



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 279 OF 2013

JAMII BORA BANK LIMITED.....PLAINTIFF

VERSUS

JAMES GITAU SINGH T/ASINGH GITAU ADVOCATES.....DEFENDANT

JUDGMENT

[1] The Plaintiff herein, **Jamii Bora Bank Limited** (hereinafter, "the Bank"), is a limited liability company incorporated and carrying on business within the Republic of Kenya as a licensed bank. It is the successor in title of **City Finance Bank Limited**. At all times material to this suit, the Defendant, **James Gitau Singh**, an Advocate of the High Court of Kenya, was practicing in the name and style of **M/s Singh Gitau Advocates**. He was in the panel of the Bank's legal service providers. The Defendant was also a tenant of the Plaintiff's, occupying the 3rd and 5th Floors of the Plaintiff's commercial property on **LR 209/2540/1 Nairobi** (the Suit Premises). The tenancy, which apparently commenced prior to **2001** was reduced to writing and the initial Lease for the period **2001 to 2006** prepared and duly executed.

[2] It was the contention of the Plaintiff that, after the term of the initial Lease expired, the parties were in agreement for a renewal; and that the terms of the renewed tenancy agreement between it and the Defendant were to be as set out in a Letter of Offer dated **15 September 2006**. It was further the contention of the Plaintiff that thereafter a Lease was prepared in terms and signed between the parties in mid **July 2010**; and that the Lease terms included the following:

[a] Rent for Years 1 and 2 was **Kshs. 61,200/=** per floor per month;

[b] Rent for Years 3 and 4 was **Kshs. 67,320/=** per floor per month;

[c] Rent for Years 5 and 6 was **Kshs. 74,052/=** per floor per month;

[d] Service Charge per month was **Kshs. 30,600/=**;

[e] Unpaid rent and service charge would accrue interest at the Plaintiff's lending rates;

[f] The Defendant was liable to pay any taxes imposed by the Government and the Municipal Council proportionate to his liability and or the leased space;

[g] Rent due was payable quarterly in advance on the 1st day of the Quarter.

[3] The Plaintiff's cause of action was that, by the **Year 2009**, the Defendant had become inconsistent in the payment of his rent and that consequently, he began to accumulate rent arrears and service charge as well as interest thereon; and that from the **Year 2010**, the Defendant refused and/or neglected to pay arrears of rent and accrued service charge and interest; and instead, he began the process of filing his Bills of Costs, in respect of legal services rendered to the Plaintiff, for taxation. That the Defendant persisted in that course, such that by **30 April 2013**, the sum due from him stood at **Kshs. 23,161,527.01**; which sum continued to accrue interest at the rate of 27% per annum. The Plaintiff further averred that, upon taxation of some of the Defendant's Bills of Costs, it demanded a set-off against rent due and payable by the Defendant, but that the Defendant declined settlement by way of set-off; thus necessitating the filing of this suit. Accordingly, the Plaintiff prayed for judgment in its favour against the Defendant for:

[a] The sum of **Kshs. 23,161,527.04**, together with interest at the rate of 27% per annum from **1 May 2013** until full payment;

[b] Costs of this suit;

[c] Any other or further relief that this Court may deem fit and just to grant.

[4] The record does show that although duly served, the Defendant did not promptly respond to the claim. Hence, default judgment was recorded herein on **20 August 2013** against the Defendant; whereupon an attempt was made at execution. The Defendant then filed his application dated **6 September 2013** seeking, inter alia, the setting aside of the *ex parte* judgment of **20 August 2013**, and the enlargement of time for filing Defence. That application was allowed on **30 September 2013**, and the Defendant then filed his Defence herein on **8 October 2014**. He denied liability to the Bank in rent arrears. According to him, there was an agreement that the rent due to the Defendant would be off-set against the various Bills of Costs that he presented for payment in connection with legal services rendered by him to the Plaintiff.

[5] At the hearing, the Plaintiff adduced evidence through the Head of its Legal Services Department, **James Murage (PW1)**, who adopted the Witness Statement filed herein on **18 January 2017**. He also relied on the Plaintiff's Bundle of Documents filed herein on **2 July 2013**, and produced the same as the **Plaintiff's Exhibit No. 1**. It was thus the testimony of **PW1** that upon joining the Bank in **July 2015**, he familiarized himself with the affairs of the Bank and got to know that the Defendant had leased the 3rd and 5th Floors of the Bank's property on **LR No. 209/2540/1 Nairobi**, otherwise known as **Unity House** at the time; and that the lease was for 6 years effective **1 January 2007**. **PW1** further stated that, he was able to ascertain from the records that the Defendant was not prompt or regular in rent payment; yet he was at the same time demanding payment for his legal fees. He added that, in the course of the taxation proceedings, the Bank asked the Court for a set-off in respect of the outstanding rent arrears and service charge; but that the Court was of the view that the Bank ought to have commenced separate legal proceedings in that regard, hence this suit. The concurrent decisions of **Ogola, J.** and **Mabeya, J.** in this connection were exhibited at pages 89-104 of the **Plaintiff's Bundle of Documents**. It was therefore the evidence of **PW1** that the Defendant is truly and justly indebted to the Plaintiff in the sum of **Kshs. 23,161,527.04**, which continues to accrue interest at the Bank's lending rate of 27% per annum from **1 May 2013**.

