REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 289 OF 2010

NGINYO INVESTMENT LIMITED.....PLAINTIFF

VERSUS

MOBILE PAY LIMITED.....DEFENDANT

JUDGMENT

(1) The Plaintiff **NGINYO INVESTMENTS LIMITED** instituted this suit vide the Further Amended Plaint dated **6th May 2010** which was later amended on **17th August 2011** and amended yet again on **18th June 2012.** In their Plaint the Plaintiff prayed for judgment against the Defendant for:-

(a) A permanent injunction restraining the Defendant, its servants or agents from committing a breach of the lease subsisting between it and the Plaintiff for the unexpired period.

(b) In the alternative to prayer (i) above, general damages for breach of the lease.

(ii) A) Kshs.3,837,128.33 being arrears for rent and service charges broken down as follows:-

(a) Kshs.508,985/= for the quarter running June 2010 to August 2010

(b) Kshs.508,985 for the quarter running September 2010 to November 2010

(c) Kshs.508,985/= for the quarter running December 2010 to February 2011

(d) Kshs.508,985/= for the quarter running March 2011 to May 2011

(e) Kshs.508,985/= for the quarter running June 2011 to August 2011

(f) Kshs.508,985/= for the quarter running September to November 2011

(g) Kshs.508,985/= for the quarter running December 2010 to February 2011

(h) Kshs.274,233.33 for the quarter running March 2010 to 10th April 2012

(ii) (B) Interest on (ii)(A) above at the commercial rate of Kshs.18% per annum from the date when the respective sum for every quarter became due.

(iii) General damages to compensate the tenants on the ground floor of the building for loss of business.

(iv) Costs of the suit and interest at court rates from the time of filing of this suit until payment in full.

(v) Any other and/or further relief(s) that this Honourable court may deem fit and proper to grant.

(2) The Defendants **MOBILE PAY LIMITED** filed their Statement of Defence and Counterclaim dated **5th July 2012** in which

counterclaim the Defendants sought for judgment against the Plaintiff for:-

> **"a. Payment of Kshs.422,533.75**
>
> **b. Interest on (a) above at Court rates from the date of filing this suit till payment in full.**
>
> **c. Such other relief as this court may deem fit to grant."**

(3) The Plaintiff then filed their Reply to Defence and Counterclaim dated **20th July 2012**. The hearing of the suit commenced before this Court on **15th February 2019.** Each party called one (1) witness in support of their case.

THE EVIDENCE

(4) **PW1 JAMES MWANIKI** was the General Manager of the Plaintiff. He stated that at all material time the Plaintiff was the registered owner of the property Title Number **I.R.4266 (L.R No.209/2439/7** on which property the Plaintiff had erected a multi-storied building commonly known as "**Nginyo Towers**". This building was situated at the junction of **Mokhtar Dadah Street** and **Koinange Street** in the Central Business Area of Nairobi.

(5) **PW1** relied entirely upon his written witness statement dated **2nd September 2016**. He told the Court that by way of a Lease Agreement dated **21st November 2008** registered as **No. I.R 4266/07** the Plaintiff leased to the Defendant the entire 7th floor of the said **Nginyo Towers**. The lease which was to run for a period of six (6) years from **1st March 2008** was to expire on **1st March 2014** and the agreed rent was provided for in the lease Agreement as follows:-

> **"(i) For the first two (2) years of the said term the monthly rent of Kenya Shillings Ninety Thousand Three Hundred and Forty Six Cents Fifty (Kshs.99,346.50) plus VAT at the rate of 15% or at such rate as may from time to be determined by law.**
>
> **(ii) for the next Two (2) years at the revised monthly rent of Kenya shillings One Hundred and Twenty four thousand One Hundred and Eighty Three Cents Ten (Kshs.124,183.10) plus VAT at the rate of 16% or at such rate as may from time to be determined by law.**
>
> **(iii) for the last Two (2) years of the said term as the revised monthly rent of Kenya Shillings One Hundred and fifty five thousand Two Hundred and Twenty Eight Cents Ninety (Kshs.155,228.90) plus VAT at the rate of 16% or at such rate as may from time to be determined by law."**

(6) The Plaintiff alleges that during the period when the Defendant occupied the demised premises, it breached several of its obligations and covenants under the lease by inter alia drilling and demolishing the walls of the demised premises whilst installing air conditioning therein without obtaining the necessary input and/or authority from the Plaintiff or its architects. It is further alleged that on **4th May 2010** the Defendant without the authority of the Plaintiff forcibly moved out its entire stock of goods in trade from the demised premises to some unknown location.

