



**Hammond Holdings Limited & another v Coast Computer Bureau Limited (Civil Suit 209 of 2008 & 174 of 2019 (Consolidated)) [2023] KEELC 18738 (KLR) (12 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18738 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CIVIL SUIT 209 OF 2008 & 174 OF 2019 (CONSOLIDATED)**

**M SILA, J  
JULY 12, 2023**

**BETWEEN**

**HAMMOND HOLDINGS LIMITED ..... PLAINTIFF**

**AND**

**COAST COMPUTER BUREAU LIMITED ..... DEFENDANT**

**AS CONSOLIDATED WITH**

**CIVIL SUIT 174 OF 2019**

**BETWEEN**

**THE REGISTERED TRUSTEES BHAGWANJI RAJA CHARITABLE  
FOUNDATION ..... 1<sup>ST</sup> PLAINTIFF**

**HAMMOND HOLDINGS LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**COAST COMPUTER BUREAU LIMITED ..... DEFENDANT**

**JUDGMENT**

**A. INTRODUCTION AND PLEADINGS**

1. This judgment is in respect of two consolidated suits. The first suit was commenced through a plaint filed on 14 August 2008 with the sole plaintiff being Hammond Holdings Limited. The suit was registered as Mombasa HCCC No. 209 of 2008. In the original plaint (for there have been amendments) Hammond Holdings Limited pleaded that through a lease agreement dated 25 October 1993, she granted the defendant, Coast Computers Limited, a long term lease in respect of an Office No. 313 and Store No. 312 located in premises known as Biashara Bank Building developed on the



land parcels Mombasa/Block XXI/396 and Mombasa/Block XXI/397. The titles thereto are leasehold titles for 99 years commencing 1 October 1973 and it is pleaded that the agreement between the two parties defined the lease to mean a lease of the premises for the unexpired residue of the term of 99 years from 1 October 1973 less the last seven days reserving the rent of one peppercorn (if demanded) per year plus service charge. It is pleaded that under the agreement the defendant was to observe various obligations including payment of service charge which the plaintiff contended the defendant had failed to pay. The plaintiff pleaded that as at January 2007, the accumulated service charge was Kshs. 701,434/= . The plaintiff pleaded that pursuant to Clause 6.1 of their agreement, if the charges remained outstanding for more than three (3) calendar months upon the defendant being notified, the plaintiff would be at liberty to re-enter the premises and the term of the lease would cease. The plaintiff pleaded that the amounts had remained outstanding for more than 3 calendar months and thus the plaintiff's right of re-entry had crystallised. In the original plaint, Hammond Holdings Limited sought the following substantive orders :-

- a. Payment of Kshs. 701,434/= as outstanding service charge;
  - b. Vacant possession of Office No. 313 and Store No. 312;
  - c. Costs of the suit;
  - d. Interest at court rates,
  - e. Any other relief that the court would deem fit to grant.
2. The original plaint in Mombasa HCCC No. 209 of 2008 was amended on 28 June 2019. The claim remained the same only that the plaintiff wished to now claim service charge at Kshs. 3, 642, 968.12/= to cover the period from 2006 to 2013.
3. The second suit, Mombasa ELC No. 174 of 2019, was commenced through a plaint filed on 2 October 2019 by two plaintiffs, respectively, The Registered Trustees Bhagwanji Raja Charitable Foundation and Hammond Holdings Limited, with Coast Computer Bureau Limited as the defendant. It was pleaded that vide a transfer of lease dated 5 October 2006 and registered on 16 August 2007, Hammond Holdings Limited transferred one half share of its original title and interest in the land parcels Mombasa/Block XXI/396 and 397, to The Registered Trustees Bhagwanji Raja Charitable Foundation (hereinafter simply referred to as Bhagwanji Raja) , thus making the two joint owners of the properties. It was further pleaded that subsequently, on 2 December 2014, Hammond Holdings Limited transferred the remaining half share to Bhagwanji Raja thus making Bhagwanji Raja the sole leasehold proprietor of the two land parcels. It was elaborated that Bhagwanji Raja was issued with Certificates of Lease for the two land parcels on 3 December 2014. The plaint still referred to the agreement between Hammond Holdings Limited and the defendant, whereby the defendant was granted a long term lease of the office No. 313 and Store No. 312 and claimed breach of payment of service charge and the right to terminate the lease and take vacant possession. The plaint sought the following orders :-
- a. Payment of service charge from January 2014 to December 2018;
  - b. Vacant possession of the premises;
  - c. Costs of the suit;
  - d. Interest at court rates;
  - e. Any other relief the court may deem just and fit to grant.



4. The defendant's response to the first suit was to file a defence, set-off and counterclaim dated 18 September 2008 and filed on 19 September 2008. In the defence, she pleaded that no service charge account was prepared as required in terms of Clause 1.2 and 12.1 of the agreement. She further pleaded that the plaintiff (Hammond Holdings in this instance) is not entitled to payment of any service charge by reason of breach of the terms of the lease. The defendant pleaded that the plaintiff failed to keep the premises in good and tenantable repair and particularly the drain pipes/sewage pipes passing in or under the premises, thus causing the defendant to constantly suffer from sewage leakage into the premises; that the plaintiff refused to repair the said sewage pipes despite demand, alleging that they are the responsibility of the Municipal Council of Mombasa; that the plaintiff blocked the fire exit in Mezzanine 3 downwards leaving the defendant with no fire escape route in case of emergency; that the refusal to open the fire exit stair case caused the defendant's director to be charged and prosecuted in Mombasa Resident Magistrate's Criminal Case No. M2811 of 2007; that the plaintiff failed to prepare service charge accounts and obtain audit certificates as required by Clause 12.1 of the lease; that the plaintiff being owner of the penthouse in the building refused to pay service charge on it thereby leaving the defendant and others to pay services to the penthouse; that the plaintiff included telephone bills for telephone lines of Biashara Bank Limited and I & M Bank Limited in the service charge thus loading that liability to the defendant and others; and, that the plaintiff failed to replace balustrades and other fixtures and fittings in the common areas. She also pleaded that the plaintiff wrongfully charged VAT on service charge and has refused to refund the defendant and claimed the right to a set-off. The counterclaim filed was against both Hammond Holdings and Bhagwanji Raja. In the counterclaim, it is pleaded that by a transfer of lease dated 5 October 2006, Hammond Holdings transferred one half of its share in the land parcel Mombasa/Block XXI/397 to Bhagwanji Raja. She contended that this was done without her consent and in fundamental breach of the *Sectional Properties Act*, 1987 and thus the said transfer was null and void. She pleaded that it was unfair for the plaintiff to demand payment of service charge only against 36 apartments and 2 offices when the Building consists of 40 apartments, numerous offices and a penthouse. She averred that it was fraudulent for the plaintiff not to pay service charge on the penthouse and enjoy services financed from service charge paid by her and others. She contended that the plaintiff falsified accounts to disguise the fact that she (Hammond Holdings) did not pay service charge. She averred that she had been denied access to the accounts and records. She contended that by refusing to pay service charge on the penthouse she has suffered loss by paying a proportion of higher service charge to cover cleaning, water, electricity, land rent, rates, staff costs, repairs and maintenance, exceptional repairs, printing and stationery, legal and professional fees, miscellaneous expenses, insurance, security, diesel, and travelling. She added that the penthouse was an illegal structure built without approved plans and the sealed fire escape. She averred that the latter blocks the fire escape and renders the building unsafe and a death trap. She proceeded to plead that Hammond Holdings fraudulently procured a contractor to paint the building in the year 2006 at Kshs. 3, 368, 710.00 inter alia that the contract was given without her consent and that a similar contract had been awarded to another contractor at Kshs. 1, 900,000/=. She avers that this led to her (defendant) being charged a proportion from the sum of Kshs. 3, 368,710.00 instead of a proportion from Kshs. 1, 900,000/= . She proceeded to plead that Hammond Holdings falsified quotations for drilling a borehole for the building to create a false impression that it had been subjected to competitive bidding. It was contended that quotations obtained from Flair Limited and Casagrande Limited were exact in all aspects. She added that Hammond Holdings failed to provide separate electricity meters to the lessees the effect of which was that the tariff is higher and the defendant is unable to determine whether the amount she is being charged is an accurate reflection of her electricity consumption. She pleaded that the plaintiff is not a licenced power distributor and the continued distribution of electricity to the defendant and other lessees is unlawful. She also claimed that she has not been provided with the insurance policy and payment premiums for the building despite being one of the lessees. She further