[6] On his part, the Defendant, **Mr. James Gitau Singh (DW1)**, relied on his Witness Statement dated **30 March 2016**. In support of his case, the Defendant filed three sets of documents on **8 October 2014**, **30 March 2016**, and **24 January 2017**. The three Bundles of Documents were produced in evidence by **DW1** on **24 May 2017** and were marked **Defence Exhibits Nos. 1, 2 and 3**. He conceded that he was a tenant of the Plaintiff from **1 January 2001** to **31 December 2012**. He testified that, after the initial Lease expired, he prepared a draft Lease with a view of renewal of his tenancy, which he forwarded to the Plaintiff at its request on **15 December 2006**; and that the Plaintiff returned a draft amended lease whose terms he did not fully agree with. Consequently, he declined to execute the Lease, though he continued to occupy the premises in accordance with the terms of the Letter of Offer and accordingly made rental payments totaling **Kshs. 3,672,000/=**. **DW1** further stated that, as the Bank's sole Advocate at the time, he was aware that the Bank had been placed under Statutory Management in **1998**, and was therefore struggling financially; for which reason he did not promptly submit his Bills of Costs for payment in the hopes that the Plaintiff's financial situation would improve in due course.

[7] However, there occurred a change in the Bank's ownership and management in **2007** and this caused him concern, given that he was yet to be paid for his services. Accordingly, he held discussions with the Plaintiff's Executive Director at the time, **Mr. Kibuga Kariithi**, who requested that individual Bills of Costs on the various files the Defendant handled, be submitted, for which the Bank would pay a global amount of **Kshs. 22,000,000/=**; but that the Plaintiff failed to keep its word. Ultimately, it was agreed that he would tax his bills and the amount due would be settled after payment, by way of set-off, of the outstanding rent. It was thus the evidence of **DW1** that he proceeded to have his bills taxed on the understanding that the amounts due to him would be off-set against the arrears of rent; and that he was surprised by the Plaintiff's letter of **9 March 2013** by which a demand was placed for **Kshs. 23,161,527.04** as outstanding rent. It was thus his testimony that the Plaintiff is indebted to him in respect of outstanding Bills of Costs for services rendered; and therefore that he is entitled to a set-off which would, in any event, yield a net credit in his favour.

[8] Directions having been given on the **24 May 2017** for the filing of written submissions, Learned Counsel for the Plaintiff, **Mr. Kimani**, filed his written submissions herein on **11 July 2017**; while Learned Counsel, **Mr. Mituga**, filed his written submissions on the Defendant's behalf on **30 October 2017**. It was the submission of **Mr. Kimani** that prior to the filing of this suit, the parties enjoyed a cordial relationship; and that the dispute arose after the expiry, on **31 December 2006**, of the initial lease agreement between the parties. He further submitted that the Defendant then entered into negotiations with the Bank with a view of having the lease renewed for a further period of 6 years from **1 January 2007** to **31 December 2012**; and that to this end, the Bank wrote to the Defendant the letter dated **28 February 2007** (at page 21 of the Plaintiff's Bundle of Documents) setting out the salient terms of the lease. Counsel reiterated the Plaintiff's contention that the Defendant thereafter failed to comply with the terms of the lease and consequently accumulated arrears of rent, together with interest thereon, to the tune of **Kshs. 23,161,527.01** as at **30 April 2013**.

[9] **Mr. Mituga's** submissions were however that, since the new lease was never signed, stamped or registered, there was no valid agreement between the parties on the basis of which this suit can be founded, granted that the purported lease is inadmissible in evidence. It was also argued that the said document is in any case a forgery as it had been altered without the knowledge or authority of the Defendant. Counsel for the Defendant further reiterated the contention that it was, at any rate, agreed that the rent arrears, if any, would be offset against the Defendant's unpaid Bills of Costs; and that had that been done, it would have been evident that it is the Plaintiff that is indebted to the Defendant and not vice versa. Counsel accordingly urged the Court to find that the suit was founded on an illegality; and that it was filed to simply forestall the recovery, by the Defendant, of his legal dues. He urged for the dismissal of the suit with costs.

[10] Having carefully considered the pleadings filed herein by the parties and the evidence adduced in support thereof, as well as the written submissions filed by Learned Counsel, there appears to be no dispute that the Defendant was a tenant of the Plaintiff for about 11 years commencing from **1 January 2001**. The demised premises were the 3rd and 5th Floors of the Plaintiff's commercial property on **LR 209/2540/1 Nairobi**, also known initially as **Unity House** (and thereafter as **Jamii Bora House**), situated on **Koinange Street** (the Suit Premises). A copy of the initial Lease was purportedly produced as part of the Defendant's Bundle of Documents filed on **8 October 2014** (**Defendant's Exhibit No. 1** herein) but was, in fact not produced. The document purported to be it, at pages 1-8 of the Defendant's Exhibit No. 1 is in fact the **2006** draft Lease version that was prepared by the Defendant.