(7) The Plaintiff alleges that on **5th May 2010** the Defendant without the Plaintiffs authority moved out all the fittings furniture and equipment from the 7th Floor to the ground floor of the building thereby blocking the main entrance and inconveniencing the other tenants/occupants of **Nginyo Towers** particularly the tenants who occupied the Ground Floor of the Building**.**

(8) As a result of the above actions of the Defendant the Plaintiff on **6th May 2010** filed a suit seeking injunctive orders to prevent the said breaches of the Lease Agreement by the Defendant. That during the inter-partes hearing for interim orders the Defendants three (3) Directors namely:-

- **Oscar Wambugu Ikinu**
- **Jonathan P. Savage**
- **Gibson G. Wambugu**

All executed an unconditional undertaking dated **11th May 2010** to pay rent to the Plaintiff as and when such rent fell due until the Defendant handed over to the Plaintiff vacant possession of the demised premise. The said undertaking was filed in court on **12th May 2010.** However, the Plaintiff claims that the Defendant did not honour the said undertaking. Accordingly, the Plaintiff demanded that the Plaintiff remove the items cluttering the ground floor and also demanded compensation of business on behalf of tenants on the ground floor who it alleges were inconvenienced by the Defendants actions.

(9) On **10th April 2012** the Defendant returned to the Plaintiff the keys of the demised premises. The Plaintiffs claim that the Defendant is liable to pay rent and service charges for the **June 2010** to **August 2010**, quarter, as well as the quarters of **September 2010** to **November 2010, December 2010** to **February 2011, March 2011** to **May 2011, June 2011** to **August 2011, September 2011** to **November 2011, December 2011** to **February 2012** and the quarter running from **March 2012** to **10th April 2012** which rent and service charges totaled **Kshs.3,837,128.33**.

(10) **DW1 OSCAR WAMBUGU IKINU** a Director of **Mobile Pay Limited** Company testified for the Defendant. The witness relied entirely upon his witness statement dated **30th November 2016**. **DW1** confirms that the Defendant entered into a Lease Agreement with the Defendant dated **21st November 2008,** leasing from the Plaintiff the entire 7th floor of **Nginyo Towers** thus the Defendant became a tenant of the Plaintiff. **DW1** states that pursuant to the terms of said Lease Agreement, the Defendant paid to the Plaintiff **Kshs.422,553.75** as a Deposit. That this amount was to be refundable subject to the Defendant discharging all its obligations under the lease.

(11) The Defendant complains that it was entitled under the terms of the lease to quiet enjoyment of the demised premises, but claims that it was denied this quiet enjoyment because the Defendant unreasonably insisted that the Defendant obtain a "**pass**" each and every time it wanted to remove any equipment from the 7th Floor. Further that the Plaintiff unjustifiably refused to allow the Plaintiff to connect fibre optic cables from **Safaricom Ltd, Telkom Ltd** and **Access Kenya Ltd** which connections were essential to the business operations of the Defendant.

(12) Being unable to conduct its business smoothly the Defendant opted to vacate the premises and move to a different location and to terminate the lease Agreement. In line with this decision on **4th May 2010**, the Defendant began to remove its properties from the 7th Floor. In response the Plaintiff filed the instant suit. The Defendant clarifies that up to this time it was up to date in rental payments and owed no outstanding arrears of rent.

(13) The Defendant states that vide a consent dated **11th May 2010**, the Defendant was to be permitted to remove its properties from the demised premises and the Directors of the Defendant executed an undertaking to guarantee payment of all rent due until the Defendant had handed the premises back to the Plaintiff in the condition they were in at the inception of the lease.

(14) However the Defendant alleges that in spite of this consent the Plaintiff frustrated their efforts to repair, restore and hand over the property, by refusing to facilitate a joint inspection of the demised premises as had been contemplated by the consent Order of **11th May 2010.** Finally on **5th April 2012** the Defendant returned the keys of the demised premises back to the Plaintiff through their lawyers. The Defendants assert that they handed back the said keys only **after** they had repaired and restored the premises as agreed.

(15) Accordingly, the Defendant contends that it is entitled to a refund of **Kshs.422,553.75** from the Plaintiff being the Deposit it paid at the inception of the lease.

(16) The Defendant insists that all works which it undertook on the demised premises including the installation of air conditioning was done with prior approval of the Plaintiffs architects. That contrary to the position taken by the Plaintiff, the lease contained no requirement that the Defendant apply for and obtain a pass each time it wished to remove equipment from its offices.

(17) The Plaintiff denies being responsible for the goods left on the ground floor of the building and states that it was the guards who upon instructions from the Plaintiff blocked the Defendants attempts to remove their equipment from the building. The Defendant's position is that the Plaintiff in any event lacks "**locus standi"** to sue on behalf of the tenants who occupied the Ground floor and cannot through this suit claim compensation on behalf of those unnamed tenants.

