REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2687 OF 1975

EAST AFRICAN POWER & LIGHTING CO. LTD.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....DEFENDANT

JUDGMENT

In this suit the plaintiff is a limited liability company duly incorporated and carrying on business in the Republic of Kenya. The defendant is the Attorney-General of the Republic, being sued on behalf of the Government under the Government Proceedings Act.

The plaintiff's claim against the defendant is for the total sum of Shs 135,321/25 being the alleged rent and car-park charges from 1st May 1973 to 30th September 1974, service charges from 1st January 1972 to 30th September 1974, excess rates of Shs 453/30, cost of redecoration of the suit premises, and legal costs. Suffice it to state that the item of cost of redecoration amounting to Shs 2516 was not seriously contested. Mr Ole Keiwua, on behalf of the Attorney-General, conceded that the cost of repairs or redecoration attributable to National Social Security Fund's misuse of the premises was payable regardless of what type of tenancy it had. It occupied the twelfth floor of the suit premises. I am of the opinion that the Government and the National Social Security Fund (the "NSSF") are liable to meet the cost of redecoration. I allow this sum. It would be absurd for anyone to get away with costs of repairs attributable to his negligence during the occupation of any premises by consent, whatever the type of his tenancy.

I find it unnecessary to itemise each item as the parties have agreed on the total figure, subject to liability. However, I will deal with any item as and when it becomes necessary.

Briefly, the plaintiff alleged that, by an agreement entered into between the plaintiff and the Government of the Republic of Kenya through the Ministry of Works, the plaintiff agreed to grant and the Government agreed to take a lease of certain premises comprising the twelfth floor of the plaintiff's premises known as Electricity House, Nairobi, at a rental of Shs 18 per square foot per annum. The term of the alleged lease was to be for six years from 1st June 1971.

There was no dispute that the plaintiff and the Government negotiated the lease of the fifth, sixth, seventh, eighth, twelfth and thirteenth floors of Electricity House. The leases for the floors (other than the twelfth floor) were eventually concluded, executed and registered after the Government ministries or departments had gone into occupation. They are still in occupation. This suit concerns the twelfth floor intended for the NSSF.

Mr Ole Keiwua reluctantly conceded that the Government, through the Ministry of Works, was negotiating the lease on behalf of the NSSF only. The Government did not have any further responsibility with regard to the tenancy of twelfth floor. In effect he contended that the Government's responsibility did not extend beyond negotiating the lease; with the result that, in the event that the NSSF vacated the premises, the Government did not have the responsibility to retain the tenancy of the premises for any other ministry or Government department. Mr Fraser, who appeared on behalf of the plaintiff, contended that the Government wished, or were presumed to have intended, to retain the premises after the NSSF vacated the twelfth floor of Electricity House.

It was common ground that as soon as the director of the NSSF initiated action by expressing an interest in occupying a floor in Electricity House, the Ministry of Works took over and started negotiating for the lease of the twelfth floor together with the leases for the other floors which were to be occupied by the Government ministries or departments. One of those leases was for an analogous fund known as the National Hospital Insurance Fund (the "NHIF").

An enormous bundle of correspondence was agreed upon and admitted by consent of the parties. The letters speak for themselves and it is clear from the tone of some of those letters that there was some confusion or misunderstanding between the parties. To some extent, the confusion or misunderstanding was created by the officers of the Ministry of Works who handled the negotiations on behalf of the Government. I am of the opinion that if the officers had acted promptly and replied to many letters and reminders addressed to the Government concerning the leases in general (and in particular the lease of twe1fth floor of Electricity House), this suit would have been unnecessary. The dispute would have been settled at the very beginning with little expense involved. The officers of the Ministry of Works acted with utter disregard of any courtesy or businesslike attitude and are, to a great extent, responsible for all the uncalled-for confusion which caused so much loss for the plaintiff in which the Government has an interest. Their indifferent attitude was most incommendable and deplorable.

In the course of the trial issues were formulated in general terms as follows:

Being agreed between the parties that the Government of the Republic of Kenya did take occupation of the twelfth floor of Electricity House, Harambee Avenue, Nairobi, for and on behalf of the NSSF on or about April or May 1971 in circumstances which do not amount to trespass,

1. What relationship existed between the plaintiff and the Government of Kenya since October 1970 in relation to 12th floor of Electricity House?

2. Was the Government of Kenya entitled to terminate that relationship?

3. If 'Yes', was the Government of Kenya required to give notice in writing to terminate that relationship?

4. If 'Yes', was any valid notice of termination of that relationship given to the plaintiff?

5. If the answer to question 3 is in the negative, thenwas there a valid termination?

6. If there was a tenancy was there any valid surrender of that tenancy?

7. What sum, if any, is due to the plaintiffs from the defendant?

The case is by no means an easy one. The issues are intricate and complex.