[11] Be that as it may, other than the Landlord/Tenant relationship aforementioned, the Defendant was also one of the lawyers (if not the

foremost one) on the panel of the Plaintiff's legal service providers. Accordingly, with the imminent expiry of the Lease, the Plaintiff required the Defendant to draft a new Lease, vide the letter dated **15 November 2006**. A copy of the letter was exhibited at page 9 of the Defendant's Bundle of Documents marked **Defendant's Exhibit No. 1**). For its full tenor and effect, and for reasons that will be apparent shortly, pertinent aspects of the letter are reproduced hereunder:

"...The bank will be leasing out to you the 4th and 5th floor subject to the following conditions:-

- 1) The bank will bear the cost of moving the IT Department from 4th floor to 3rd floor and give you vacant possession of 4th floor.
- 2) The 4th and 5th floor will be partitioned and furnished at your cost.
- 3) Rent of shs 40 per sq.ft (shs 61,200/= for 1530 sq.ft) per month will be charged for each floor.
- 4) Service charge of shs 10 sq.ft (shs 15,300/= per sq.ft) per month will be charged for each floor.
- 5) The rent and service charge is payable quarterly in advance.
- 6) The lease period will be for 6 years with a 10% increase after every two years with effect from 1st December 2006.

Please arrange to send us the lease document for execution at your earliest..."

[12] Thus, the parties were in consonance that the Defendant would pay provisional service charge of **Kshs. 30,600/=** per month; and that the rent payable under the new Lease would be as follows:

[a] Rent for Years 1 and 2 - **Kshs. 61,200/=** per floor per month.

[b] Rent for Years 3 and 4 - **Kshs. 67,320/=** per floor per month.

[c] Rent for Years 5 and 6 - **Kshs. 74,052/=** per floor per month.

[13] There was no dispute that the Defendant did prepare a draft Lease and forwarded the same to the Plaintiff for execution; and that the Plaintiff acknowledged receipt of the draft on **15 December 2006** vide the letter of even date, exhibited at page 10 of the **Defendant's Exhibit No. 1**. Here is what the Plaintiff, then **City Finance Bank Limited**, had to say:

"...We refer to the draft lease document forwarded by you. Please send the same by soft copy. As the same is going to be discussed at the Executive Committee Meeting on Tuesday 19th December, you may go ahead with the partitioning of the 5th Floor so as to enable you to move from the 3rd floor. This will enable our IT depart[ment] to move to the 3rd floor..."

[14] From the evidence adduced herein, it is manifest that the new Lease was never perfected. According to **DW1**, the draft Lease exhibited at pages 1-8 of the **Defendant's Exhibit No. 3** was returned to him by the Plaintiff in **May 2007** with amendments that had not been negotiated or agreed on; and which terms were unacceptable to him. Accordingly, he declined to execute the Lease. He nevertheless continued to occupy the 3rd and 5th Floors in accordance with the terms of the Letter of Offer; and proceeded to make rental payments between **13 April 2007** and **15 January 2009** totaling **Kshs. 3,672,000/=**. It is also manifest that the Defendant made these payments notwithstanding that his fees were not forthcoming from the Plaintiff. According to the Defendant, (and this contention was not rebutted by the Plaintiff) because the Plaintiff had been placed under Statutory Management in **1998**, and was therefore "financially ailing", he deferred the submission of his fee notes for payment in the hopes that the Plaintiff's financial position would improve, and that his fees would ultimately be fully paid.

[15] The cordial relationship between the parties was however rattled by the subsequent multiple changes in the directorship and management of the Plaintiff in **July 2009**. The Defendant's uncontroverted evidence was that, out of concern over his unpaid legal fees, and following discussions with the Plaintiff's incoming management team, it was agreed that he would have his Bills of Costs taxed for settlement; including a set-off against any arrears of rent owing to the Plaintiff. The various correspondence exchanged in this regard between the parties between **2009** and **2012** were produced herein at pages 60 and 80 of the Plaintiff's Bundle of Documents and pages 19-25 and 27-34 of the **Defendant's Exhibit No. 1**. There is no dispute therefore that the Defendant proceeded to have his Bills of Costs taxed with a view of enforcement of payment; and those processes were being undertaken contemporaneously with the prosecution of this suit.

[16] Thus, the Defendant did present uncontroverted evidence herein that several of his Bills of Costs have been taxed and considerable sums of money awarded in his favour against the Plaintiff. Consequently, on **18 February 2013**, **Ogola, J.** entered Judgment in the Defendant's favour against the Plaintiff for taxed costs of **Kshs. 1,869,300/=** together with interest thereon in **High Court Miscellaneous Cause No. 709 of 2011: Singh Gitau Advocates vs. City Finance Bank Limited**. Similarly, **Mabeya, J.** entered Judgment for the Defendant in respect of taxed costs in **High Court Miscellaneous Civil Case Number 698 of 2011: Singh Gitau Advocates vs. City Finance Bank Limited**, which was used as a test case for **HCMC No. 116 of 2011, HCMC No. 468 of 2011, and HCMC No. 8344 of 2011** between the same parties.

[17] It was in the light of the foregoing that the Plaintiff proposed the following issues for determination by the Court:

[a] Whether there was any lease agreement between the Bank and the Advocate for the period between **1 January 2007** up to **31 December 2012**;

[b] Whether the lease agreement annexed to the Plaintiff's Bundle of Documents at page 65 is authentic;

[c] How long the Advocate was a tenant of the Bank;

[d] Whether any amount is owing on account of the Advocate being a tenant of the Bank;

[e] Whether there was an offset agreement between the Advocate and the Bank relating to the Advocate's Bill of Costs and the rent arrears.