(18) The Defendant contends that the Plaintiff's claim for rent arrears is "**Res Judicata**". That the Defendant having completed the required repair and restoration of the demised premises was ready to hand over the possession of the restored premises by **25th May 2010**. However, it was the Plaintiffs who caused the delay in failing to facilitate a joint inspection of the premises. The Defendant finally prays that the suit against it be dismissed with costs and further prays that its counterclaim be allowed and it be awarded the costs of the same.

(19) Upon conclusion of oral evidence both parties were invited to file their written submissions. The Plaintiff filed its written submissions on **24th October 2019,** whilst the Defendant filed its submissions on **22nd January 2020.**

ANALYSIS AND DETERMINATION

(20) It is trite law that in any suit of this nature, the party who seeks to rely on the existence of a fact or a set of facts must provide evidence that those facts exist. This is what in law is termed as the "**Burden of Proof**" and is encapsulated for by **Section 107** of the **Evidence Act Cap 80 laws of Kenya** which provides as follows:-

> **"107 Burden of Proof**
>
> **(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
>
> **(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

(21) In **Gichinga Kibutha V Caroline Nduku [2018] eKLR**, the Court stated:-

> **"It is therefore, settled law that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue."**

(22) In their submissions dated **24th October 2019** the Plaintiffs identified the following as the issues requiring determination by the Court.

(a) Whether the issues raised by the Plaintiff are res judicata?

(b) Whether the Plaintiff's breached the Defendant's right to quiet possession of the leased premises?

(c) Whether the Defendant breached the terms of the lease?

(d) Whether the Defendant properly yielded the leased premises and when?

(e) Whether the Plaintiff is entitled to rent arrears from **June 2010** to **April 2012**?

(f) Whether the Defendant illegally and unlawfully blocked the entrance to the building?

(g) Whether the Defendant is entitled to a refund of the deposit?

(h) Who is to bear the costs of the suit?

RES JUDICATA

(23) The Defendant submitted that vide the Rulings delivered on **14th June 2011** by **Hon Justice Njagi** and the Ruling of **Hon Justice Mutava** dated **3rd May 2012** the High Court had already made definitive findings that there existed no justification for the Plaintiff's claim for payment of rent arrears. It was submitted that this particular aspect of the Plaintiff's suit was therefore **Res Judicata** and was untenable. The Plaintiff's position however was that this was a matter which was live for determination in the main suit.

(24) In his ruling dated **14th June 2011 Hon Justice Njagi** held as follows:-

> **"Upon considering the pleadings and submissions of Counsel, I agree entirely with Mr. Kangata's submission on the last point, where parties consent to an order which is duly recorded and adopted by the court, all the consenting parties are bound thereby as long as the order subsists. None of them can subsequently renege of such an order. The only way by which such an order can be set aside is by a fresh consent of the parties. Having consented to the handing of vacant possession of the premises, it is too late for the applicant (the Plaintiff herein) to go back on the consent order and it ought to take back its premises and allow the Respondent to leave."**[own emphasis]

(25) This issue of "**Res judicata**" was raised by the Defendant vide a Preliminary Objection which was heard by **Hon Justice Sewe.** In her Ruling dated **28th September 2018** the Honourable Judge held as follows:-

> **"Similarly in the Uhuru Highway case (supra), the Court of Appeal made it clear that ultimately, it is the decision of the trial court that counts in connection with the issues in controversy in a particular suit.**
>
> **….**
>
> **In light of the foregoing, it is clear to me that the Defendant's plea of res judicata is untenable in the circumstances of this case. The Plaintiff is entitled to present its case as pleaded for a determination on the merits, notwithstanding the positions taken in the Rulings aforementioned. Accordingly, I would dismiss the Defendant's Preliminary objection."**

(26) Therefore this is a matter which had already been raised before and the High Court vide the Ruling of **28th September 2018** directed that the question of "**Res Judicata**" was not tenable. The Defendant did not file any appeal against the Ruling of **28th September 2018** nor did it seek a review of the same.

QUIET POSSESSION

(27) It is common ground that the parties herein had entered into a Lease Agreement dated **21st November 2008** which Agreement was then registered on **6th May 2009**. A copy of the said Lease Agreement duly executed for both the Plaintiff and the Defendant appears at **Page 10** of the Plaintiff's Bundle of Documents filed on **15th August 2013**. That Lease Agreement having been entered into voluntarily binds the two parties.