Mr Ole Keiwua was in agreement with these general issues, although he was not happy about the suggestion that the responsibility of leasing the twelfth floor and the attendant consequences should be cast upon the Government. He wished it spelled out that the responsibility of the Government extended only to negotiating the lease of the twelfth floor for the NSSF and nothing more. That the NSSF was

responsible for paying the rent after the lease was negotiated, with the result that the Government was not responsible to retain the premises or to accommodate another Government department or to give notice of the NSSF's termination of the intended lease for the twelfth floor.

There can never be any doubt that the Government, through the Ministry of Works, took over the responsibility of negotiating all the leases on behalf of the Government, as well as that of the twelfth floor for the NSSF. Similarly, the Government, through the Ministry of Works, was dutybound to make its position clear with regard to the twelfth floor when it became apparent that the NSSF was vacating the floor while the lease was being negotiated by the Ministry of Works on behalf of the NSSF. I am of the opinion that communication broke down between Ministry of Works, the NSSF and the plaintiff's agents. The Government should have informed the plaintiff's managing agents in advance of its intention to terminate negotiations for the lease of twelfth floor, as well as to inform them of its intentions with regard to the future occupancy of the twelfth floor after the NSSF made its intention clear that it would vacate the twelfth floor. This the Ministry of Works did not do. The plaintiff's managing agents and the plaintiff's advocates were left in the dark and cannot be blamed for this clear inactivity on the part of the officers of the Ministry of Works.

However, I find no serious objection to the general issues as framed; and I approve them. I adopt them as framed, although I will not be confined within their scope entirely.

According to the evidence of Mr James Hamilton of Messrs Hamilton Harrison & Mathews, advocates of Nairobi, he received instructions from the plaintiff's managing agents of Electricity House to prepare four draft leases for the Government of Kenya to lease certain floors in Electricity House for occupation by NSSF, the NHIF, the Ministry of Power and Communications and the Department of Community Development. He drew up the draft leases and subsequently submitted them to the Ministry of Works, with whom he dealt, after receiving the instructions from the plaintiff's managing agents. He stated that the four leases were identical in general terms; but different with regard to the terms of the particular premises. The four leases were being negotiated at the same time; but on different instructions and terms.

With regard to the lease of the twelfth floor, the subject-matter of this suit, he said that a letter of 22nd January 1971 was the basic instructions from the Ministry of Works for the lease of the twelfth floor for occupation by the NSSF. I consider it necessary to reproduce the contents of this letter. The letter reads:

In October 1970 the director of the NSSF indicated his willingness to lease one floor in Electricity House. Unfortunately this matter was never concluded in time. The director has now confirmed that he is willing to accept the whole of the twelfth floor.

Due to a certain misunderstanding, he has already sent his plans for partitioning of the sixth floor to our provincial engineer. Since the architects for Electricity House are doing this work it is no longer necessary for our provincial engineer to undertake this work. The NSSF are anxious to occupy this accommodation as soon as possible. This is to confirm that we shall take the twelfth floor at the already agreed rental of Shs 18 per square foot per annum.

By copy of this letter the provincial engineer, Nairobi, is requested to forward partitioning plans to the architects.

On receipt of this letter Mr Hamilton said that he prepared the lease of the twelfth floor and caused it to be sent to the Ministry of Works on 2nd February 1971.

Pausing here, I observe that the letters of 1st and 2nd February 1971 dealt with copies "of the form of agreement for lease for the NSSF". This form of agreement was not produced and its fate is unknown. However, it was not returned to Mr Hamilton duly initialled as requested. Henceforth confusion ensued with regard to the identity of the lease of the twelfth floor for the NSSF as it is clear from the correspondence that Mr Hamilton was dealing with all the four leases collectively while the Ministry of Works was dealing with them separately. Be that as it may, with regard to the lease of the twelfth floor there appears to have been a complete silence or inactivity until 21st June 1971, when the Ministry of

Works wrote as follows:

Please refer to my letter reference Number 102/2312 of 22nd January 1971.

I do not appear to have received draft lease for the accommodation on the twelfth floor that is occupied by National Social Security Fund.

We have already made our comments on the lease for the accommodation rented for the National Hospital Insurance Fund. If the draft leases are the same, may I suggest that you take the comments made for the accommodation for the NHIF to apply to the lease for the NSSF *mutatis mutandis*, and let me have the draft incorporating the suggested alterations for my approval.