[18] The Defendant, on his part, proposed the following issues for determination:

[a] What kind of tenancy existed between the parties in the absence of the lease being registered or stamped;

[b] Whether the Plaintiff's case is fatally flawed in the absence of a registered or stamped lease;

[c] Whether the Plaintiff is estopped from denying that it misrepresented to the Defendant that the rent would be offset against fees owing;

[d] What damages are payable;

[e] Whether the lease is a forgery, as pleaded by the Defendant.

[19] I note that one of the framed issues is a question as to what damages are payable. However, since the Plaintiff did not explicitly claim general or special damages for breach of contract, I am not persuaded that the award of compensatory damages is an issue; or that the claim of **Kshs. 23,161,527.04** is a claim in the nature of special damages. According to **Black's Law Dictionary** special damages is defined to be:

"A pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another."

Accordingly, although the Defendant made extensive submissions on whether special damages are due, the Plaintiff is not herein contending that he suffered loss to its property for which compensatory damages have been sought. Indeed, Paragraphs 8-13 of the Plaintiff, and in particular paragraph 10 thereof, disclose the cause of action to be for recovery of **Kshs. 23,161,527.04** being the amount due to the Plaintiff for rent from the Defendant for the period **1 January 2007 to 30 December 2012** together with interest, in respect of a tenancy that has since been determined. That, to my mind, is not a stake for special damages; a fact well explicated by the Court of Appeal in **Hermanus Phillipus Steyn vs. Giovanni Gnechi Ruscone Civil Appeal No. 171 of 2009** thus:

"The respondent's claim was based on contract. The contract between the appellant and the respondent was for the performance of a specific assignment at an agreed fee. The respondent's claim was for that fee and accruing interest, and more. It was a claim based on contract and for a contractual sum. The trial judge in his judgment appears to have confused a liquidated claim and special damages. The two are not the same. The respondent's claim was neither special nor liquidated damages. It was a claim for services rendered, not for any particular damage...The respondent was required to call evidence to show a contract existed between him and the appellant, the specific terms of that contract, and in the event of breach how much was due to him, arising from that breach."

[20] Hence, in this instance, the Plaintiff has claimed arrears of rent on account of a tenancy agreement. The question of compensatory special damages would therefore not arise, noting that it was neither pleaded in the Plaintiff nor adverted to by the Plaintiff in his evidence. Accordingly, the only issues for determination, to my mind, are simply these:

[a] Whether there was a valid lease agreement between the Bank and the Advocate for the period between **1 January 2007** up to **31 December 2012**;

[b] Whether any amount is owing on account of the Advocate having been a tenant of the Bank;

On the validity Lease Agreement:

[21] Pursuant to the Plaintiff's Letter of Offer dated **15 November 2006** (at page 9 of the Plaintiff's Bundle of Documents), the Defendant, in his capacity as the Advocate for the Plaintiff, prepared a draft Lease and caused the same to be forwarded to the Plaintiff for further processing. The Defendant relied on the copy of the Lease was exhibited at page 1-8 of the **Defendant's Exhibit No. 1** to support his argument that, ultimately, the Lease was neither signed nor dated; and that it was also not registered or stamped, notwithstanding that the Defendant forwarded a payment of **Kshs. 27,800/=** on **6 August 2010**, to cater for stamp duty and registration fees. Accordingly, Counsel for the Defendant cited **Sections 19 and 56 of the Stamp Duty Act, Chapter 480 of the Laws of Kenya; Sections 40 and 61 of the Registration of Titles Act** (now repealed) as well as **Section 107 of the Evidence Act, Chapter 80 of the Laws of Kenya**, to support the argument that the Plaintiff's claim must collapse for the reason that it is based on an invalid and inadmissible Lease. He also relied on the cases of **Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others [2014] eKLR** and

Beatrice Wayeko (suing as the Administratrix of the Estate of Oscar Smith Njinuli - Deceased) vs. Cellulant Kenya Limited 2014 eKLR for the submission that parties are bound by their pleadings, which, in turn, limit the issues upon which a trial court may pronounce itself; and therefore that the Plaintiff could not rely on the contention that there existed a month to month tenancy, an aspect that was not pleaded in the Plaintiff.

[22] It is noteworthy however that the Lease that was relied on by the Plaintiff was exhibited at pages 65-77 of the Plaintiff's Bundle of Documents (**Plaintiff's Exhibit No. 1**). The Plaintiff's version was purportedly signed by the Defendant in the presence of **John Ochwo Oloo, Advocate**. It also purports to have been sealed with the common seal of the Plaintiff, **Jamii Bora Bank Limited**, in the presence of the Company Secretary, **Emu Registrars Ltd**. The Lease was prepared, not by the Defendant, but by **Taibjee & Bhalla, Advocates**; and, although the Defendant denied any knowledge of the document prior to the institution of this suit, he conceded that the signature of the Lessee, at page 76 of the Plaintiff's Bundle of documents, is his.

[23] More importantly, the Defendant conceded, in cross-examination that the terms of the Lease, save for the provision in respect of the Service Charge, are the same as the terms in the Letter of Offer and the version of the Lease that he prepared. It is also instructive that, in his letter to the Plaintiff dated **14 August 2008** (at page 56 of the Plaintiff's Bundle of Documents), the Defendant acknowledged the involvement of **Taibjee & Bhalla Advocates** in the preparation of the Lease. Here is an excerpt of what he stated in that letter:

"...Please note that when our firm first occupied the premises in 2001, the lease was drawn by us. When the lease came up for renewal, we prepared the 1st draft after which it was suggested by the then Chairman and Mr. Ramani that the new lease should be prepared by Taibjee & Bhalla Advocates as we were an interested party.