contended that no management company had been put in place despite the plaintiff (Hammond Holdings) informing the lessees that one will be formed through letters dated 5 January 1995 and 13 January 1995.

5. In the counterclaim the defendant sought a raft of orders being as follows :-
- a) That the plaintiff's suit be dismissed with costs.
  - b) Subject to the Order of the taking of accounts, the Set-Off be allowed.
  - c) That the prayer (b) in the plaint for vacant possession be dismissed with costs.
  - d) For a declaration that the failure and/or refusal by Hammond Holdings Ltd to pay service charge for the pent house was fraudulent, illegal, unlawful and amounted to theft and unjust enrichment.
  - e) For a declaration that Coast Computer Bureau Ltd need not pay any further service charge until Hammond Holdings Ltd, the Registered Trustees, Bagwanji Raja Charitable Foundation and any of their assigns, agents and successors in title pay service charge for the pent house from 22.11.1993 till this suit is determined.
  - f) For an order that accounts be taken of all service charge payable for the total lettable areas (including the pent house) from 22.11.1993 until the determination of this suit.
  - g) For an order that the defendants in the counterclaim do pay service charge payable with regard to the pent house from 22.11.1993 till this suit is determined together with interest at 12% per month from each date and successive date that quarterly service charge was payable.
  - h) For an injunction restraining the defendants in the counterclaim from demanding and/or enforcing the payment of any service charge by the plaintiff (Coast Computer Bureau Ltd) until all service charge relating to the excluded lettable area is paid in full.
  - i) An order of injunction restraining the defendants in the counterclaim from selling, charging, transferring, leasing or disposing of any interest in Title Numbers MOMBASA/BLOCK XXI/396 and MOMBASA/BLOCK XXI/397 without the consent of Coast Computer Bureau Ltd and before the full payment of service charge for the penthouse from 22.11.1993 till the date of such sale charge, lease, transfer or disposal.
  - j) A mandatory injunction compelling the defendants in the counterclaim to demolish the Pent house and clean and remove at their costs all the debris resulting therefrom.
  - k) For a mandatory injunction compelling the defendants in the counterclaim to provide a fire escape stair case or fire exit from the 1st floor to mezzanine 2.
  - l) An order that the defendants in the counterclaim do pay the legal costs incurred by Nitin Pandya, a director of Coast Computer Bureau Ltd in defending Mombasa Resident Magistrate's Criminal Case No. M.2811 of 2007.
  - m) A declaration that Biashara Bank Building is subject to the provisions of the [Sectional Properties Act](#), 1987 notwithstanding the failure by Hammond Holdings Ltd to comply with the provisions of that Act and that therefore it cannot be sold, charged, leased, transferred or otherwise dealt with without the written consent of Coast Computer Bureau Ltd.
  - n) A declaration that the records of service charge and the reviews supplied by the 1st defendant for the years 1994 to 2006 were not audited accounts and audit certificates respectively and



that no audited accounts and certificates have been issued in terms of clause 12.1 and 1.2 of the lease and that therefore Coast Computer Bureau Ltd is not bound to pay any further service charge until such accounts and certificates are availed from the period 1994 until this suit is determined.

- o) General, punitive and aggravated damages.
  - p) For an order requiring the defendants in the counterclaim to supply to the plaintiff in the counterclaim copies of all insurance policies and/or endorsements on Biashara Bank Building together with copies of receipts for premiums paid from 22.11.1993 to 1.9.2007.
  - q) An order compelling the defendants to provide a separate and independent electric power meter to the plaintiff in the counterclaim at the plaintiff's cost.
  - r) An order compelling the defendants in the counterclaim to provide an account of all electric power consumed in Biashara Bank Building and an account of the manner in which all the occupiers of Biashara Bank Building contribute and have contributed to the payment thereof from 22.11.1993.
  - s) For an order restraining the defendants from managing the affairs and service charge of Biashara Bank Building otherwise than as shareholders of a separate company to be formed by all the lessees of Biashara Bank Building and the defendants and in the meantime the plaintiff in the counterclaim do deposit further service charge in court or in an interest earning joint account between the parties.
  - t) That costs of the suit, the set off and counterclaim be paid by Hammond Holdings Ltd and by the Registered Trustees, Bagwanji Raja Charitable Foundation.
6. In her defence to the suit Mombasa ELC No. 174 of 2019, the defendant did contend that the said suit was res judicata given the previous suit, Mombasa HCCC No. 209 of 2008. She nevertheless pleaded that she has refused to pay service charge for being denied services and that there had been no audited service charge accounts. She followed up her defence with an application to strike out suit for being res judicata. I heard the application and delivered ruling on 24 June 2020. I did not strike out the suit, but ordered that the two suits be consolidated for hearing. That is how this judgment is a consolidated judgment in respect of the suits Mombasa HCCC No. 209 of 2008 and Mombasa ELC No. 174 of 2019.

