37 water meters.

The other main issue relates to rent. The plaintiff's case is that even though the lease expired on 31st March, 2002, the premises were not handed back until 25th November, 2002. They therefore claim mesne profits on the basis of S.14 of the Distress for Rent Act, Cap. 293 of the Laws of Kenya. If the plaintiffs contention is correct, then they would be entitled to double the monthly rent payable at the time of the expiry of the lease. There is no dispute that the lease expired on 31st March, 2002. There is equally no dispute that possession of the premises was delivered back to the plaintiffs on 25th November,2002, after a spell of about 8 months. The only dispute is who was responsible for the delay. As expected, the rival parties sought to heap the blame on each other. According to Mr. Ochako, he tried to get in touch with the plaintiff's agents immediately before and after the expiry of the lease in order to hand over the premises, but these agents kept on avoiding him. But Mr. Kagiri, P.W.3, testified that within a few days of KBC calling him with a view to handing over, he had already assembled a team which met the other side for the handing over on 25th November, 2002. In my view, between these two positions, it is noteworthy from the evidence that Mr. Ochako could not tell the exact date when the first or last of the KBC staff vacated the premises. But he was certain that it was after the lease had expired. That could have been any date between April and October,2002. Even though the defendant states in its statement of defence that the repairs to the interior parts of the premises were effected before the expiry of the lease, this was contradicted by Mr. Ochako who said that the repairs were effected after the last member of KBC staff had vacated the premises. Even though he could not give a definite date, as to when the last person vacated the premises, it was clear that this was done after the expiry of the lease. Indeed, at the time of the handing over, the contractor was till on the site, which suggests that the repairs were effected in or about November, 2002.This tends to further suggest that the repairs were effected shortly after the last tenant had vacated the premises. In the circumstances, I would opine that it was the defendant who delayed the delivery of the premises in vacant possession to the plaintiffs.

Is the defendant thereupon obligated to pay double the rent under S.14 of the Distress for Rent Act?

The section in question states as follows-

> **"If a tenant gives notice to his landlord of his intention to quit the premises held by him at a time mentioned in the notice, and does not accordingly deliver up the possession thereof at the time specified in the notice, then the tenant… shall from thenceforward pay to the landlord double the rent or sum which he should otherwise have paid… and the double rent or sum shall continue to be paid while the tenant continues in possession…"**

With respect, I don't think that the matter at hand is governed by the Distress for Rent Act. Instead, the circumstances of this case tend to indicate that after the expiry of the lease, the landlady did not take any steps to recover the premises. By the necessary implication, she acquiesced in their continuing in possession, and that would imply consent for them to do so under S.116 of the Transfer of Property Act. If this is correct, then the tenancy became one from month to month under S.106 of the same Act. For this reason, the plaintiff will be entitled to monthly rent for 8 months from 1st April, 2002, at the rate of Ksh.458,816/40 per month.

Coming back to the issue of the water bills, the defendant has conceded that if the bills were received and were in order, then it had an obligation to repay and settle them in the name of the second plaintiff. That obligation still stands. Mr. Muriithi was highly critical of the bills saying, rightly so, that some of them did not bear the meter number, there was no certainty that all the meters started recording from "00", and that many of them did not bear account dates. I have added my own observations to this criticism. All the bills which are handwritten bear a previous reading of the meter, and then show the present reading as "0", and the consumption as "0" . One wonders how a meter which had a previous reading would subsequently read "0". What happened to the previous readings ? This has not been explained. As there is no date of the previous reading, and no evidence by the plaintiff as to the date when

each meter was installed; whether it was new and reading “00” or whether it had been used and, if so, its reading when it was installed, I would feel hesitant to grant the sums payable on all such bills. This applies to water bills in respect of Flats 1,2,3,4,5,6,7,8,9,23,34 and 35 as at August, 2002. In the event that those meters had been previously used, it may be possible that some of the balances brought forward may have been incurred elsewhere by someone else, and it would be unfair to load them onto the defendant.

The second plaintiff also submitted a second set of its account for water bills as at 23rd May, 2003. In prayers (b) and (c) of the plaint, the plaintiffs pray for judgment against the defendant for-

> **“(b) the payment to the second plaintiff of the sum of Ksh.3,001,391.85 being the amount of the water bills outstanding as of August, 2002 and such further accounts as shall have accrued at the time vacant possession if finally given to the plaintiff.**
>
> **(c) Further and in the alternative and without prejudice to (b) above, an order requiring the defendant to pay directly to the Nairobi City Council and the Kenya Power & Lighting Co. Ltd. respectively, all outstanding water and electricity bills and such further water and electricity bills as shall have accrued at the time vacant possession is given and to supply to this Honourable Court evidence of such payment.”**

It is common ground that the premises were handed delivered back to the plaintiffs on 25th November, 2002. Even though plaintiffs exhibit 10 is titled “water bills as at 23rd May, 2003”, this was about six months after the premises had been given back to the plaintiffs. Any bills bearing meter readings after 25th November, 2004 ought not to be allowed. This, as indicated earlier on, applies to flats 3,12,17,19 and 27 all of whose meters were read on 31st April, 2003. It is difficult to hazard a guess as to what the reading had been on 25th November, 2002. In the circumstances, only their respective readings before November, 2002 ought to be allowed.