We agreed to this but informed them that each side would have to meet its legal fees. This is the reason that the Letter of Offer and also our initial draft was silent on the issue of fees...we should be grateful if you would request them to delete 'clause y' at page 9 to enable us execute the lease..."

[24] By the letter dated **16 June 2010** (at page 61 of the Plaintiff's Bundle of Documents) it was intimated by **Taibjee & Bhalla** that Clause 'y' had been amended as proposed by the Defendant. Indeed, the Lease at pages 65-77 does confirm that the provision for the payment of fees by the Defendant was excluded. There would, therefore be no basis for the Defendant's repudiation of the Lease. Likewise, I have no hesitation in rejecting the Defendant's that, since the negotiations, the Letter of Offer and the draft Lease were between him and **City Finance Bank** and not **Jamii Bora Bank** (the Plaintiff herein) the Lease is invalid. That argument clearly lacks traction; the Plaintiff having pleaded from the beginning, and at paragraph 1 of its Plaintiff that:

"The Plaintiff is a limited liability company incorporated and carrying on business within the Republic of Kenya as a licensed bank and financial institution. The Plaintiff is the successor in title of City Finance Bank Limited..."

[25] In the same vein, the Plaintiff pleaded in paragraphs 3 and 4 that **City Finance Bank Ltd** was the Plaintiff's predecessor and that it was the registered owner of all that property known as **LR 209/2540/1** Nairobi on which stands **Unity House**, now known as **Jamii Bora House**. It is also noteworthy that the Plaintiff did produce correspondence it exchanged with the Defendant in connection with the subject matter herein following the change of name. One of the letters is dated **1 November 2012** (at page 79 of the Plaintiff's Bundle of Documents). It is a letter addressed to the Defendant notifying him of the expiration of the subject Lease and giving notice of non-renewal. The Plaintiff also claimed for rent arrears in the sum of **Kshs. 19,850,414.46** from the Defendant, on the premise that these were sums due to it as the successor of **City Finance Bank Ltd**. The Defendant responded to that letter vide his letter dated **8 November 2012** (at page 80 of the Plaintiff's Bundle of Documents). He did not dispute the Plaintiff's claim to ownership of the suit property, or right to issue the notice aforementioned. In fact he acknowledged and confirmed the same by pursuing his fees from the Plaintiff, **Jamii Bora Bank Ltd** by way of set-off. He stated:

"We would also like to know whether the set off is to be applied, or whether each party should proceed to enforce their respective rights."

[26] There are other letters from the Defendant to a similar effect. They are exhibited at pages 61-62 and 81-86 of the Plaintiff's Bundle of Documents along with the Plaintiff's response thereto. In the same vein, the Defendant acknowledged the relationship between **City Finance Bank Ltd** and **Jamii Bora Bank Ltd** vide the letters exhibited at pages 27-34 of its **Exhibit No. 1** herein. But perhaps more telling is the Lease itself which was drawn in the name of the Plaintiff, **Jamii Bora Bank Limited** as the Lessor. There is, therefore, no denying that the Plaintiff, as the successor in title of **City Finance Bank Ltd**, is the owner of the suit property and has all the rights at law to sue in connection therewith. Indeed, this was recognized by the Defendant in his version of the draft Lease when, in the preamble, he stated that the Lease was between City Finance Bank Limited as the "**Lessor**" and added that this expression included "**...where the context so admits, its successors and assigns...**"

[27] In the premises, I find and hold that the Plaintiff is competent to lodge this claim for rent. I am further satisfied and do hold that the parties competently negotiated the Lease exhibited at pages 65-77 of the **Plaintiff's Exhibit No. 1** and that, though undated, the instrument was duly signed by both parties. What is disconcerting however is that the Lease was never registered or stamped as by law required. No explanation was proffered by the Plaintiff as to why the Lease was not registered, granted that the Defendant did comply with **Clause y** thereof and paid the requisite sum of **Kshs. 27,800/=**, being the cost of stamp duty and registration fee, as confirmed by the letters dated **26 July 2010** and **6 August 2010** (at pages 63 and 64 of the **Plaintiff's Exhibit No. 1**).

[28] In the premises, and pursuant to **Section 19(1)** of the **Stamp Duty Act**, the Lease is inadmissible in evidence; for that provision is explicit that:

"No instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever except:

(a) in criminal proceedings;

(b) in civil proceedings by a collector to recover stamp duty; unless it is duly stamped."

[29] Authorities abound to confirm the posturing that the Lease is inadmissible in evidence. For instance in **National Bank of Kenya Limited vs. Ananj Warehousing Limited [2015] eKLR**, the Supreme Court had occasion to comment on the effect of the above provision, and had the following to say at paragraph 59 of its Judgment:

"...Section 19 of the Stamp Duty Act, upon which the Appellate Court placed reliance in arriving at its conclusion, does not in our view, provide a basis for invalidating the instruments in question. Section 19 of the Stamp Duty Act only seeks to render inadmissible for purposes of evidence, all documents which are unstamped..." (Emphasis supplied)

[30] Similarly, in **Weetabix Limited vs. Healthy U [2006] eKLR** wherein **Azangalala, J.** (as he then was) held that an Assignment that had not been stamped and registered was inadmissible. He proceeded to expunge the same from the record. Accordingly, I would find and hold that the undated Lease at page 65-77 of the Plaintiff's Bundle of Documents is inadmissible in evidence and is consequently expunged from the record. In the premises, the Defendant's argument that the said document is illegal is in itself not only untenable for being inconsistent with his contention by the Defendant that the document is null and void for lack of stamping and registration; but is also unsupported by the proven facts as presented herein; which facts go to show that the document was otherwise negotiated and duly signed by the parties.