## **B. EVIDENCE OF THE PARTIES**

### **Plaintiff's Evidence**

7. The evidence of the first witness of the plaintiff, Manish Shah, was first taken before Mukunya J on 2 July 2013 and on other subsequent days. Manish Shah is the finance Manager of Hammond Holdings Limited and part of his duties are to manage the subject building. He testified that the building has 36 long term leaseholders and that it is only the defendant who does not pay (service charge) since the year 2006 save for electricity. He referred to clause 12 of the agreement regarding payment of service charge. He did state that he has audited service charge accounts and that the auditors do verify the expenses every year. He stated that they allocate the charge according to the space occupied by the lessees. With regard to painting he referred to a letter dated 23 January 2006 which informed all lessees of intention to paint the building and of the cost, and what each lessee was to pay, but the defendant refused to pay. He explained that when service charge remains outstanding for over 3 months, the lessor had a right to terminate the lease. He referred to Clause 6 of the agreement. On the claim by the defendant



of leakages, he did state that they received complaints from the defendant and they did repair works addressing the defendant's concern but he still persisted in non-payment. He acknowledged that the defendant complained of inequitable distribution of service charge and elaborated that the mode of payment was explained to the defendant in correspondences. On the penthouse, he stated that the same has remained unoccupied since it was built. He expounded that the plaintiff occupies 37% of the space and thus pays 37% of the service charge. The rest, i.e 63% is distributed to the lessees. He testified that the defendant had made allegations of fraud and theft and was sued in the case Nairobi HCCC No. 1307 of 2000 ( a defamation suit) and he was ordered to apologise and pay damages of Kshs. 500,000/=. The letter of apology was written on 27 November 2009. He testified that a half share of the premises was transferred to Bhagwanji Raja through a transfer dated 5 October 2006. On the complaint regarding blockage of fire exits, he produced a report by Securex Limited which report he stated was done to allay the fears presented by the defendant. He added that they had been served with a demand by the Public Health office of the Municipal Council of Mombasa, after complaint by the defendant, and they complied, which compliance was affirmed by the Municipal. On the contention that the penthouse was unapproved, he testified that the Municipal Council issued an occupation permit in the year 1991 which confirms extension of the building.

8. Cross-examined, he testified that with regard to accounts, what they provided the defendant was a fair summary not the whole audit report. He acknowledged that the defendant had been asking for the audit reports. His explanation was that it would be very expensive to provide the reports. He added that the report has profit and loss accounts which is not the business of the defendant though he did acknowledge that it was not impossible to prepare a full report of service charge. Their auditors were KPMG.
9. He did affirm that they were charged in court after the defendant complained to Public Health on issues relating to maintenance of the premises. He acknowledged that the defendant complained of leakage on 16 December 2011 and it was not repaired until 18 March 2012. He testified that the tenants have no option on payment of service charge but can question if it is misused. They had a caretaker being paid Kshs. 150,000/= per month which was reduced to Kshs. 75,000/= per month upon receipt of complaints. On electricity, he explained that they have their own sub-meters distributed to tenants and therefore do not supply tenants with the Kenya Power and Lighting Company (KPLC) bills with exception of October 2009. He testified that there is a bank in the building, Biashara Bank which later changed to I & M Bank, and its directors are also directors of Hammond Holdings and Bhagwanji Raja. The bank uses a generator whose expenses fall within service charge. He acknowledged that the bank occupies a bigger area than that of the defendant. He was questioned on the painting cost where they obtained three quotations of Kshs. 4.9 million, Kshs. 3.6 million and Kshs. 1.9 million. The contract was offered to the company that quoted Kshs. 3.6 million, his explanation being that it was an issue of quality. He acknowledged that the defendant demanded a bill of quantities (BQ) of the paint work but was not given, his explanation being that he has no business asking about the cost of painting. On the cost of the borehole, he affirmed that the quotations received were exactly the same.
10. Re-examined, he testified that their caretaker's (Alex) responsibilities were reduced in 2012 thus the reduction of his salary. On electricity he testified that they receive a bill from KPLC which they distribute depending on the consumption reflected in the check-meters for each tenant. They then invoice the tenant accordingly. On leakages, he testified that whenever they receive a complaint, they try to undertake repairs and the defendant's complaints were not left unattended. He added that they have a problem of leakage from pipes and they need to reconstruct the drain pipes from outside which cost will be borne by all tenants. He explained that they were yet to get quotations and the tenants are yet to agree on spending the extra money. On the management company, he stated that they are in the process of forming one where all long-term leaseholders will become shareholders and the company



can make decisions on management and on repairs. On the accounts, he testified that they are company accounts not service charge accounts alone and documents comprise of ledgers and invoices which are bulky and expensive to produce. He stated that they do not comprise part of the lease and that some constitute confidential company information which they could not share with the defendant. What they issued were audited service charge reports in summary form. He added that the auditors would object to any amount not a service charge item and they would rectify any error. He stated that they have not received any complaint about any particular item of service charge. He elaborated that what the lease agreement provided was for accounts to be certified by a Certified Public Accountant/Auditor and that service charge has always been audited. He affirmed that he and his caretaker, one Issa, were charged for not undertaking repairs and maintenance of common areas. They were never charged on any issue relating to the fire exist or leakages and he added that the court agreed that there was a fire exit. He acknowledged that when it rains, water seeps into the defendant's office and destroys part of his carpet and office.

11. The evidence of PW-2, Joseph Irungu Kariuki, was taken before Omollo J, on 4 November 2015, as Mukunya J had been transferred from the station. PW-2 is a registered member of the Institute of Certified Public Accountants of Kenya (ICPAK) and was a partner at KPMG. He has worked with KPMG for 14 years from the year 2000 and he became partner in the year 2014. He was engaged by the directors of Hammond Holdings to audit her accounts for the years 2006 – 2010. He audited the records of the company and also service charge. He referred to Schedule 5 of the Lease agreement as providing detailed requirements for service charge which formed the basis of his work. Clause 12.1 of the agreement did provide for appointment of an accountant to carry out the exercise. The exercise entailed going through the general ledger and supporting documents for expenses including invoices, receipts, LPOs, delivery notes and utility bills. They then compare the same with the report prepared by the management. He explained that the building is 150,852 square metres and 63% of it is occupied by long-term leaseholders. The plaintiff occupies 37% of the premises. They confirm this distribution of expenses in this ratio. Once confirmed, they issue a service charge certificate confirming that this was a true reflection of the financial affairs for service charge. He produced the audited accounts for the years 2006, 2007, 2008, 2009, and 2010. He was not aware of any complaints from the defendant or any other lessee. They charge a professional fee which is covered in the service charge though the contracting authority was the lessor (Hammond Holdings). The report prepared is issued to the directors of the company (Hammond Holdings).
12. The evidence of PW- 3, Piyush Shah, was similarly taken before Omollo J. He is also an auditor and a member of ICPAK. He works for PKF (Kenya) where he is a partner. He has been a partner since the year 2005. His firm was engaged by the plaintiffs to audit service charge for the years 2010 and 2011. They undertook the audit and provided the audit reports. He was cross-examined on the electricity bills and the submeters and he testified that units for common areas is not given. He could see that in October 2009, the bill for common areas was 10% but in 2016 the percentage was 50%. There was also charge for alarm response which he stated would be for the bank and was not sure if it is enjoyed by the defendant. There was also a charge for legal services but he could not tell what the services offered were. He stated that audit is done by sampling. He did not carry the supporting documents used for the audit. He was also questioned on VAT on non-commercial aspects amounting to Kshs. 2, 380,438/= which he explained was potential VAT that may not be claimable. The cost was passed to tenants because it formed part of the total cost. He could not however tell what this non-commercial expenses were. Just as PW-2 stated, the report was to the company and the fee payable was also charged as part of service charge. He was also questioned on salaries disparity between 2004 (which stood at Kshs. 350,589/=) and 2011 which stood at Kshs. 2,190,485/=. His view was that this may have been due to salary increments but he did not have the payslips.