I have checked all the two sets of bills as at August, 2002 and May, 2003, in respect of each flat. In the case of 23 flats, the water bills for the same flat as at August, 2002 and May, 2003 bear the same date of reading, the same figure for the present and previous reading, but different accounts. For example, as at August, 2002 the meter for flat No.10 was read on 31/01/02. The previous reading was 1076 and the present reading 1076. The consumption was therefore “0”. The previous account was Ksh.35,978.80. The Nairobi City Council estimated that water worth 120.00 had been consumed and, together with the sewer and meter rent, a total sum of 234/50 was due from the consumer. The total amount for the bill therefore comes to Ksh.36,213.30.

The bill for the same flat as at 23rd May, 2003 shows that the meter was read on 31/01/02, the same date featuring for the period as at August, 2002. The previous reading was 1076 and the present reading 1076. Up to that point, these particulars are an exact replica of the bill as at August, 2002. But whereas in the bill for August the previous account is shown as Ksh.35,978.80, in the one for May, 2003 is shown as Ksh.37,620.30. Adding the estimates for water consumed, sewer and meter rent, the bill as at May, 2003 becomes Ksh.37,854.80. I am utterly unable to comprehend how two bills in respect of a meter which is read on the same date, and in respect of which the readings are the same, could give rise to two different accounts. Where this has happened, I think it is more prudent to award the lower figure, invariably being the one in the account as at August, 2002. This has been the case in respect of flats Nos. 10 to 22 inclusive; 24 and 25; 27 and 28; 30 to 33; 36 and 37.

With regard to flat No.1, the bill for the period as at August, 2002 does not have the date of reading. However it falls in the category of those bills which i have observed give a figure for the previous reading, and then show that the present reading is “0”. This is one such example. Although the bill has no date of reading, it shows that the previous reading was 2060 and the present reading as “0”. Then it comes up with an account of Ksh.256,957/20. In all such cases, I think that such a figure ought to be ignored. However, for the period as at May, 2003, the bill for flat No.1 shows that the meter was read on 30/09/01. The previous reading was 2620 and the present reading 2620. This suggests to me that the meter may not, like nearly all the others, have been working. However, the bill carries a previous account of

Ksh.258,634.20. Added to this is water, sewer and meter rent, bringing a total of Ksh.258,913.70. Where this has happened, I think it is fair to award the figure for the bill as at May, 2003. This has been the case for flat Nos. 1 and 2; 4 to 8; 23, 26, 29, 34 and 35.

With regard to flat No.3, I note that in the account as at August, 2002, the water bill shows that the meter was read on 30.09.01. The previous reading was 6788 and on that day the reading was "0". Going by the sentiments I express ed earlier on in respect of this phenomenon, I don't think it would be proper to allow the amount stated in this bill. In the period as at May, 2003, the meter in respect of the same flat was read on 30th April, 2003. This was a whole five months after the premises had been delivered back to the plaintiffs. This bill shows that the previous reading was 6788 and the reading on that day was 6924. This is questionable since the last reading of the same meter in September, 2001 was "0". I would have expected this bill to show that the previous reading was "0".But it doesn`t. By showing that the previous reading was 6788 as in bill for September, 2001, it is actually depicting the previous, previous reading. It is not reliable and ought not to be accepted. As a parting shot, I note that only meters in flat Nos. 3,12,26,19 and 27 were operational. I don't know whether it by coincidence that these are also the only meters which were read on 30th April, 2003 and, if it is, I wonder what the implication would be.

Secondly I further note that even though the defendant contended that the 2nd plaintiff did not give it notice under S.46(a) of the Kenya Broadcasting Corporation Act, the said notice was incorporated in that of the first defendant. I don't think that the defendant was prejudiced in any way as it was neither ambushed nor taken by surprise. Having so found, I need not address the issue as to whether such notice was in the first place necessary under S.46 of the Kenya Broadcasting Corporation Act.

Arising out of the totality of the above considerations, I therefore enter judgment for the plaintiffs against the defendant for-

1. The sum of Ksh.3,670,531.20 by way of 8 months rent from 1st April 2002 to 30th November, 2002 at the rate of ksh.458,816.40 per month, with interest on the decretal sum at court rates from the date of filing of this suit until payment in full.

2. The sum of Ksh.2,729,921.15 on account of water consumed by the defendant's members of staff while in occupation of the suit or lease premises.

Since the Nairobi City Council is not a party to these proceedings, the court cannot order direct payment to the said City Council as the latter would have no locus to enforce the award. In the circumstances, the defendant should issue a bankers cheque in favour of the Nairobi City Council and hand it over to the plaintiffs for onward transmission to the City Council.

3. The defendant will also pay the costs of this suit.

Dated and delivered at Nairobi this 26th day of October 2004

L. NJAGI

JUDGE