[31] Having so found, the next question to consider is whether, with the obliteration of the Lease from the record, the Plaintiff's case inescapably crumbles. It is now trite that even in the absence of a registered and stamped lease agreement, the agreement between the parties can still be inferred from the correspondence exchanged and the conduct of the parties. Copies of such correspondence were exhibited herein by both the Plaintiff and the Defendant. By the letter dated **28 February 2007** (at page 21 of the Plaintiff's Bundle) the Plaintiff's predecessor communicated to the Defendant, its Board approval of the renewal of Lease and restated the terms thereof, as set out in the Letter of Offer dated **15 November 2006**. There is considerable evidence herein that Defendant held over and continued to pay rent for the early part of the lease term, awaiting the perfection of the Lease. This is evinced by the Defendant's letters dated **10 April 2007, 4 July 2007, 5 December 2007, 12 January 2008, 4 June 2008 and 8 October 2008**. Copies of these letters were exhibited at pages 23, 26, 30, 31, 48 and 58 of the Plaintiff's Bundle of Documents.

[32] Likewise, there is ample and credible evidence herein that as of **11 July 2008**, the Defendant was happy with the draft Lease as prepared by **Taibjee & Bhalla Advocates** and his response, vide the letter of even date (at page 53 of the Plaintiff's Exhibit No. 1) was as follows:

"We have perused the lease and find that it is in order save that we need your confirmation that the Service Charge provided for at Clause 1 of page 3 includes the two floors.

We have also previously indicated that Clause 1Z at page 9 is unnecessary as the duty to direct movement within the building is competently being handled by the security team."

[33] The Plaintiff responded to the concerns aforementioned and confirmed that the service charge provided for at **Clause 1** was per floor and that **Clause 1Z** would remain as it was. As has been pointed out herein above, the Defendant's further concern about the full amount of legal fees being shouldered by him was also addressed by the Plaintiff and **Clause y** amended accordingly. The Defendant, by his own admission, ultimately signed the Lease and forwarded the same vide his letter dated **20 July 2010** to the Defendant. The forwarding letter was exhibited at page 62 of the Plaintiff's Bundle of Documents. The Defendant also paid **Kshs. 27,800/=** for stamp duty and registration of the Lease. He had done his part, awaiting his copy of the registered Lease. In the meantime he was in occupation of the demised premises, and continued in occupation until **31 December 2012** when the Lease term expired. In fact, the Defendant admitted that he continued in occupation up to **23 February 2013** when he finally yielded up possession to the Plaintiff.

[34] It would thus be inequitable for the Defendant to contend, as he did, that, because the Lease was not dated, stamped or registered, there was no agreement between the parties in connection with his occupation of the suit premises for the 6 years ending **December 2012**. To the contrary, the evidence adduced herein shows that there was a binding and enforceable contract between the parties. I say so because in **Grosvenor vs. Rogan-Kamper [1974] EA 446** it was held that:

"...the trend of judicial decisions in East Africa has been for the courts to enforce unregistered leases or agreements for leases as contracts *inter partes*, where the contract is one capable of being specifically enforced and does not affect the rights of third parties...There was such a contract between the parties, evidenced by the agreement of 29th September 1969. Its material terms are sufficiently stated: the names of the lessor's agents, the name of the lessee, the description of the property, the term and its commencement, and the rent agreed to be paid. This contract could have been ordered to be specifically performed at the instance of either party."

[35] In addition to the foregoing, **Section 106** of the **Transfer of Property Act, 1882** (now repealed) but which was applicable to the instant transaction, also recognized that:

"In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of tenancy."

[36] It is also instructive that **Section 36(2)** of the **Land Registration Act** which provides for the general applicable principles pertaining to dispositions and dealings affecting land, including leases, makes it clear that:

"Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract."

It is accordingly my finding that the tenancy between the Plaintiff and the Defendant constitutes a valid and enforceable contract as a month to month tenancy, which was terminated at the end of **February 2013**; and that it is immaterial therefore that this aspect was not pleaded by the Plaintiff.