Almost a year after the initial instructions, Mr Hamilton said that he received a letter dated 3rd January 1972 which raised a number of points for consideration and inclusion in the draft leases. No doubt that the points raised in the letter were common to all the four leases. Mr Hamilton said that as a result of that letter, he prepared another draft lease and this was forwarded to the Ministry of Works on 25th April 1972. This was the draft lease of the twelfth floor for the NSSF and it was duly approved by the plaintiff. A letter of 25th April 1972 makes it clear that the draft lease of the twelfth floor for the NSSF was forwarded to the Ministry of Works along with the draft leases for the other floors. Several reminders ensued and, on 26th July 1972, the Ministry of works wrote:

You state in paragraph 2 of your letter [of 25th April 1972] that the points raised in my letter dated 3rd January 1972 have been considered and that all of the suggested amendments, to your original draft lease, have been incorporated to my satisfaction.

After studying the purported new draft lease which you submitted under cover of your letter under reference, I am afraid to observe that none of the suggested amendments has been included in the draft leases.

The points I suggested for amendment are those marked X in the draft lease, and as I have given reasons of amending the clauses in my letter of 3rd January 1972 there is no necessity of repeating them here again.

To enable you to see the clauses marked X, I enclose herewith one copy of the draft lease. If the suggested amendments are approved please prepare the proper lease for execution by the Government.

Delay in replying to your letter was due to circumstances beyond our control.

Pausing here again, it would appear that the confusion was setting in roots. There was a meeting between an official of the Ministry of Works and a representative of the plaintiff's managing agents at which the points in dispute were discussed. These were: (1) length of the lease of six years was agreed but a breach clause was in dispute; (2) increase of site value tax based on the 1970 rate of taxes; it was agreed that those of 1971 were payable by the Government; (3) service charges commensurate with the accommodation occupied in the building; (4) cost of service of notices; (5) extermination of vermin; (6) legal charges; and (7) the Transfer of Property Act, 1882 (India).

These points of disagreement were common to all the leases. Up to this stage, each side was labouring under the impression that all the four leases were being negotiated collectively. On 27th July 1972 the plaintiff's managing agents made their position clear with regard to the points in dispute. The Government was either to agree to the lease with whatever concessions given, or leave them. Further correspondence and discussions ensued when it was finally agreed that the leases for the sixth, seventh, eighth, and thirteenth floors would commence on 1st June 1971. Here is where the serious misunderstanding arose. This agreement was confirmed by the parties. It is clear from the plaintiff's managing agents' letter of 21st August 1972 that the managing agents assumed that the agreement for the commencement of all the leases was to be from 1st June 1971. The negotiations of the leases for separate floors were now being conducted by the Ministry of Works. This is beyond doubt because in the

plaintiff's managing agents' letter dated 6th September 1972 the agents singled out two leases for Ministry of Power and Communications and for the Department of Community Development (the sixth, seventh, eighth and thirteenth floors, respectively). The plaintiff's managing agents appear deliberately to have excluded the fifth and twelfth floors in this letter; and this fact is clearly demonstrated by what followed. The heading of their letter ("Re Electricity House-Leases - Ministry of Works - For Ministry of Power and Communications and Department of Community Development") makes this pretty obvious. In reply to the agents' letter of 6th September 1972 the Ministry of Works wrote on 3rd October 1972 as follows:

I am pleased to inform you that we have agreed with your suggestion that Government is to pay flat rate of Shs 1000 per month in respect of service charges for the accommodation that we are renting in Electricity House. Arrangements are in hand to authorise the Ministries which occupy the accommodation to effect necessary payment. It is hoped that the arrears of rent on this account will be cleared within the next few weeks. The acceptance of the Government to pay the flat rate of Kenya Shs 1000 per month as service charges is on the understanding that the charge will remain the same throughout the period of the renting, and that there will be no separate charge for the supply of toilet papers.

The Government has also agreed to pay for the carparking charges for the car-parking bays reserved for the Government departments occupying accommodation on the sixth, seventh, eighth and thirteenth floors of Electricity House. I am verifying these charges and I will arrange for a cheque to be sent to you for the correct amount in due course. In this connection, I wish to inform you that in the event that all reserved parking bays are not required, the surplus bays will be surrendered to you and you will be expected to reduce rent for the bays proportionately.

The above-mentioned outstanding issues having now been agreed on you may proceed to engross the lease for execution.

It is clear from the letters referred to above that the Ministry of Works gave the green-light for the engrossment of the lease of the sixth, seventh, eighth and thirteenth floors. The leases of the fifth floor for the NHIF and that of the twelfth floor for the NSSF were completely omitted. Mr Hamilton gave evidence that he had no idea why the twelfth floor was excluded in the letters of 6th September and 3rd October 1972. There had been no separate correspondence about the leases of the fifth and twelfth floors.