13. I took the evidence of PW-3 on further cross-examination and re-examination, upon transfer of Omollo J. This was from 28 September 2022. In re-examination, PW - 3 testified that electricity bills for common areas would be computed according to square area. He explained that their job was to ensure that the expenses are supported by documents and also confirm that service charge is split according to the correct formula of square footage. Their work was not to justify why a particular expense was incurred as justification was not within the scope of their work. He elaborated that they use sampling methodology, which is allowed in audit, as it is impossible to cross-check every document.
14. With the above evidence, the plaintiffs closed their case.

### **Defence Evidence**

15. Before the defence offered her witness, Mr. Kinyua, learned counsel for the defendant, was permitted to make an opening statement. In it, he stated that his client has not paid service charge since the year 2006 for reason that he was not given proper and certified accounts in the terms of the lease and also due to issues relating to repair of the premises directly affecting him, particularly leakages of sewage and rain water into his offices. He stated that his client had offered solutions which were rejected and claimed that this was an attempt by the plaintiffs to constructively evict his client.
16. DW-1 was Mr. Dickson Mashudi Chilowa, who testified that he qualified as a Certified Public Accountant (CPA) in the year 2012. He is the managing partner of Mashudi & Mashudi Auditors. He explained that an accountant prepares the books on behalf of the management while an auditor will take the books so prepared and verify that the books are well kept. He will verify a sample of the documents to affirm the correctness of the figures and give an independent opinion. He stated that he was appointed by Mr. Nitin Pandya a director of the defendant to review the statements given to him and he prepared a report which he signed on 15 April 2021. Cross-examined, he affirmed that he did look at the reports of the auditors of the plaintiffs. He prepared the report on instructions of Mr. Pandya. He was not given the source documents which would be invoices and bills including electricity bills. What he was given were extracts of reports from the plaintiffs' auditors and correspondences from the landlord to his client. He was pressed on whether he is actually the one who prepared the report or whether the report was prepared by Mr. Pandya (who is also an accountant) and only given to him to sign and he insisted that this was his independent report. He thought that miscellaneous income in the accounts of Hammond Holdings consisted of extra charge of service charge. He was questioned on electricity meter readings of 2019, which he said were given to him by Mr. Pandya.
17. DW-2 was Mr. Nitichandra Pandya. He is an accountant by profession (CPA, K) and partner in the audit firm of Shah Pandya & Company and director of the defendant. He explained that the Biashara Bank Building is a ten storey building comprising of a ground floor, three office floors, and the rest are apartments. There are 40 apartments and at the top is a penthouse which he stated has never been occupied. He testified that the building has two towers and the defendant owns 5,000 square feet being the whole of the first floor of one of the two towers. Out of this, his audit firm occupies 2,000 square feet and the other 3,000 square feet is ordinarily let out. From the year 1994 to 2000 the extra space was let to the Ministry of Tourism but they vacated due to leakages which would spoil their carpets. The space remained vacant until 2011 when his son occupied it till the year 2015. He had a tenant between 2015 and 2022 but they left due to the same reason, i.e leakages and failure to have the building properly maintained and this space is thus vacant.
18. According to him, the building as first developed comprised of a basement, ground floor, and two mezzanine floors only. A new owner took over the building and developed the first floor and the other floors of apartments. These were sold to third parties save for four apartments. He occupies the



first floor which is part of the new development. He explained that there are service shafts from the penthouse and upper floors passing through his office and if there is leakage, it will end up in his office. He added that there was a flaw in design so that if it rains heavily, there is leakage in his office from the sewer pipes as there is no outlet. He stated that this has been going on since the year 1994 and that water floods his office. Insects and birds also fall into his office through the vents though he clarified that this was cured by the landlord building a slab on one vent. He however complained that this slab cannot prevent seepage of sewer and water. He has wall to wall carpets and persian rugs which get soaked. The leakage incidences take place from time to time about every 6 months. He suffered the leakages in January 2022 and July 2022. When this happens, he complains and what the landlord does is to undertake partial repairs but not completely. When the upper apartments are repaired, debris falls into his office. He has a false ceiling and the pipes are inside the space above the false ceiling. He uses this space also as his storage. He complained of rusting pipes for which some apartment owners have replaced with plastic pipes. He made reference to various photographs that he had filed to demonstrate the leakages and damage complained of. He testified that he had offered solutions; that the sewer pipes can be reinforced and covered; that all vents need fixing with waterproof compound. He stated that he discussed these with the owner of the building but he was denied permission to proceed as proposed without giving reason. On electricity, he stated that by chance, he saw a bill in the year 2009, and realized that they were being wrongly billed. They were never allowed to see these bills. He wrote a letter asking to see the bills but was told that he cannot see them. He explained that there was one bill and what the tenants had were sub-meters. He stated that there was however no sub-meter for common areas to run lifts and lights therein. He claimed that this was billed from Biashara Bank though he was not sure if they had a sub-meter of their own. He added that Biashara Bank uses a generator belonging to the building which they would pay for, though he stated that from the year 1999 Biashara Bank now use their own generator. He claimed that they had asked for electricity meter separation from 1995 and alleged that there is a higher tariff when the meters are not separated as there is no differentiation between apartments and businesses. He however conceded that from the year 2022, they now have their own separate meters and alleged that the power bill has now come down substantially. He also complained about the borehole quotations which he said were the same for all companies that quoted and that even the fax number was shared. He stated that he raised issue and a new similar quote was prepared and the borehole was done anyway and they were charged for it though the penthouse was not charged. He alleged that he does not know how water is charged and claimed that the bank, which occupies more space, is charged less for water. The building exclusively uses borehole water and billing is per a sub-metre for each owner. He complained that the plaintiff does not have a separate sub-metre for their usage of the borehole water. The building is however charged by the Municipality for sewer and there is one sewer meter. He offered that the Municipal gives the figure which the landlord distributes to the owners but he claimed not to know the formula. He testified that the building is wholly maintained by the landlord and they play no role. He contended that there has been refusal to cede management of the building yet the property is under the [Sectional Properties Act](#).

19. He admitted not paying service charge and contended that it is because of overcharging of electricity and water. He claimed that there is no auditor certificate given according to international standards. He stated that he has asked for source documents since the year 1993 such as petty cash vouchers but he was never given. He acknowledged that they had a meeting in the year 2011 and claimed that it was agreed that he would be given 5 year accounts but he only got for three years. He also raised issue that the fire escape is blocked from the first floor with concrete. He asserted that he wants to verify the service charge from the source documents before paying it.
20. Cross-examined, he denied that the case herein is based on suspicion, misconception, and a sour relationship that he has with Mr. Suresh of Hammond Holdings. He acknowledged that they (tenants)



were not paying water until the year 2017. It was this year that the County Government placed one sewer metre and started charging for sewer, for water used within the building. The landlord distributed the cost depending on one's use of water though he said that he does not trust the figures. He acknowledged however that each apartment/office has a sub-meter and the same are open to be read even by himself. He was questioned on the lease agreement of 22 November 1993. He affirmed that what he has is 5,000 square feet which comprises both office and store and there is no separation between office and store in the building. He affirmed paying service charge from 1993 to 2006 but not having paid from the year 2006. He however pays for sewer and electricity every month as he risks disconnection. He otherwise enjoys use of services offered in the building including the lifts, cleaning services, security, water, and common fire equipment such as fire extinguishers. He denied being unfair.