[b] Whether any amount is owing from the Defendant on account of his occupation of the suit premises from 1 January 2007 to 23 February 2013:

[37] There appears to be no dispute that the Defendant paid rent for the period **1 January 2007 to 31 December 2008**. This fact was adverted to in paragraph 5 of the Defendant's Amended Witness Statement, wherein the Defendant asserted that he made rental payments in accordance with the Letter of Offer to the tune of **Kshs. 3,672,000.00** as follows:

[a] 13 April 2007	Kshs. 459,000/=
[b] 20 June 2007	Kshs. 459,000/=
[c] 17 September 2007	Kshs. 459,000/=
[d] 5 December 2007	Kshs. 459,000/=
[e] 9 January 2008	Kshs. 459,000/=
[f] 9 May 2008	Kshs. 459,000/=
[g] 8 October 2008	Kshs. 459,000/=
[h] 15 January 2009	Kshs. 459,000/=

[38] It is therefore manifest from the foregoing that, though the Letter of Offer dated **15 November 2006** provided for the payment of rent quarterly in advance, the Defendant did not adhere at all to that stipulation; for it appears that the only payment that was made closest to its due date was the payment for the first quarter of **2008**, which was paid on **9 January 2008**. While conceding the payments aforementioned, it was the contention of the Plaintiff that they were the only payments made by the Defendant; and that no payment was made by the Defendant for the period **January 2009 to February 2013**. Indeed, there is no evidence by the Defendant that he made rent payments for the period **January 2009 to February 2013**. To the contrary, the Defendant expressly conceded that he had not issued any cheques to the Bank since **2009**. Thus, the rent receivable for the period **January 2009 and February 2013** is as hereunder:

Year	Amount per month (Kshs.)	Total (Kshs.)
2009	67,320*2 = 134,640*12	1,615,680.00
2010	67,320*2 = 134,640*12	1,615,680.00
2011	74,052*2 = 148,104*12	1,777,248.00
2012	74,052*2 = 148,104*12	1,777,248.00
2013	148,104 for Jan. 2013 148,104 for Feb. 2013	296,208.00
Total		7,082,064.00

[39] There is evidence however that the Defendant was the Bank's Advocate and that, as of **February 2013**, he was owed substantial sums of money by the Defendant for legal services rendered. The Defendant's letters dated **24 March 2009, 21 April 2009 and 22 July 2009** (at pages 19, 21 and 23 of the Defendant's Bundle marked **Exhibit No. 1**) show that, following negotiations, the Defendant was prepared, at some point in time, to accept a global payment of some **Kshs. 22,000,000/=** from the Plaintiff in full and final settlement of all outstanding fees. There is no indication herein that this sum was paid. The Defendant also demonstrated, vide the letter dated **24 November 2009 and 7 October 2010** (at pages 24 and 28 of the Defendant's Exhibit No. 1) that the Plaintiff was agreeable to a set-off of his fees against rent arrears; and that the Plaintiff confirmed some set-off vide its Advocate's letter dated **24 June 2010** (at page 25 of the **Defendant's Exhibit No. 1**). The Plaintiff accounted for the set-offs as follows:

No.	Date	Case No.	Amount Taxed	Amount Credited

			(Kshs)	(less VAT +WHT)
1.	17.12.2009	745/2009	-	200,831.70
2.	14.6.2010	331/2010	1,472,726.00	1,181,542.85
3.	14.6.2010	892/2009	317,321.00	259,874.95
4.	14.6.2010	1022/2009	477,555.00	391,101.10
5.	26.11.2010	305/2010	456,200.00	373,612.40
6.	17.12.2010	95/2009	1,005,534.80	819,653.25
6.	7.1.2011	867/2010	111,234.00	91,096.81
Total				3,317,713.06

[40] Again, there is no indication that these sums were taken into account in computing the claim herein. Moreover, there appear to be some taxed costs which were acknowledged by the Plaintiff but which were not expressly accounted for in the letter dated **24 June 2010** or in the Rent Receivable Schedule at page 87 of the Plaintiff's Bundle of Documents. That notwithstanding, it is evident that even if the acknowledged set-off sums were to be taken into consideration, the Defendant would still be indebted to the Plaintiff to the tune of **Kshs.3,764,350.94**.

[41] Similarly, it was a term of the parties' agreement that the Defendant would pay Service Charge of **Kshs. 30,600/=** per month for the two floors of rented space. Yet according to the Recalculated Service Charge at page 88 of the Plaintiff's Bundle of Documents, huge sums have been posted therein that appear to have no direct bearing with the Letter of Offer or the agreement between the parties. Also, no credit appears to have been given for what was admittedly paid for the first two years of the tenancy. Hence, the total amount payable as service charge for the 6 years from **2007** was posted as **Kshs. 27,340,161/=**.

[42] It would be preposterous that the amount of Service Charge should exceed the outstanding rent payable; with yet a further sum of **Kshs. 4,496,517/=** being alleged to be due and payable by the Defendant. Granted that the service charge component had already been factored in the monthly rent as set out on page 87 of the Plaintiff's Bundle of Documents, as well as in the sum of **Kshs. 3,672,000/=** paid by the Defendant for the Years **2007** and **2008**, it is manifest that the Plaintiff's tabulation is inaccurate and that its claim was altogether overstated. Thus, in my calculation, the Service Charge payable for the six years from **1 January 2007** to **31 December 2012** at the rate of **Kshs. 30,600/=** per month would be **Kshs. 2,203,200/=** only. Since payment was acknowledged for the period ending **31 December 2008**, it would follow then that what is due as Service Charge for **January 2009** to **December 2012** would be no more than **Kshs. 1,468,800/=**; and I so find, noting that, the Plaintiff only asked for Service Charge up to **31 December 2012** (see page 87 of the Plaintiff's Bundle of Documents). And whereas the Letter of Offer provided that the Defendant would pay any taxes imposed by the Government and the Municipal Council proportionate to his liability and or the leased space, there was no proof that the Plaintiff paid any such taxes, or that the figures set out on page 88 of the Schedule were proportionate to the space leased out to the Defendant. In any case, no claim was made in the Plaintiff for such sums.

