REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D.S. MAJANJA J.

CIVIL SUIT NO. 13 OF 2013

BETWEEN

RAMJI MEGHJI GUDKA LIMITED.....PLAINTIFF

AND

KISII UNIVERSITY.....DEFENDANT

JUDGMENT

1. The plaintiff, a limited liability company, is the proprietor of a building situated on KISII TOWN/BLOCK III/147 ("the Building") within Kisii town. The dispute between it and the defendant ("the University") arises over the terms of occupation of the Building.

2. The plaintiff's case is that in August 2011, it started negotiations over the lease with the University for the 1st, 2nd and 3rd floors of the Building followed by parties signing a letter of offer which captured the terms under which a lease would be granted on, inter alia, the following terms:

> *(a) Rent agreed is Kshs.34 per sq. Feet plus V.A.T (rent figure is inclusive of V.A.T.) Every two years there will be increment of rent at a rate of ten (10) percent.*
>
> *(b) The annual rent is payable quarterly in advance as follows:*

i) *First two years, Kshs.3,446,172/- per quarter (Kshs.1,148,724/- per month) plus 16% V.A.T (this is 34/-per sq. feet plus V.A.T);*

ii) *Next two years Kshs.3,790,789/20 per quarter(Kshs.1,253,596/40 per month) plus 16% V.A.T (This is 37/40 per sq. feet plus V.A.T);*

iii) *The last two years Kshs. 4,169,868/-per quarter (Kshs. 1,389,956/- per month) plus 16% V.A.T (This is 41/14 per sq. feet plus V.A.T)*

3. The plaintiff contended that the University assumed possession of the Building but failed to pay rent as agreed. It therefore sought the following reliefs in its plaint:

> *a) Declaration that the Defendant has breached and/or violated the terms of the Letter of Offer,*

duly signed and/or executed by the Defendant on 7th day of March 2012.

b) Payment of the sum of Kshs. 96,072,716/-only, being the outstanding rent arrears, accruals and damages for breach of Contract, which contract was to subsist up to and including the year 2017.

c) Interest on (b) above at Court rates (14%) w.e.f December 2012.

d) Cost of this suit be borne by the Defendant.

e) Such further/or other relief as the Honourable Court may deem fit and expedient so to grant.

4. In its defence, the University denied the plaintiff's claim. It accepted that it only took possession of the 1st floor in August 2011 but denied that it took possession of the 2nd and 3rd floors as these were under construction and that they remained incomplete up to 31st December 2012. The University averred that it vacated the 1st floor on 31st December 2012 after receiving letters from the plaintiff terminating the lease.

5. The case was initially heard by Okwany J., who took the testimony of the plaintiff's Managing Director, Ashwin Ramji Gudka (PW 1). Following her transfer, I completed the hearing by taking the testimony of the former University Finance Officer, Johnson Mburu Mwaura (DW 1) and Amon Marucha Maikara (DW 2).

6. PW 1 testified that in August 2011 he was approached by the University for premises. The plaintiff agreed to lease the Building and in that regard the parties executed a letter of offer. He further testified that before embarking on the venture to have the premises constructed, the plaintiff submitted building plans for approval and a Environmental Impact Assessment was also conducted and NEMA approval obtained. In addition, the approval was issued after structural inspection was conducted. Thereafter the plaintiff was issued with completion certificates and occupation permit in respect of the premises before the University took possession of the 1st and 2nd floor and it handed over the 3rd floor much later. The plaintiff issued the University an invoice for Kshs. 4,909,767/- after it failed to pay rent. PW 1 told the court that other than the initial payment of Kshs 4.9 million, the University did not make any further payment on account of rent. He complained that the University vacated the Building in December 2012 despite the lack of a termination clause in the letter of offer.

7. DW 1 testified that when the University rented the Building from the plaintiff, it only took possession of the 1st floor as the 2nd and 3rd floors were not ready for occupation. He stated that the University received letters from the plaintiff dated 14th October 2012 and 6th November 2012 asking it to vacate the building. It also received a letter from *J.O. Soire, Advocate* requesting the University to execute the lease or vacate the premises within 7 days. A subsequent demand letter from *Oguttu-Mboya & Company Advocates* dated 5th December 2012 demanded that the University vacate the premises by the end of December 2012. DW 1 testified that the University overpaid the plaintiff as it had paid rent deposits for all floors including the two unoccupied floors. He denied that the University owed the plaintiff any money as claimed.

8. The manager of the National Bank of Kenya, Kisii branch, Amon Marucha Maikara (DW 2) was called by the defendant to confirm that University gave the Bank instructions on 3rd April 2012 to transfer Kshs. 1,332,520/- to the plaintiff's account in Kenya Commercial Bank, Kisii Branch.