(28) **Clause 4(1)** of the **Lease Agreement** (Page 30 of Plaintiff's Bundle of Documents) provided as follows:-

> **"4 THE LESSOR HEREBY COVENANTS WITH THE LESSEE as follows:-**
>
> **i. That the Lesee paying the rent herein before reserved and observing and performing the covenants on the part of the Lesee hereinbefore contained may subject to the revision of this Lease and subject also to the provisions of the said Grant peaceably and quietly hold and enjoy their demised premises for the term hereby granted without any interruption by the Lessor or any person lawfully claiming under or in trust for the Lessor." [own emphasis].**

This is the provision that guaranteed to the Defendant's quiet and peaceful possession of the demised premises for the duration of the lease.

(29) The Defendant alleges that the Plaintiff breached this clause of the contract in two ways. Firstly by requiring that the Defendant obtain a security pass any time it wanted to remove equipment and other items from its offices on the 7th floor out of the building and secondly by the Plaintiffs adamant refusal without justifiable cause to allow the Plaintiff to connect to fibre optic cables by **Safaricom Limited, Telkom Limited** and **Access Kenya Limited** to the building despite the fact that such connection would not cost the Plaintiff anything as it was to be done by the said companies free of charge.

(30) The **Cambridge online Dictionary** defines the term **quiet possession** thus:-

> **"The right to own or use property or goods without anyone causing you any difficulty."**

The Business Dictionary defines "**quiet possession**" as

> **"Freedom to enjoy a possessed property without interference…."**

(31) The Plaintiff denied having interfered with Defendants possession of the demised premises. The Plaintiff submitted that the requirement for a gate pass was a necessary security measure and claimed that the Defendant had previously readily complied with this requirement whenever it was moving equipment out of the building. That the Defendant only raised issues with the requirement for a gate pass when it was attempting to remove servers, its entire stock and its fittings and furniture from the building. The Plaintiff alleges that the real reason why the Defendant was removing all this items and equipment was in pursuance an attempt to irregularly terminate the lease Agreement without notifying the Plaintiff in breach of the termination clause in the lease.

(32) On the issue of installation of fibre optic cables in the building the Plaintiff's position was that such installation would only be permitted, if the Defendants paid rental charges for the rooftop space where the said equipment/antennae was to be located. The Plaintiff insisted that the rooftop could only be availed upon payment of an agreed rental fee.

(33) These two issues were addressed by **Hon Justice Njagi** (retired) in his Ruling of **14th June 2011** as follows:-

> **"….In the present lease, there was no termination clause and the normal thing would have been for the tenant to occupy the leased premises until 1st March 2014. However, the respondent in this case seems to have been particularly incensed by the introduction by the applicant of a procedure for obtaining a gate pass every time the respondent wished to remove good or equipment from the leased premises. The applicant was under the impression that this practice was embedded in Clause 3 (xxiv) of the lease. Unfortunately, such is not the case. That clause merely prohibits the carriage of "…any goods, furniture, or other equipment in the lifts of the building unless previous arrangements shall have been made with the caretaker of the building…"**
>
> **Since the practice of seeking a gate pass is not expressly provided for the in the lease, it is bound to subject the respondent to annoyance and irritation. It also erodes the quite(sic) possession and enjoyment of the leased property which covenant is implicit in every tenancy agreement. The respondent further maintains that it informed the applicant as far back as May 2007 that due to the nature of the respondents ICT business, it needed to be connected by way of Fibre Optic Cable to Kenya Data Networks, Safaricom, Telkom Kenya, Access Kenya, Jamii Telecom, all of whom were ready and willing to connect their Fibre Optic Cable infrastructure to the suit building at no cost to the applicant. However that applicant adamantly refused to grant permission for fibre optic link to the building by unreasonably insisting that such links can only be done at an agreed fee payable to the applicant. Given the nature of the respondents business, refusal to grant it such permission can only lead to unnecessary frustration. Such refusal is also not conducive to the quiet possession and enjoyment of the leased premises by the Respondent."** [own emphasis]

(34) I am in agreement with the reasoning and findings of the Hon Judge in respect to both issues. **PW1** under cross-examination admitted that:-

> **"In that ruling the Judge (here referring to Justice Njagi) found that the Plaintiffs insistence on gate passes and the refusal to allow connection of the building fibre optic cables was tantamount to denying the Defendant peaceful and quiet enjoyment of the building. We did not appeal against this ruling by Justice Njagi."**

(35) Clearly the demands being made by the Plaintiff were unreasonable and only served to frustrate the Defendant and hamper the smooth running of its business. In this way I find that the Plaintiff did infringe on the Defendants right to quiet enjoyment of the demised premises.

Was there any Breach of the lease Agreement by the Defendant?