[43] As for interest payable, it is instructive that the Letter of Offer did not make any provision for interest on late payment. Nevertheless, the Court has the discretion to award interest if this is warranted. **Section 26(1) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya**, is explicit that:

"where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."

[44] The rationale for the above provision was well explained in the case of **Lata vs. Mbiyu [1965] EA 592** that an award of interest on the principal sum is, generally speaking, to compensate a plaintiff for the deprivation of any money or specific goods through act of a defendant. Hence, in **Dipak Emporium vs. Bond's Clothing [1973] EA 553**, it was held that the court's right to award interest is based on Section 26(1) of the Civil Procedure Act, which recognizes that the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of payment or to such earlier date as the court thinks fit.

[45] In the **Dipak Emporium Case**, the Court quoted with approval from the Judgment of **Lord Denning M.R** in **Jefford vs. Gee [1970] 1 All E.R 1202** that:

"Interest ... should only be awarded to a plaintiff for being kept out of money which ought to have been paid to him ...Interest should be awarded on this lump sum as from the time when a defendant ought to have paid it, but did not: for it is only from that time that a plaintiff can be said to have been kept out of the money. This time might in some cases be

taken to be the date of letter before action, but at the latest it should be the date when the writ was served..."

[46] There is no gainsaying therefore that the Court has the discretion to award pre-action or pre-judgment interest. The Plaintiff has claimed interest from **1 May 2013** in accordance with the demand notice dated **9 May 2003** and the computation of its claim exhibited at page 87 of its Bundle of documents. This claim being in respect of commercial premises, I am satisfied that sufficient justification has been shown for the awardability of pre-action interest. I find succour in this conclusion from the holding in the case of **Sempra Metals Ltd vs. Inland Revenue Commissioners and Another [2007] 3 WLR 354** in which it was held that:

"In the nature of things the proof required to establish a claimed interest loss will depend upon the nature of the loss and the circumstances of the case. The loss may be the cost of borrowing money. That cost may include an element of compound interest. Or the loss may be loss of an opportunity to invest the promised money. Here again, where the circumstances require, the investment loss may need to include a compound element if it is to be a fair measure of what the plaintiff lost by the late payment. Or the loss flowing from the late payment may take some other form. Whatever form the loss takes the court will here, as elsewhere, draw from the proved or admitted facts such inferences as are appropriate. That is a matter for the trial judge."

[47] As to the rate of interest, it was the Plaintiff's contention that their agreement was that it be paid outstanding sums with interest at its prevailing lending rate. However, there was no such evidence adduced herein as to whether that was the agreement; or what the Plaintiff's prevailing lending rate was at the material time. **Section 107(1) of the Evidence Act, Chapter 80 of the Laws of Kenya**, is explicit that:

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.

[48] Similarly, **Sections 109 and 112 of the Evidence Act** stipulate that:

(109) The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

...

(112) In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

[49] This burden was not discharged by the Plaintiff in connection with the applicable rate of interest. In the same vein, no evidence was adduced to show that the interest would be compounded, as was purportedly done in the Plaintiff's calculation set out at pages 87 of the **Plaintiff's Exhibit No. 1**. Thus, there being no evidence that interest was payable at 27%, I would find and hold that interest is payable at the current prevailing commercial rate of 14% as was attested to by **PW1**, which would be commensurate, and on a *quid pro quo* basis, with the rates applicable to the Defendant's outstanding Bills of Costs as per the Court decisions at pages 89-104 of the Plaintiff's Bundle of Documents and pages 66-74 of the **Defendant's Exhibit No. 2**). Accordingly, it is my resultant finding that, as of the time of giving vacant possession of the suit premises, the Defendant was indeed indebted to the Plaintiff as follows:

[a] Arrears of rent from January 2009-February 2013 - **Kshs. Kshs. 3,764,350.94**

[b] Service Charge from January 2009-December 2012- **Kshs. 1,468,800/=**;

[50] As no Counterclaim or Set-off was pleaded or evidence adduced as to the full extent of the Plaintiff's indebtedness to the Defendant in terms of legal fees, it would not be within the scope of this Judgment to get into a consideration of the Defendant's outstanding Bills of Costs. His evidence was that he deliberately opted to pursue the taxation option as opposed to a set-off herein because that route is the easier route; and I am in full agreement, considering that the Bills of Costs are contested (granted the Defendant's letter dated **30 July 2012** at page 43 of the **Defendant's Exhibit No. 1**) and would require taxation and ascertainment by the Deputy Registrar. Besides, it was the evidence of the Defendant that he still had bills to the tune of **Kshs. 45 million** which are pending taxation. Hence, other than what has been admitted and accounted for herein above, it would be up to the parties to conclude the taxation process and ascertain the exact total amount due to the Defendant in legal fees; which can then be paid either by way of a consensual arrangement between the parties or through the enforcement mechanism available under the **Advocates Remuneration Order**.

[51] In the result, Judgment is hereby entered in the Plaintiff's favour against the Defendant in the total sum of **Kshs. 5,233,150.94** together with interest thereon at 14% per annum from **1 May 2013** until full payment, as well as costs of the suit.

It is so ordered.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF APRIL, 2018

OLGA SEWE

JUDGE