9. After the hearing, the parties filed written submissions. The plaintiff reiterated that the demised area was defined in the letter of offer and that the University took occupation of the 1st and 2nd Floor on 1st August 2011, while the third floor was handed over to the in May 2012. The plaintiff submitted that the duly executed letter of offer was binding on the University and conclusive on the terms thereof. The plaintiff relied on the case of ***John Onyancha Zurwe v Oreti Atinda*** **CA Civil Appeal No. 217 of 2013 (UR)** to advance its claim that extrinsic evidence cannot be received to prove the object with which a document was executed or that the intention of the parties was then appearing on the face of the

document. Counsel for the plaintiff also cited the decision in ***National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited & Another,*** **Civil Appeal No. 35 of 1999 (UR)** where the Court of Appeal held that a court of law cannot re-write a contract between the parties as the parties are bound by terms of their contract unless coercion, fraud and/or undue influence are pleaded and proved. The plaintiff maintained that the University was under the obligation to pay rent in respect of the demised premises.

10. The University relied on the decision in ***Rogan Kamper v Lord Grosvenor (No.2)*** **(1977) KLR**. It submitted that a letter of offer was not a lease and could not be a basis for specific performance and that the plaintiff's prayer for loss of future rent must fail. It contended that the plaintiff wrote to the University on several times to terminate the lease and that it was the Plaintiff who terminated the lease.

11. Before I deal with the substantive issues for trial let me dispose of the question of jurisdiction. The University contested the jurisdiction of this court to determine the claim arguing that the appropriate court was the Environment and Land Court. The Land and Environment Court is established pursuant to **Article 162(2)(b)** with jurisdiction to hear and determine disputes relating to, *"the environment and use and occupation of and, title to land."*

12. Whether the High Court can deal with matter concerning land including leases and recovery of rent was settled in the by the Court of Appeal in ***Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna and 5 Others*** **MSA CA Civil Appeal No. 83 of 2016 [2017]eKLR** where it held as follows:

> *[40] To the appellant, the charge was an instrument granting an interest in the land, hence jurisdiction in the matter lay with the ELC. However, under* ***Section 2*** *of the said Act, an instrument is a writing or enactment which creates or affects legal or equitable rights and liabilities. For the purposes of this suit, that instrument was the charge. However, it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale.*

13. By parity of reasoning, the issue here is not the lease itself but the recovery of outstanding rent and damages for breach which under the authority of the decision in ***Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna and 5 Others*** **(Supra)** means that this court, the High Court, has jurisdiction to determine the matter.

14. Having disposed of the issue of jurisdiction, I now turn to the substantive case. From the pleadings, evidence and submissions, it is not in dispute that the University signed a letter of offer. Under the letter of offer, the University accepted to lease 3 floors of the building for a period of 6 years with commencing on 1st August 2011 and expiring on 31st July 2017. It is also not in dispute that the University vacated the building on 31st December 2012. The issues for determination are as follows:

a) Whether the letter of offer was a valid contract between parties.

b) Whether the University breached the letter of offer by vacating the Building on 31st December 2012.

c) Whether the plaintiff is entitled to damages and if so, to what extent.

Whether the letter of offer was a valid contract between parties?

15. I have no doubt that the executed letter of offer created a binding legal relationship which took the form of an agreement for a lease between the parties for the lease of premises with the approximate area being 33,786 sq. feet consisting of the 1st, 2nd and 3rd floor of the building. The University's position is that the letter of offer was not a lease and could not form the basis for specific performance or indeed a

claim for damages based on the *dicta* in ***Rogan Kamper v Lord Grosvenor (No. 2)*** **[1977] KLR** where the court held that under **section 107** of the ***Transfer of Property Act (Repealed)*** as well as **section 40** of the ***Registration of Titles Act (Repealed)*** a lease for premises for over one year could only be made by a registered instrument otherwise it becomes a month to month tenancy.

16. The Building in this case was registered under the ***Registered Land Act (Repealed)***. **Section 47** thereof governing leases provided as follows:

> *A lease for a specified period exceeding two years, or for the life of the lessor or of the lessee, or a lease which contains an option whereby the lessee may require the lessor to grant him a further term or terms which, together with the original term, exceed two years, shall be in the prescribed form, and shall be completed by –*
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> *a) opening a register in respect of the lease in the name of the lessee; and*
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> *b) filing the lease; and*
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> *c) noting the lease in the encumbrances section of the register of the lessor's land or lease.*

17. Although **section 47** aforesaid was not complied with as no formal lease was signed or registered, the parties conduct was regulated by the letter of offer signed by University which signified that it had accepted the plaintiff's offer. It has been held that failure to register a lease does not invalidate the lease as it remains contract inter-parties and is enforceable in its full terms between the parties thereto. The Court of Appeal, in relation to the ***Registered Land Act (repealed)***, stated as follows in ***Chon Jeuk Suk Kim & Another v E.J. Austin & 2 Others*** **[2013] eKLR**:

> *Those two decisions show that an agreement of a lease or unregistered lease where the statute requires registration, though not conferring any legal or equitable estate is nevertheless enforceable as a contract between the parties for the period stated in the document and non-registration does not preclude the use of the document to show the terms of contract between the parties. Although those decisions relate to the construction of the provisions of the Registration of Titles Ordinance Act they apply with equal force to the legal effect of an agreement for a lease of unregistered lease of a period of two years under the Registered Land Act as Section 47 thereof is similar to the provisions under consideration in those decisions.*
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> …
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> *The legal character of the document under consideration in this appeal is from its form and contents an agreement of lease. It is common ground that the formal lease was not executed. From the authorities although the document does not conform legal or equitable estate to the appellants the covenants therein would be enforceable as between the parties if it is ultimately found to be an enforceable contract. The non-registration does not result in a periodic tenancy under the RLA as the learned Judge erroneously held.* [Emphasis mine]

18. I find the letter of offer signed by the defendant is an agreement for a lease and constitutes a binding agreement between the parties notwithstanding that no formal lease was drawn up or registered.

Whether the University breached the terms of the letter of offer by vacating the Building

19. The next issue is to determine whether University breached the terms of the agreement as alleged by the plaintiff. The plaintiff's case is that by vacating the Building before the expiry of the term agreed, the University was in breach and that it was therefore entitled to the rent for the entire period together with rent arrears for the period the University was in occupation. The University, on the other hand, contends that the plaintiff demanded that it vacate the premises and it did so and that it never occupied the 2nd and 3rd floor for the entire period it was in occupation of the 1st floor.

20. The fact that the agreement between the parties was for a fixed term of 6 years did not exclude the possibility of termination. It only means that termination would amount to a breach for which the party at fault would have to pay damages. In ***Chimanlal Meghji Naya Shah & Another v Oxford University Press (EA) Limited*** **ML HCCC NO. 556 of 2005 [2007] eKLR**, Warsame J., explained this principle as follows**:**

> *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.*

21. PW 1 admitted that the he issued two notices to the University; on 6th October 2012 and 14th October 2012 demanding that the University deliver vacant possession if rent was not paid. On 18th October 2012, the University wrote to the plaintiff settling the arrears of rent, requesting the plaintiff to withdraw the two notices and confirming that the signed letter of offer had been sent under cover of that letter. The plaintiff responded by the letter dated 24th October 2012 acknowledging receipt of the letter of offer and confirming that it had withdrawn the notices.

22. At this point the issue had been settled and the parties' relationship was now based on the letter of offer but this did not last for long. By a letter dated 5th December 2012, the plaintiff instructed its advocates, *Oguttu-Mboya & Co. Advocates* to write to defendant on, inter alia, the following terms;

> *Notwithstanding the foregoing, your institution remains in rent arrears in the sum of Kshs. 12,870,179/- only in respect of LR NO. KISII TOWN/BLOCK III/147. In this regard, our client proposes to credit the overpayment, in account of one (1) months rents rendered for the latter premises, leaving a balance of Kshs. 12,494,964.50 only.*
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> *In view of the foregoing, we have been instructed to <u>DEMAND</u>, which we hereby do, the immediate payment and unconditional payments of the sum of* ***Kshs 12,494,964.50*** *only, to our client. Besides our client has since terminated the Tenancy relationship in line with the letter of offer and thereby demands <u>vacant possession</u> w.e.f 30th day December 2012.*
>
> *NOW BE WARNED, that unless the said amount is paid to our client forthwith at any rate, within 14 days henceforth, our strict and peremptory instructions are to institute appropriate, but adverse recovery proceedings against your institution, at the Institution own risks as to Costs and attendant consequences."*

23. That letter was received by the University on 2nd December 2012. It is clear beyond paradventure that the tenor and effect of the letter aforesaid was to terminate the tenancy relationship and demand vacant possession of the Building. According to DW 1, this letter is the one that caused them to vacate the Building at the end of December 2012 and it did in fact vacate the Building. After the University had vacated the building, plaintiff through it advocates, *Oguttu-Mboya and Company Advocates* wrote another letter dated 15th January 2013 to the University stating, inter alia, as follows:

> *On the other hand, your institution unilaterally terminated the Lease Contract and moved out of the premises, albeit without Notice and without due regard to the terms and conditions of the Letter of Offer. Consequently, your institution is guilty of breach of the terms of the Lease.*

24. For all intents and purposes, the plaintiff demanded that the University vacate the Building and the University did exactly that. The plaintiff cannot turn around and accuse the University of leaving the

premises without giving notice. In any case, the letter making the demand was written on 15th January 2013 after the University had left the premises in accordance with the plaintiff's demand.