21. He recalled that he had been sued for defamation after he had written a letter in the year 2000, to the directors of Hammond Holdings (including Mr. Suresh), claiming that they are thieves and defrauded them for selling the fire escape and stealing power. He wrote a letter of apology in the year 2009 withdrawing his contentions. It was put to him that he complains against everyone not ascribing to his opinions and labels them as corrupt. He denied this. He admitted writing to the Town Clerk, accusing one Mr. Maithya, a fireman, of being bribed. He admitted not having evidence of bribery. He admitted complaining to the Minister of Local Government in the year 2009 still accusing Mr. Maithya. His complaint was that Mr. Maithya cleared Hammond Holdings with regard to the alleged blockage of the fire escape. He admitted accusing KPMG of underhand dealings which he claimed are known. He admitted complaining to EACC and the Governor Joho the former Governor of Mombasa. He admitted not having brought any engineering report on the alleged defects within the building. What he had were only photographs. He contended that Mr. Suresh and Mr. Navin Shah were charged and found guilty over blockage of the fire exit. He stated that he complained to KPLC about the legality of the sub-meters and admitted that KPLC responded through their letter dated 2 July 2009, and informed him that this is common practice and found nothing wrong with it. He was also referred to a letter from Hammond, that he could inspect the electricity bills. He admitted being given 3 years of the source documents prior to the year 2011. He stated that the major anomaly was a legal bill of Kshs. 700,000/= for a case before the tribunal, where the tribunal found the landlord liable. He admitted complaining to ICPAK who wrote back to him stating that they cannot discipline a member without evidence.
22. Re-examined, he testified that there is only one staircase downwards from the first floor but two stair cases upwards. He claimed that one is blocked by a concrete wall. He stated that there had been a fire in the year 2013 and the directors of the plaintiff were charged with blocking the fire exit and they pleaded guilty despite there being a letter of compliance issued by Mr. Maithya.
23. With the above evidence, the defendant closed her case.

### **Site Visit**

24. I thought that the court would benefit from a site visit which was conducted on 30 September 2022. The property in contention is easily identified as Biashara Bank Building along Nyerere Avenue, opposite Palli House. We were taken round by the caretaker, Mr. Issa Mustafa. There is a ground floor, two mezzanine floors, a slab then the 1<sup>st</sup> floor. The offices terminate at the 1<sup>st</sup> floor and thereafter are apartments up to the 8<sup>th</sup> floor. The penthouse is on the 9<sup>th</sup> floor supplied by one staircase. There is a lift and three staircases. There is a fire exit as well to the front and back of the building. There was some visible discolouration of the paint in the office of the defendant which must have been due to leaks but there was no visible leakage seen and the caretaker stated that the leaks were repaired. There was also discolouration of paint outside the office caused by the flowerbed which the caretaker stated they



were considering removing altogether after consulting the owners. Mr. Pandya's office has a wall to wall carpet and other loose Persian rugs which I must say I found unusual to have if there is persistent leakage. The explanation of Mr. Pandya was that he is trying to maintain a standard and that the leakages are not permanent. I climbed up the false roof and I could see sewer pipes showing signs of having been repaired. We also accessed the other part of the office which is leased out. It is distinct from what Mr. Pandya uses and you have to get out of his office to access it. It is not occupied and there were signs of water on the floor due to leakages. Mr. Pandya was surprised to see the leakage; he had last been to this part of his office a couple of months back and was not aware of it. Mr. Mustafa's explanation was that this has not been brought to his attention to repair and he would have no way of knowing as this is inside a private office. Mr. Pandya pointed to what he claimed was the closed fire exit, which he found sealed when he purchased the office, but Mr. Mustafa had no knowledge of it.

25. My general observation, which I recorded, was that the building is generally clean and well maintained. There was adequate security personnel and the staircases were clean. The lifts were working very well. There was some evidence of leakages but there did not appear to me to be any serious issue outside the general maintenance, and wear and tear that is expected of any building.

### C. ANALYSIS AND DISPOSITION

26. I invited counsel to file submissions, which they did, and I have taken note of the submissions filed by both Mr. Kibara, learned counsel for the plaintiffs, and Mr. Kinyua, learned counsel for the defendant, before arriving at my decision.
27. The parties agree that their relationship is governed by the lease agreement dated 22 November 1993. Through that agreement, the defendant obtained a lease for an office No. 313 and store No. 312. The reality of the occupation is that one cannot tell what is the office and what is the store, for what was demised to the defendant appears to be all office space which in total encompasses 5,000 square feet. It is this office No. 313 and store No. 312 which comprise of "the premises" for purposes of the agreement. Clause 1.15 is the specific clause on what "the premises" comprises and it states as follows :-

1. 15 "the Premises" means that Office No. 313 and Store No. 312 being part of the Property and for the purpose of identification marked Office No. 313 and Store No. 312 of the Biashara Bank Building upon the Building Plan registered in the Registry of Documents at Mombasa in Volume B.13 II Folio 562/806 File 1637 ... together with such other conveniences to be enjoyed therewith in accordance with the terms of this Lease and more particularly described in the First Schedule hereto.

Under Clause 1.16, the expression 'the premises' will also include any additions and improvements on it, all fixtures, all pipes serving the premises which are in, under, or over, the premises, the walls forming the outer boundaries.

28. From the said agreement the term of the lease is the unexpired residue of the term of ninety-nine years commencing 1 October 1973 less the last seven days subject to determination as provided in the agreement. The consideration indicated in Clause 2 of the agreement is an annual rent of "one peppercorn (if demanded) plus service charge payable in accordance with the Fifth Schedule (which includes the Insurance Rent payable on demand in accordance with the Sixth Schedule) by way of additional rent...". This one peppercorn rent (if demanded) and the service charge also constitute the definition of "charges" under the lease pursuant to Clause 1.6 of the said agreement.
29. Clause 3 of the agreement provides for the Lessee's covenants and provides as follows :-



The Lessee covenants with the Lessor :

3.1 Charges :

3.1.1 to pay the Charges on the days and in the manner set out in this lease and not to exercise or seek to exercise any right or claim to withhold charges or any right or claim to legal or equitable set-off.

3.1.2 if so required in writing by the Lessor to make such payments by banker's order or credit transfer to any bank and account that the Lessor may from time to time nominate.

3.2 Outgoings :

To pay and indemnify the Lessor against all rates taxes head rent assessments duties charges impositions costs and outgoings which are now or during the Term shall be charged assessed or imposed exclusively upon the Premises or upon the Lessee or occupier of them excluding any payable by the Lessor occasioned by receipt of the Charges or by any disposition or dealing with or ownership of any interest reversionary to the interest created by this Lease.

3.3 Electricity and other services consumed :

To pay to the suppliers and to indemnify the Lessor against all charges for water, electricity, telephone and other services consumed or used at or in relation to the Premises (including meter charges if any).