(36) The lease Agreement provided in **Clause 3 (F)(XXIV)** that:-

> **"THE LESSEE HEREBY COVENANTS WITH THE LESSOR**
>
> **XXIV Not to carry any goods furniture or other equipment in the lifts of the Building AND not to allow or suffer or permit in any circumstances the total weight of any one load in any lift or lifts to exceed one Thousand (1000) Kilos AND ALSO to be observed at all times the rules as displayed for the operation of such lift or lifts."**

(37) **Clause 3 (F)(XII)** of the Lease Agreement provided that:-

> **"(XII) not to drive any nails, screws bolts or wedges in the floor walls or ceiling of the demised premises not to cut main or injure the walls or the timbers of any ceilings"**

(38) The Plaintiff submitted that the Defendant breached the terms of the lease Agreement and specifically the provisions of **Clause 3(F)XII** and **(XXIV**) aforesaid in the following ways:-

> **a) By drilling holes on the walls and demolishing walls contrary to Clause 3 (xii) of the lease in order to install air conditioning facilities in the demised premises.**
>
> **b) Removing their equipment and goods from the premises without obtaining a gate pass from the management of the building contrary to sub-clause xxiv of the lease.**
>
> **c) Contravening Clause 3(xiii) of the lease agreement by setting up a data center at the demised premises instead of using the same as an administrative office for the purpose for which the Defendant had rented the demised premises.**
>
> **d) Failing to pay rent as and when the same fell due for payment.**
>
> **e) Terminating the lease contrary to the agreed terms and without properly yielding up the demised premises.**

(39) On the question of the Plaintiffs requirement that the Plaintiff obtain security passes, the above clauses made no mention of any requirement that security passes be obtained before equipment or goods are moved out of the building. **Clause 3 F XXIV** only talked of the maximum weight allowed in the lift. In the premise the Defendant cannot be said to have breached the Lease agreement, by failing to obtain a gate pass when removing their equipment from the Building.

(40) The Plaintiff also alleged that the Plaintiff drilled holes in the wall without the Plaintiffs authority for purpose of installing air conditioning facilities. The Defendant whilst admitting that it did install air conditioning on its floor asserts that it submitted floor plans to the Plaintiff for installation of the air conditioning units and maintains that those plans were fully approved by the Plaintiffs architects. The Defendant ends by stating that in any event it did repair and restore the leased premised back to the condition it was in at inception of the lease. The Plaintiff whilst admitting that drawings were duly submitted to the architect who approved the same but claims that it was not evident from said drawings that the premises was to be utilized as a Data centre.

(41) **Clause 3(XIII)** of the lease provided that the demised premises was to be used as an administrative office. **DW1** confirmed that the Defendant leased the premises primarily for use as an administrative office, but he testified that the Defendant needed to expand their operations to include a Data Centre, which need to expand arose when the Defendant, was licenced by the Central Bank of Kenya to operate as a Bank.

(42) I do not buy the theory that the Plaintiff had no idea of the nature of the Defendant business. The fact that the parties had been negotiating the issue of installation of optic fibre equipment indicates that the Plaintiff was fully aware that the Defendant was engaged in the Telecommunications business. In common with other businesses the Defendant was entitled to grow and expand its business. It is not disputed that the Defendant did submit their plans to alter the leased premises and that the said plans were duly approved by the Plaintiffs architects. The Plaintiff raised no objection at all to the Defendants plans so submitted. They cannot object **after** the approval had been granted. I find that the Defendant did not breach the terms of Clause **3 F(Xii) of 3(F)(xiii)** of the Agreement since they sought and obtained the requisite approval before proceeding with the works in question.

TERMINATION OF LEASE

(43) As stated earlier the period which this lease was to run was for six (6) years from **1st March 2008**. The Plaintiff contended that by removing their equipment, furniture and other items from the demised premises **before** the expiry date of the lease being **1st March 2014**, the Defendants were attempting to unlawfully terminate the lease prematurely. It is pertinent to note that the Lease Agreement dated **21st November 2008** did not contain a termination Clause. As such the Plaintiff's position was that the Defendant could not unilaterally terminate the said lease mid-term. To support this submission the Plaintiff relied on the case of **KENYA COMMERCIAL BANK LIMITED –VS- POPATIAL MADHAVJI & Another [2019] eKLR**, where the Court of Appeal held thus:-

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

(44) Likewise, in the case of **CHIMANLAL MEGHJI NAYA SHAH & ANOTHER V OXFORD UNIVERSITY PRESS (EA) LIMITED [2007] eKLR , Hon Warsame** (as he then was) held as follows;

> **"Equally there is no doubt that the subject lease did not contain and/or provide a termination clause to enable the tenant to end its relationship with the Plaintiffs. Perhaps it is also essential to point out that no landlord can force a tenant to stay in**

his premises for a particular period whether a lease exists or otherwise. The situation depends on many issues that would determine the relationship either way.