He said that as a result of the letter of 3rd October 1972 which gave a green-light for the engrossment of the leases for the sixth, seventh, eighth and thirteenth floors, he prepared engrossment of all the four Government leases including that of the fifth and the twelfth floors. The engrossment of the leases was forwarded to the Ministry of Works on 16th November 1972, including that of the twelfth floor.

Mr Hamilton said that reminders after reminders were sent to the Ministry of Works, but without fruitful results. He received a letter dated 28th June 1973 from the Ministry of Works which read:

The matter concerning the lease for renting of this accommodation has taken rather too long to finalise due to the fact that it has been dealt with by various people at different stages. In my files I have records indicating that although the terms of the lease were agreed to incorporate amendments suggested by me the actual lease submitted for execution does not contain all these amendments.

It has appeared to us that there have been attempts to go back on some items agreed on previously and this has caused delay in signing the leases. However, our outstanding disagreement with Messrs Kenya Trust Co Ltd is based on two points only, namely (4) and (7) as indicated in their letter dated 27th July 1972, which was copied to you.

As it is desired in the interest of all concerned that this matter should be finalised without further delay, may I suggest that Messrs Kenya Trust Co Ltd are advised by you to honour their agreement contained in the letter dated 25th Apri1 1972, a copy of which is forwarded for ease of reference.

The plaintiff's managing agents, responded to this letter in their letter dated 18th July 1973 as follows:

We refer to your letter dated 28th June addressed to Messrs Hamilton Harrison & Mathews in connection with finalisation of the leases of the above accommodation.

You maintain that two aspects have not yet been concluded, namely the question of payment of costs of the leases and the exclusion of the Indian Transfer of Property Act. However, in Mr Flatt's letter to you dated 27th July 1972, it was stated clearly that both of these points were unacceptable to our clients, and Messrs Hamilton Harrison & Mathews wrote a letter of explanation with regard to the Indian Transfer of Property Act on 23rd August 1972.

It appeared from your letter dated 3rd October 1972 that all of the outstanding matters had been settled, and you instructed us to proceed to engross the lease for execution. No further mention was made of either of the two points raised in your letter.

If the whole matter is to be opened up again, we would be grateful if you would firstly explain what aspects of Messrs Hamilton Harrison & Mathews' letter dated 23rd August 1972 are not acceptable to you, so that we may take our client's further instructions.

This letter does not refer to the leases for fifth and twelfth floors. In any case the NSSF had already vacated the twelfth floor of Electricity House. Mr Hamilton stated that he had not received any reaction to the earlier reminders. He stated that, until 21st November 1973, correspondence dealt with the leases generally. He received a letter dated 21st November 1973 from the Ministry of Works which notified the managing agents that the NSSF had vacated the twelfth floor on 3rd April 1973 and that rent up to 30th April 1973 was to be paid.

It was agreed that the NSSF went into occupation of the twelfth floor of Electricity House (sometime between late April and early May 1971. On 26th April 1973, the director of the NSSF wrote to the plaintiff's managing agents as follows:

Please refer to your letter dated 10th April 1973. It is true we vacated the said floor on 3rd April 1973 and the Ministry of Works should have advised you accordingly.

The first general issue for determination is, therefore, what relationship existed between the plaintiff and the Government of Kenya since October 1970 in relation to the occupation of the twelfth floor of Electricity House. This general issue calls for determination of the following sub-issues, namely: (a) what terms were agreed upon between the plaintiff and the Government of Kenya between October 1970 and late April/early May 1971 when the NSSF actually went into occupation of the twelfth floor of Electricity House; (b) what relationship existed between the plaintiff and the Government between late April/early May 1971 (when the NSSF went into occupation) and 3rd April 1973 (when the NSSF vacated the 12th Floor of Electricity House); and (c) what relationship existed between the plaintiff and the Government of Kenya from 3rd April 1973 and thereafter?

With regard to the general issue, Mr Fraser contended that there was a concluded lease whose essential elements had been agreed upon before the NSSF went into occupation of the twelfth floor of Electricity House and that the Government of Kenya was bound by the agreed terms and conditions of that lease. Mr Ole Keiwua contended on behalf of the Attorney-General that there was no such concluded lease and that the NSSF went into occupation as tenant at will. Let us see.