3.4 Repair, etc

3.4.1 To repair the Premises and keep them in repair.

3.4.2 To clean the Premises and keep them in a clean condition.

3.4.3 Not to keep or store on the Retained Parts any caravan or movable dwelling. (Retained parts here meaning common areas).

3.4.4 As often as may in the reasonable opinion of the Surveyor be necessary in order to maintain a high standard of decorative finish and attractiveness and to preserve the Premises and in the last year of the Term to redecorate the Premises in a good and workmanlike manner and with appropriate materials of good quality to the satisfaction of the Surveyor any change in the tints colours and patterns of such decoration to be approved by the Lessor provided that the covenants relating to the last year shall not apply where the Lessee shall have performed the obligation in question less than (18) months prior to the expiry of the Term.

3.19 Defective Premises

To give notice to the Lessor of any defect in the Premises which might give rise to an obligation on the Lessor to do or refrain doing any act or think in order to comply with the provisions of this lease or the duty of care imposed on the Lessor in pursuance of the provisions of any law in force and at all times to display and maintain all notices which the Lessor may from time to time reasonably require to be displayed at the Premises.

3.20 Lessor's rights

To permit the Lessor at all times during the Term to exercise without interruption or interference any of the rights granted to it by virtue of the provisions of this lease.



3.21 The Premises Covenants and the Service Charge :

3.21.1 To observe and perform the Premises Covenants.

3.21.2 To observe and perform its obligations contained in the Fifth Schedule.

The Lessor's covenants are contained in clause 4 of the agreement and the relevant parts are as follows :-

30. There are also covenants of the lessor which are contained in Clause 4 which provides as follows.

The Lessor covenants with the Lessee :

4.1 To keep in good and tenable repair and condition :

4.1.1 the main structure of the Buildings including the roof timbers foundations external and load bearing internal walls (but not the interior faces of such parts of the internal walls of the Premises) and

4.1.2 all drains gutters drainpipes waterpipes sanitary apparatus wires and cables in or under the Buildings which serve the same (excluding nevertheless any which lie within the Premises and exclusively serve the same) and

4.1.3 the entrances staircases landings corridors passenger lifts and

4.1.4 all other Common Parts enjoyed or used by the Lessee in common with others.

4.2 To carry out any repairs to the interior of the Premises or to the fixtures therein which may become necessary at any time during the term hereby created by reason of structural repairs to or defects in the Buildings or by reason of any breach or non-performance of the obligations of the Lessor under this clause. The liability of the Lessor hereunder shall only extend to repairs which may be necessary other than by reason of damage caused by the Lessee or the servants licencees or invites of the Lessee.

31. Clause 5 of the agreement elaborates the service charge and insurance covenants and provides as follows :

5. The provisions of the Fifth and Sixth Schedules shall have effect and the parties covenant with each other to observe and perform their respective obligations set out in those schedules.

32. Clause 6 is titled Provisos and provides as follows :

6 Provisos

6.1 Re-entry and forfeiture of Lease

If and whenever during the Term :

6.1.1 the Charges (or any of them or any part of them) under this Lease are outstanding for more than 3 calendar months after the date on which the Lessor shall have notified the Lessee of the amount thereof and demanded payment thereof or

6.1.2 there is a breach by the Lessee of any covenant or other term of this lease or any document expressed to be supplemental to this lease



Then the Lessor may re-enter the Premises (or any part thereof in the name of the whole) at any time (and even if any previous right of re-entry has been waived) and the Term will absolutely cease but without prejudice to any right or remedies which may have accrued to the Lessor against the Lessee or to the Lessee against the Lessor in respect of any breach of covenant or other term of the Lease (including the breach in respect of which the re-entry is made).

## 6.2 Sale of Lease

The Lessor shall upon forfeiture and repossession thereupon proceed to grant a fresh Lease of the Premises upon substantially the same terms as this Lease for the residue of the Contractual Term hereby granted to such persons as the Lessor may consider suitable at the best aggregate premium which the Lessor can obtain without undue delay and the Lessor shall pay the Lessee the amount of such premium after deduction therefrom of all Charges and Interest outstanding as at the date of such sale and costs charges and expenses incurred by the Lessor in connection with the negotiation and granting of such new Lease and any other sums which may be lawfully due from the Lessee to the Lessor.

## 6.3 Entire understanding

This lease embodies the entire understanding of the parties relating to all the matters dealt with by any of the provisions of this lease.

33. The Fifth Schedule to the agreement elaborates the issue of Service Charge and I will set out what is relevant.

### 1. Periodical Expenditure means :

- 1.1 all costs expenses and outgoings whatsoever incurred by the Lessor during a Financial Period in or incidentally to providing all or any of the Services and any taxes (including penalties) payable
- 1.2 all sums incurred by the Lessor during a Financial Period in relation to the matters specified in Part D of this Schedule (“the Additional Items”) and any taxes or penalties payable.
- 1.3 excluding any expenditure in respect of any part of the Biashara Bank Building for which the Lessee or any other tenant shall be wholly responsible to the exclusion of all other tenants of the Biashara Bank Building and excluding any expenditure that the Lessor shall recover or which shall be met under any policy of insurance maintained by the Lessor pursuant to its obligations in this Lease and



- 1.4 including (when any expenditure is incurred in relation to the Biashara Bank Building) the proportion of such expenditure that is reasonably attributable to the Lessee as shall be determined from time to time by the Lessor.
2. “Computing Date” means 31<sup>st</sup> December in every year of the Term or such other date as the Lessor may from time to time nominate and “Computing Dates” shall be construed accordingly.
3. “Financial Period” means the period :
  - 3.1 from the Charge Commencement Date to and including the first Computing Date and subsequently
  - 3.2 between two consecutive Computing Dates (excluding the first Computing Date from but including the second Computing Date in the period).and Financial Period shall be construed accordingly.
7. “Services” mean the services facilities and amenities specified in Part C of this schedule.
8. “Service Charge” means the Service Charge Percentage of the Periodical Expenditure plus the Insurance Rent.
9. “Service Charge Percentage” means the percentage that the floor space of the Premises from time to time relates to the total floor space of the Lettable Areas.
11. Performance of the Services  
The Lessor shall perform the Services throughout the Term...
12. Payment of the Service Charge
  - 12.1 The Lessor shall as soon as convenient after each Computing Date prepare an account showing the Periodical Expenditure for the Financial Period ending on that Computing Date and containing a fair summary of the expenditure referred to in it and upon such account being certified by the Accountant it shall be conclusive evidence for the purposes of this Lease of all matters of fact referred to in the account except in the case of material manifest error.
  - 12.2 The Lessee shall pay for the period from the Charges Commencement Date next following the date of this Lease and for each subsequent



Financial Period a provisional sum calculated upon a reasonable and proper estimate by the Lessor of what the Periodical Expenditure is likely to be for that Financial Period by quarterly instalments in arrears on the 1<sup>st</sup> January, 1<sup>st</sup> April, 1<sup>st</sup> July and 1<sup>st</sup> October in each year as the Lessor shall require.

12.3 If the Service Charge for any Financial Period shall :

12.3.1 exceed the provisional sum for that Financial Period the excess shall be forthwith due to the Lessor on demand or

12.3.2 be less than such provisional sum the overpayment shall be credited to the Lessee against the next quarterly payment of the Service Charge.