If for example, the lease provides for a fixed period of 6 years and the tenant is unable to pay the rent applicable, then the tenant cannot be heard to say that the landlord cannot end or terminate his lease. In my view where there is no termination clause and the lease is terminated before its period of expiry, the situation that obtains is a breach of a contract. Where the parties are not regulated by their lease agreement as to the nature and mode of notice, if the lease is terminated by either party, then the party offended is entitled to damages for breach of contract. In essence my position is that a lease agreement properly registered is a form of a contract and therefore when there is a default, the terms of breach of a contract aptly applies."[own emphasis]

(45) **DW1** in his evidence told the court that due to the frustrations the Defendant was experiencing in conducting its business in that particular building they had resolved to relocate to a different site. Hence the move to remove their equipment from the demised premises. There is no evidence that the Defendant served the Plaintiff with any notice of its intention to vacate the demised premises. It is therefore manifest that the Defendants were attempting to terminate the lease without notice.

(46) By Prayer (a) of the Plaint the Plaintiff sought a permanent injunction to prevent the Defendant from breaching the unexpired period of the lease. In the alternative the Plaintiff sought damages for breach of the lease. In other words the Plaintiff was seeking to have the court compel the Defendant to remain in occupation of the premises for the entire duration of the lease. In his Ruling dated **14th June 2011 Hon Justice Njagi** held that the Defendant could not be compelled to remain in occupation or the premises and that any prejudice or injury suffered by the Plaintiff could be compensated by an award of damages.

(47) In that Ruling **Hon Justice Njagi** stated as follows:-

"Mr Kihiko for the Applicant is on record telling the court that the Respondent was aware that the Lease had no termination clause and therefore he has no choice but to occupy the premises for the full term. But a Lessee is not a prisoner. It cannot be compelled to live in a leased premise against its will. If by vacating the premises it contravening any terms of the lease, then it will be held answerable in law…"[own emphasis]

(48) As a general rule general damages are not recoverable for breaches of contract. In the case of **KENYA TOURISM DEVELOPMENT CORPORATION –VS- SUNPOWNER LODGE LTD [2018] eKLR,** the Court of Appeal stated as follows:-

"We are not persuaded that the authorities cited by the learned Judge support the proposition that in cases of breach of contract there does exist a large and wide-open discretion to the court to award any amount of damages. The opposite is in fact the case: as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In DHARAMSHI vs. KARSAN [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication. And so it would be. See also SECURICOR (K) vs. BENSON DAVID ONYANGO & ANOR [2008] eKLR." [own emphasis]

(49) The rationale for such was explained by the court in the case of **Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd (2015) eKLR,** as follows:

"The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This is principle is encapsulated in the Latin phrase restitution in integrum (see Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009]eKLR, Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004]eKLR). The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved."

Thus in line with the above authorities I find that the Plaintiff is not entitled to an award of General Damages for Breach of Contract.

RENT ARREARS

(50) The question of whether or not the Plaintiff is entitled to be paid **Kshs.3,837,128.33** as rent arrears and service charge is intricately linked to the question of whether and if so when the Defendant yielded back the demised premises to the Plaintiff. It is not in dispute that on **4th May 2010** the Defendant began to remove its property from the leased premises. As a result, the Plaintiff filed the instant suit on **6th May 2010**. However on **11th May 2010** the parties recorded a consent before **Hon Justice Njagi** in the following terms:-

a) THAT the three directors of the Defendant company namely Mr. Oscar Wambugu Ikinu, Jonathan Savage and G.G. Wambugu do file a joint written undertaking with the court duly signed by each one of them and sealed with the seal of the Defendant Company to the effect that they will be liable jointly and severally to pay rent as and when it falls due until the Defendant hands over vacant possession of the leased premises to the Plaintiff in the condition they were at the inception of

the lease.

b) THAT UPON Service of a filed copy of the Directors undertaking herein above upon the counsel for the Plaintiff, the Defendant to be at liberty to remove its goods which are now lying within the leased premises and also those lying on the ground floor of Nginyo towers Building.

c) THAT the application by chamber summon dated 6th May 2010 is hereby stood over for hearing on 27th May 2010.

d) THAT the seal of the Defendant Company which is among the Defendant's goods lying on the ground floor of Nginyo Towers Building be availed to the Defendant's for the purpose of sealing their undertaking to the court."