25. I therefore find and hold that the University did not breach the terms of the letter of offer by vacating the Building on 31st December 2012. It only vacated the Building upon demand by the plaintiff through the letter dated 5th December 2012.

Whether the plaintiff is entitled to damages and if so, to what extent?

26. The plaintiff's claim comprises accrued rent from August 2011 to December 2012 for the entire building and rent for the balance of the term. The University takes the position that the it did not take occupation of the entire building and in the circumstances, it had paid rent until the date it vacated the premised on 31st December 2012.

27. I have already held that the relationship between the parties was governed by the letter of offer signed by the University Principal and Registrar on 7th March and 19th March 2012 respectively. The letter of offer was forwarded to the plaintiff by the Principal by his letter of 18th October 2012. The import of signing the letter of offer is that University was bound by its terms including the fact that the covenanted that it had rented 3 floors of the building. Since the letter of offer contained the entire understanding of the parties', extrinsic evidence was inadmissible to the vary or contradict the terms thereof as was held in ***John Onyancha Zurwe v Oreti Atinda*** **(Supra)** where the Court of Appeal cited with approval the following passage in ***Halsburys Laws of England (4th Ed. Vol 12)*** *para 1478* on Interpretation of Deeds and Non- Testamentary Instruments: Para 1478 which reads:

> *Extrinsic evidence generally excluded:*
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> *"Where the intention of the parties has been reduced to writing it is in general, not permissible to adduce extrinsic evidence whether oral or contained in writing such as instructions, drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary or add to the terms of the documents. The principle applies to records, arbitrators awards, bills of exchange and promissory notes, bills of lading and charterparties, bonds, description of boundaries, guarantees, leases or contracts for sale of*
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> .....
>
> *Extrinsic evidence cannot be received in order to prove the object with which a document was executed or that the intention of the parties was other than that appearing on the face of the document.*

28. In this case, the University stated that it did not occupy the 2nd and 3rd floors because that part of the building was still under construction. It also contended that the plaintiff did not have approval for the construction of the 3rd floor and that it had not been issued with occupation certificates. All these matters may be true and correct but they are all matters extraneous to the letter of offer signed by the University which concluded the terms of the lease. It is worth noting that letter of offer had been signed in March 2012. It remained in the hands of the University which was still entitled to reject the offer based on all the complaints it had raised. Despite those complaints, the University, by its letter dated 18th October 2012 went ahead and delivered the letter of offer this confirming that the terms of the letter of offer. It is that letter of offer that is now binding and conclusive of the matters dealt with. Moreover, the University did not make any counterclaim seeking to set aside the letter of offer for misrepresentation, fraud or mistake.

29. The import of the letter of offer was that the demised premises comprised the 1st, 2nd and 3rd floor of the Building on the terms agreed including payment of rent until 31st December 2012 when it left the premises. The University admitted that it had paid Kshs. 4,909,467/- and was entitled to a credit of Kshs. 1, 332,520/- being the deposit making a total of Kshs. 6,241,987/-. Based on the aforesaid, I accept the

plaintiff's submissions that it is entitled to rent arrears due as at 31st December 2012 made up as follows:

1st Floor	Kshs. 34/per sq ft X 11,317 X 17	Kshs. 6,541,226/-
2nd Floor	Kshs. 34/per sq ft X 11,317 X 17	Kshs. 6,541,226/-
3rd Floor	Kshs. 34/per sq ft X 11,317 X 6	Kshs. 2,291,328/-
Total		Kshs. 15,373,780/-
Less paid		Kshs. 4,909,767/-
Less Deposit		Kshs. 1,332,520/-
TOTAL		**Kshs. 9,131,493/-**

Conclusion

30. In conclusion I find and hold that the University was bound by the letter of offer signed by its principal on 7th March 2012 and by its Registrar on 19th March 2019 under which it undertook to lease three floors of the demised Building. I also conclude that the University vacated the premises on 31st December 2012 upon demand by the plaintiff through its advocate's letter dated 5th December 2012 hence it did not breach the terms of the letter of offer. Finally, I find that the University owed the plaintiff Kshs. 9,131,493/- as rent arrears which it is now bound to settle.

31. Consequently, I now enter judgment for the plaintiff against the defendant as follows:

(a) Kshs. 9,131,493/-.

(b) Interest thereon at 12% per annum from the date of filing suit until payment in full.

(c) Costs of the suit.

DATED and **DELIVERED** at **KISII** this **2nd** day of **JULY 2019**.

D.S. MAJANJA

JUDGE

Mr Oguttu Mboya instructed by Oguttu-Mboya, Onchwangi and Ochwal and Company Advocates for the plaintiff.

Mr Mukhabane instructed by Nyairo and Company Advocates for the defendant.