34. It will be recalled that Clause 7 of Schedule 5 referred to Services in Part C. Part C elaborates the particulars of the services that will comprise of service charge which are :

14. Maintaining Structure and Retained Parts (particulars involving maintenance and repair of the structures, painting and decorating)
15. Lift
16. Hot and Cold Water
17. Maintaining Plant
18. Maintaining Pipes (excluding those which are responsibility of lessee)
19. Cleaning of retained parts (i.e the common areas)
21. Gardens and floral decorations.
22. Fixtures and fittings
23. Windows
24. Refuse
25. Other services – i.e other services relating to the building provided by the Lessor from time to time.

35. Part D contains the additional items which are (paraphrased for brevity)

26. Fees
  - 26.1.1 Fees of the Accountant
  - 26.1.2 the managing agents
  - 26.1.3 valuation fees or costs of assessing the cost of rebuilding
  - 26.1.4 caretaking and security fees



26.1.5 fees used for performing the services referred to in the agreement.

27. Staff costs – The cost of employing such staff as the Lessor may in its absolute discretion deem necessary for the performance of the services.
  28. Contracts for services
  29. Outgoings – being rates, taxes, rents charged on the building.
  30. Electricity and gas
  31. Road charges – being contribution the Lessor may be called upon to make for pavements or structures or pipes.
  32. Regulations – cost of preparing regulations.
  33. Statutory requirement costs
  34. Nuisance costs – costs used in abating nuisance
  35. Interest – any interest and fees in respect of money borrowed to finance the provision of services or the additional items.
  36. Anticipated expenditure - i.e provision for any anticipated expenditure.
  37. Rebuilding costs – Costs for rebuilding and reinstatement of the building.
36. There is also insurance cost in the Sixth Schedule and therein is “insurance rent” which is the service charge percentage of the insurance cost. The lessee is to pay the insurance rent at the same time as the service charge. Within the insurance covenants, the lessor agrees to produce to the lessee, on demand, a copy of the insurance policy and the last premium renewal receipt.
37. I have taken quite some space and trouble to outline the above provisions of the contract as I believe they are critical to the determination of this case. It will be recalled that the case of the plaintiffs is that the defendant has failed to pay service charge in accordance with the contract and that they have a right to consider the lease forfeited as provided for in the agreement. The defendant does not deny not paying the service charge from the year 2006 but believes that he is justified in not so paying inter alia because he has not been receiving the requisite services, that the service charge is not properly audited, and further that some items charged under service charge should not be so charged. There are also the other issues raised in her counterclaim regarding maintenance of the premises, the penthouse, and transfer of the lease which I will deal with later.
38. The starting point is to appreciate that parties are bound by their contracts. The contract between the parties herein as comprised in the above agreement is thus binding on them and they have to abide by it. The obligation to pay service charge is in Clause 3.1.1 which I have already laid out above but I will copy it below for ease of reference. It provides that the lessee covenants with the lessor “to pay the Charges on the days and in the manner set out in this lease and not to exercise or seek to exercise any right or claim to withhold charges or any right or claim to legal or equitable set-off.”
39. My interpretation of the above clause is that once the lessee is informed of the service charge, then he must pay it. Contractually, he is not allowed to exercise any right to withhold the payment thereof, or refuse to pay and demand that the same be set-off against other charges that may be due to the lessee from the lessor. One may have an issue to raise over what is being charged as service charge but he cannot, by virtue of not being happy with what is being charged, or with the services rendered, withhold payment. His relief must come through other avenues but certainly not the path



of withholding payment. For example, there would be nothing to bar the lessee from filing suit immediately upon receipt of the amount that he is expected to pay as service charge and on payment of it, to seek a declaration that what has been charged ought not to be charged, or file suit to seek a refund of what has been paid but ought not to be paid, or even sue the lessor for neglecting to perform his part of the agreement, or sue so that he can be availed of all the supporting documents that comprise expenses on service charge. It does not matter how convinced the lessee may be that he is being shortchanged, he has no right to withhold payment as agreed in Clause 3.1.1. That is the contract that the defendant signed to and it is not for this court to change it. It was therefore completely wrong for the defendant to refuse to pay service charge, for that right of refusal, does not exist under the contract.

40. I am aware that the defendant pointed at what he considers to be items that he ought not to pay service charge on. I will reiterate that nothing stopped him from seeking accounts on these amounts, and if he felt that there was impropriety, proceed to sue, but he ought not to have stopped paying what he had been billed for service charge. In fact, when DW-2 was cross-examined, he was asked whether he enjoys services such as security, water, electricity, cleaning, lifts, and use of common areas, all of which are maintained using service charge. He affirmed that he did. It was visible to this court, when it visited the building, that the defendant is enjoying these services. It was unfair for her to continue enjoying these services without paying a cent for them, and this, she and her directors have done since the year 2006. They enjoy services but pay no cent in return. The directors of the defendant should be ashamed of their conduct. I have shown that no right of refusal to pay existed under their contract, but even if it did, why didn't the defendant then proceed to pay for what she and her directors continued to enjoy, such as a fair proportion of security, cleaning, and such like services, then contest what is disputed ?
41. The defendant attempted to argue that there was non-compliance with Clause 12.1 which relates to provision of accounts. Her point is that there are no audited accounts. I don't agree. What clause 12.1 provides is for the lessor to prepare an account which contains a fair summary of the expenditure and upon it being certified it be conclusive evidence on matters of service charge. Nowhere in the agreement is there a clause saying that there needs to be audited accounts in the fashion that the lessee wants. There is a wealth of exhibits provided by the plaintiff indicating the accounts and I am unable to fathom the complaint of the defendant. Even assuming that there was no strict compliance with Clause 12.1 that still did not allow the defendant not to pay a cent for services that he continued to consume. I am persuaded that the plaintiffs have made out a case that the defendant failed to pay service charge as agreed and that the plaintiffs are fully entitled to accumulated service charge billed to the defendant from the year 2006 to date.
42. In the plaints, the plaintiffs seek that the lease be ordered as forfeited for non-payment of service charge and for the defendant to vacate the premises. They rely on Clause 6.1 of the agreement. Indeed, the said clause does permit the lessor to re-enter the premise when there is breach of the terms by the lessee and terminate the lease. This is more or less an exposition of the lessor's right to forfeiture. I agree with the plaintiffs that they are within their rights to exercise the right of forfeiture under the lease. However, the law does allow courts to give relief against forfeiture. Section 76 of the [Land Act](#), 2012, provides as follows :-

76. Relief against forfeiture

- (1) A lessee upon whom a notice has been served under section 75, or against whom the lessor is proceeding, by action or re-entry, to enforce his right of forfeiture, may apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and the conduct of the parties and the circumstances of the case, thinks fit, and, if it grants relief, may grant it on such terms as it thinks fit.



- (2) The court, on application by any person claiming as sublessee or chargee any interest in the property or part of the property comprised in the lease forfeited or sought to be forfeited, may make an order vesting the property or such part in such sublessee or chargee for the whole period of the lease or any less period, upon such conditions as the court in the circumstances of the case thinks fit:

Provided that nothing in this subsection shall apply in the case of a forfeiture arising from a breach to which the sublessee is a party, or from the breach of an express agreement or condition against subleasing, parting with the possession of or disposing of the property leased.