(51) Following the Consent, on **12th May 2010** the Defendant's three directors filed their undertaking dated **11th May 2010** which was worded as follows;

"Further to the consent recorded by the parties herein on the 11th day of May 2010, we Oscar Wambugu Ikinu, Jonathan P. Savage and Gibson G. Wambugu, hereby give an undertaking that we shall jointly and severally be liable to the Plaintiff for the payment of rent as and when if falls due, until the Defendant herein hands over vacant possession of the lease premises to the Plaintiff in the condition the premises were at the inception of the lease."

(52) Thereafter the Parties appeared before court on **3rd June 2010** where counsel for the Defendant informed the court as follows;

"We are still pursuing the handing over process with a view to restoring the premises to their original condition. We ask for further mention on 07/06/2010.

Mr. Kihiko undertakes to go with the Defendant to the premises today to reconnect electric power. There will then be a joint handing over in the presence of the landlord's architect."

Counsel for the Plaintiff confirmed this position and parties consented to mention the matter on **7th June 2010**.

(53) On **7th June 2010** when the parties appeared before court with both counsels present they recorded the following consent

"f) The parties and their counsels and the architect for the Plaintiff do meet at the suit premises on 08/06/2010 at 9.00 am for the purpose of a joint inspection and handing over of vacant possession of the suit premises to the Plaintiff.

g)Matter to be mentioned thereafter before this court at 11.00am and the same date for confirmation of the handing over and any other directions that the court may give."

(54) On **8th June 2010 Mr.Kangata** Counsel for the Defendant informed the Court as follows;

"The Landlord's architect has failed to turn up therefore there was no joint inspection and handing over of vacant possession."

The parties then proceeded with hearing of the Plaintiff's application dated **6th May 2010** seeking an injunction against the Defendant. The court delivered its ruling on the same on **14th June 2011** dismissing that application.

(55) Thereafter on **18th August 2011** the Plaintiff filed the application **17th August 2011** seeking to have the three Directors of the Defendant committed to civil jail for failing to pay rent arrears in disobedience of the court orders of **11th May 2010. Hon Justice Mutava** who heard that application for contempt dismissed the same vide his Ruling of **3rd May 2012**. In his Ruling the Hon Judge stated as follows:-

"In the event, while this court cannot tell if the joint inspection of 8th June 2010 would have resulted in the hand-over of the premises or whether the landlord would have required further repairs, I do not find it feasible that that(sic) either way, the Plaintiff/Applicant would be entitled to demand rent for the whole span of time that has since elapsed for the simple reason that the Defendant/Respondent was ready to hand over as the of the said June 2010 and has indeed not been in occupation of the premises since. Similarly, it would in my view be stretching the limits of equity to suppose that the intervening period of over one year during which the parties have been litigating over the application dated 6th May 2010 can be deemed to be computable for purposes of calculating the rent arrears payable, given the court's ruling of 14th June 2011 that favored release of the Respondent from the premises, and from which no appeal has been preferred. My humble assessment is that any rent arrears payable by the plaintiff, if at all, would hardly exceed the rent payable for the quarter ending August 2010. However, this is a matter that the parties should agree upon or canvass fully at the hearing of the main suit."[own emphasis]

(56) The court in its earlier rulings made no definitive finding on the issue of rent arrears leaving this issue for determination at the full trial. After discussion between both counsel the Defendant vide its letter dated **5th April 2012** forwarded the keys to the leased premises which were then handed back to the Plaintiff. Under cross-examination **PW1** confirms the receipt of the keys from the Defendant when he states:-

"We accepted back the keys unconditionally without any joint inspection."

(57) The critical question then - is when was the demised premises yielded back to the Plaintiff? In **ABDUL GAYUR YUSUF HASHAM – VS- NATIONAL HOSPITAL INSURANCE FUND [2010] EKLR, Hon Justice Emukule** (Retired) whilst dealing with a similar issue held as follows:-

"Turning to matters directly in issue the question is whether the tenancy was extended by constructive occupation/ possession. In his written submissions to the lower court. Counsel the Appellant referred to the definition of constructive possession contained in Black's Law Dictionary 8th And. P. 1201 as control or dominion over property without actual possession of it. I have looked at Black's Law Dictionary and Possession is described as;

(1) The fact of having or holding property in one's power; the exercise of dominion over property.

(2) The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object".

Salmond Jurisprudence 285, Glanvile L. Williams Ed. 10th Ed. 1947 cited in **Black's Law Dictionary says:**

"In the whole range of legal theory there is no conception more difficult than that of possession. The Roman lawyers brought their usual acumen to the analysis of it and since their day the problem has formed the subject of a voluminous literature while it continues to tax the ingenuity of the jurists. Nor is the question of one of mere curiosity or scientific interest, for its practical importance is not less than its difficulty. The legal consequences which flow from the acquisition and loss of possession are many and serious. Possession, for example is evidence of ownership the possessor of a thing is presumed to be the owner of it and may put all other claimants to proof of their title".