43. It will be seen that on application, the court can give relief against forfeiture. The defendant has not applied for relief, but this court in exercise of its inherent jurisdiction and discretion, will give relief against forfeiture, subject to the defendant paying all accumulated service charges as exhibited by the plaintiffs, from the year 2006 to date, within the next 3 months. If the said amounts are not paid in full to the plaintiffs, then the lease herein be considered as forfeited and the plaintiffs will be at liberty to proceed to exercise their right of re-entry as provided in the agreement.
44. The defendant did lodge a counterclaim and I have given it due consideration. First, he claimed a set-off with regard to amounts related to VAT. I have already demonstrated above that there is no right of set-off. If the defendant is of opinion that there was or there is a wrong charge of VAT, he has to specifically sue for it, specifying the amount and hope that he will get judgment in his favour, but a set-off is not permitted. He also claimed that the transfer of the leasehold title to Bagwanji Raja was unlawful because it was done without her consent. I have seen nowhere that the consent of the defendant was required before the leasehold title could be transferred. I have even pored over the submissions of Mr. Kinyua and nowhere has he substantively addressed this issue. The other issues in the counterclaim relate to how the plaintiff has dealt with the property and how it has awarded contracts for maintenance of building. In the agreement, the parties agreed under Clause 11 that it is the Lessor to manage the property. The defendant cannot be allowed to micromanage the plaintiffs in the manner in which they award contracts and/or engage service providers. I will reiterate that if the defendant had an issue upon supply of every year's accounts, he ought to have sued and pointed out what is wrong with them, not refuse to pay service charge.
45. Going to the specific prayers in the counterclaim, prayer (a) is for the plaintiff's suit to be dismissed. I have already found substance in the plaintiff's suit. Prayer (b) is for taking accounts and set-off. I have already found that the defendant was supplied with accounts and he has no right of set-off. Prayer (c) seeks dismissal of the plaintiff's prayer for vacant possession. I have already dealt with that when addressing the right of forfeiture. Prayer (d) seeks a declaration that failure by the plaintiffs to pay service charge for the penthouse is fraudulent. On this, I have already mentioned that it is the onus of the defendant, to lodge a claim upon receipt of annual accounts and urge for redistribution of the service charge amounts. This court cannot proceed to make proportions of what each tenant is required to pay for that is to be left to the contract of the parties. That is an issue that parties themselves need to address and requires a different analysis. This also deals with prayer (e). Prayer (f) is for an order of accounts to be taken of all service charge payable for total lettable areas. I have dealt with this as I have held that accounts were provided and if the defendant was aggrieved by any annual accounts he ought to have sought redress upon receipt. Prayer (g) is a prayer requiring the plaintiffs to pay service charge for the penthouse. I have dealt with that when dealing with prayer (d). Prayer (h) is to stop the plaintiffs from demanding and/or enforcing service charge until all lettable area is charged. I cannot allow that prayer for the defendant has an obligation to pay service charge. I will repeat that if the defendant is not happy with distribution of service charge as provided every year, he needs to lodge a claim on



receipt of the same. He is also at liberty to lodge a claim on how service charge ought to be distributed. That will of course involve all parties that pay service charge and this court cannot make orders that may affect persons who are not parties to this suit. Prayer (i) seeks an order to stop any dealings on the property without the consent of the defendant. I see no place of this prayer as the law does provide for what a head-lessor (the person holding the leasehold tenure) can deal with and what he cannot deal with for such a property. Prayer (j) is seeking a mandatory injunction to compel the demolition of the penthouse. I am afraid that I have no evidence before me that the penthouse was built illegally and this prayer is dismissed. Prayer (k) seeks a mandatory injunction for provision of a fire escape from the 1<sup>st</sup> floor to mezzanine 2. When I visited the site, I saw fire escapes and according to me the same were adequate. I see no place for this prayer. Prayer (l) is to compel the plaintiffs to pay legal costs for Mombasa Criminal Case No. M2811 of 2007. That is a prayer that should be made in the court that handled the case. Prayer (m) is for a declaration that the building is subject to the provisions of the Sectional Properties Act. I agree, the building is subject to the Sectional Properties Act and the said Act needs to be complied with. Prayer (n) again complains about the accounts which claims I have already held to be unfounded. Prayer (o) seeks general, punitive, and aggravated damages. I have not found the plaintiffs culpable for breaching the agreement so this prayer is dismissed. Prayer (p) is for supply of insurance policies and for payment of premiums. If the defendant wants these, he can simply make a request. He doesn't need a court order for it as it is covered in the contract of the parties. Prayer (q) is to compel provision of a separate meter. The evidence adduced was that these are already available and the occupants each pay separately. The prayer is thus overtaken. Prayer (r) is to compel provision of electricity bills from 1993. Again I see no place for this. The evidence showed that bills used to be shared equally and I have not received any evidence that bills were shared inequitably for this court to allow that prayer. Prayer (s) is to restrain the plaintiffs from managing the building unless a separate company is formed. There could be substance in this prayer and I will give it some consideration.

46. It will be recalled that pursuant to Clause 11, it is the lessor who undertakes the services. The premises indeed falls under the Sectional Properties Act. Both the former Sectional Properties Act of 1998 (repealed) and the current Sectional Properties Act, 2020, do provide for establishment of a company which will manage the property. Section 17 of the present Act provides as follows :-

Section 17 : Establishment of a Corporation

- (1) On the registration of a sectional plan, there shall be constituted a Corporation under the name "The Owners, Sectional Plan No. (the number to be specified being the number given to the plan on registration)".
- (2) The Registrar shall issue a certificate of registration of the corporation.
- (3) A Corporation shall consist of all those persons —
  - (a) who are the owners of units in the parcel to which the sectional plan relates; or
  - (b) who are entitled to the parcel when the sectional arrangement is terminated under this Act.
- (4) The Corporation shall have perpetual succession and a common seal.
- (5) The Corporation shall be regulated in accordance with this Act and the bylaws specified in the regulations shall subject thereto, have effect in relation to the corporation and its board.
- (6) The provisions of the Companies Act, 2015 (No. 17 of 2015) shall not apply to the Corporation.



47. The duties of such corporation are provided in Section 20 and include doing all things to ensure that the property is well managed including engaging the services of a property manager.
48. This law needs to be put into effect by the plaintiffs, and once such company is formed, then the plaintiffs must cede management to this company. I give the plaintiffs 12 months from today, to ensure that the management company is incorporated as provided by law and to transfer management of the building to this company.
49. Prayer (t) in the counterclaim relates to costs. The core issue, and what indeed led to the filing of this suit, was the non-payment of service charge by the defendant and on this, I have found for the plaintiff. The only bit that the defendant has convinced me is that he is entitled to the prayer for a management company. For that reason, I will award 90% of the costs of the suit and of the counterclaim to the plaintiffs.
50. Judgment accordingly.

**DATED AND DELIVERED THIS 12 DAY OF JULY 2023.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