When the appellant claims that the Respondent was in constructive possession of the erstwhile tenancy premises, he surely cannot mean that the Respondent was claiming any interest in the property, whether as owner or lessee. The term interest of lessee had been terminated in the manner agreed with the appellant by the three months. <u>The respondent had surrendered the physical possession of the premises. With vacating the premises the Respondent had also demonstrated that it did not have the necessary animus possidendi the intention to appropriate to itself the exclusive use of the premises</u>.

…..

In conclusion therefore, once a tenancy has been determined in the manner agreed and unless the tenancy remains in possession no term can be implied that the tenancy remained in force in accordance with the terms of the terminated tenancy. Any questions relating to repairs, or other unsettled issues are regarded as breaches of the tenancy terms, not on extended tenancy on the basis of constructive possession. <u>Once the premises were vacated the Respondent ceased to be in exclusive possession of them to the exclusion of anyone else or the appellant owner</u>. The appellants right in this scenario was to take over his premises immediately the notice expired renovate and lease them to another party or use them as he determines. [own emphasis]

(58) Upon completion of the restoration of the leased premises by the Defendant the same was ready on **8th June 2010** for inspection with the Plaintiff's architect and handing over. However, the Plaintiffs architect failed to turn up for said inspection. No reason was proffered for his absence and it was not indicated when the said architect would be available. It is clear that the Plaintiffs were playing games by deliberately failing to avail themselves for the joint inspection probably with the aim of sabotaging the inspection and handing over exercise.

(59) Indeed in the Ruling delivered on **3rd May 2012** dismissing the Notice of Motion dated **7th February 2012**, **Hon Justice Mutava** observed as follows:-

"Having also reviewed the Court record of 8th June 2010 in which the Parties reported back on the Joint Inspections that they were to carry out that morning as per the Consent Order of 7th June 2010, it is clear to me that the reason why the Joint Inspection was not carried out is that the Plaintiff's architect did not show up. The Plaintiff did not explain to Court why the Architect was not available or even offer an indication of when such Joint Inspection could be carried out. In effect therefore, the reason for the ensuing stalemate and for the arrears that have built up since 7th June 2010 are attributable to the Plaintiff as the Defendants were ready and available for the Joint Inspection and possible handover of the premises. It would therefore be unconscionable and indeed inequitable for the Plaintiff to seek to benefit from its own breach by requesting this Court to commit the Directors of the Defendant to prison for breach of their undertaking to pay rent when accrual of the rent is attributable to the Plaintiff's breach of the Consent Order of 7th June 2010…"

(60) The keys were sent to the Plaintiffs advocate on **5th April 2012** but I find that the Defendant having vacated the demised premises on **12th May 2010** can be said to have yielded back possession of the same to the Plaintiff on **8th June 2010** (the date when the joint inspection was to have taken place). It is not disputed that the Defendant had fully paid all rent due to the end of **May 2010**. Accordingly I find that the issue of rent arrears does not arise and the Plaintiffs claim for **Kshs.3,837,128,33/=** having no basis is hereby dismissed.

(61) The Plaintiffs claim for general damages on behalf of the ground floor tenants is not tenable. The Plaintiffs have no authority to claim on behalf of those un-named tenants and it has no locus standi in such a claim. Tellingly the Plaintiffs did not canvass this prayer at all. They clearly have abandoned the same.

(62) Based on the foregoing I find no merit in the Plaintiffs suit against the Defendant. The same is hereby dismissed in its entirety with costs to the Defendant.

(63) The Defendant in its **COUNTERCLAIM** dated **5th July 2012** sought the refund of the security deposit paid at the commencement of the lease. The Plaintiff conceded that the Defendant paid a security deposit of **Kshs.422,553.75** which was to be repaid when the lease ended. The Defendant asserts that it did repair and restore the premises to the condition it was in prior to their occupation. The Plaintiffs declined to avail themselves of the opportunity to inspect the premises to for a joint inspection for the purpose of confirming that said restoration had been done satisfactorily.

(64) The Defendant returned the keys to the Plaintiff on **5th April 2012.** To date the Plaintiff has not complained either that repairs and restoration had not been undertaken or that the same was not up to par. As such I find no reason why the Defendant should be denied a refund of their security deposit as prayed for. I therefore allow the counter claim dated **5th July 2012** and enter judgment against the Plaintiff in favour of the Defendant in the amount of **Kshs.422,553.75** plus interest from the date of filing of the Counter-claim until payment in full. The costs of the counterclaim are awarded to the Defendant.

It is so ordered.

Dated in Nairobi this 4th day of September 2020.

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Justice Maureen A. Odero