With regard to sub-issue (a) above, there can never be any doubt that, after the director of the NSSF expressed his interest for the NSSF to occupy one floor in Electricity House, he initiated action by writing to the Ministry of Works and to the plaintiff's managing agents confirming his interest in taking up one floor in Electricity House. This was in October 1970. The director's actions amount to no more than exploratory and preliminary steps towards the creation of some relationship with regard to the leasing of a floor in Electricity House. That exploratory or preliminary expression of an interest did not amount to a binding relationship between the plaintiff and the NSSF or the Government of Kenya, or either of them. The relationship remained fluid until 22nd January 1971 when the Ministry of Works wrote the letter of that date (supra). I understood Mr Frazer to concede this by stating that the initial action by the director of

the NSSF was purely an enquiry. I agreed with him that until the Ministry of Works stepped in to negotiate the lease of the twelfth floor, nothing binding between the plaintiffs and the NSSF or with the Government of Kenya may properly be inferred .

By this letter the Ministry of Works confirmed that the NSSF would accept the whole of the twelfth floor of Electricity House: “This is to confirm that we shall take the twelfth floor at the already agreed rental of Shs 18 per square foot per annum”.

There can never be any doubt that, as at that date, the Ministry of Works agreed and confirmed acceptance for occupation of the twelfth floor and that the rent was to be the agreed rent (presumably agreed for the other Government leases). The use of the word “we” makes it clear that the Government confirmed the acceptance on behalf of itself and on behalf of the NSSF. There was no evidence that any more particulars were agreed upon except matters concerning partitioning of the twelfth floor. The NSSF expressed the wish to move into the twelfth floor by 1st February 1971. This intention was regretted by the plaintiff’s agents as the work of the contractors would be hindered if they had to work around the NSSF after the latter had moved into the premises and before the partitioning was completed. Matters appear to have rested there until the NSSF moved into occupation of the twelfth floor sometime in late April or early May 1971. The next move on the record was a request from the Ministry of Works calling for draft lease of twelfth floor for the NSSF with the suggestion that the comments already made in respect of the NHIF should apply for the draft lease of the twelfth floor for the NSSF *mutatis mutandis*. The draft lease was of course to be approved with those comments incorporated in the draft lease for twelfth floor, This was on 21st June 1971 after the NSSF had gone into occupation of the twelfth floor.

The plaintiff’s agents declined to accede to the request referred to in the letter of 21st June 1971 stating that they were unable to offer any further concessions in the matter. This was on 24th June 1971 and the letter appears to refuse the comments made with regard to the lease of the fifth floor for the NHIF. In their letter of 22nd June 1971 the plaintiff’s managing agents had given the option that either the Government agreed to the draft lease for the NHIF without the suggested comments or vacate the premises (ie the fifth floor for the NHIF). The agents were not prepared to extend any concession with regard to the lease of the twelfth floor for the NSSF. The NSSF were similarly required to vacate, the twelfth floor.

It is clear; therefore, that even after the occupation by the NSSF of the twelfth floor of Electricity House, in the absence of a formal agreement for the lease, the conditions of the lease had not been agreed upon. It was not even clear who was responsible for the payment of rent. It was not unti1 22nd September 1971 that the plaintiff submitted a demand for payment for rent and-service charges for the period from 1st May 1971 to 30th October 1971 and 1st May 1971 to 30th June 1971, respectively. The demanded rent and service charges included those of the thirteenth floor occupied by the Department of Community Development. The amended invoice for the twelfth floor was eventually paid, separately. However, for subsequent period, the payment of the service charges and parking charges were threatened to be stopped until the lease was finalised. This threat did not materialise as the plaintiff’s agents threatened to withdraw the facilities in default of payment. The NSSF had to give in and continued to pay these. The threat of stoppage was initiated by the Ministry of Works for no apparent reason, other than that the leases had not been finalised.

As stated earlier, copies of the draft lease of the twelfth floor for the NSSF were sent to the Ministry of Works, together with the draft leases for the other floors. The Ministry of Works raised objections that the draft leases (including that for the twelfth floor for the NSSF) did not incorporate the suggested comments. This was on 26th July 1972.

It would appear that, since the plaintiff’s agents failed to give concessions with regard to the leases of the fifth and twelfth floors, nothing happened to resolve the points of disagreement. The draft lease of the twelfth floor was in general terms similar to those other draft leases and, without the suggested comments being incorporated in the draft lease for the twelfth floor, there was no agreement on the conditions of the draft leases as at 26th July 1972. I will revert to the parties relationship as at that time when dealing with sub-issue (b).

As I have already stated, the relationship between the parties between October 1970 and April/May 1971 was somewhat dubious. One term agreed was that the NSSF should occupy the premises after partitioning had been completed. The NSSF occupied the premises in April/May 1971. The other agreed terms were the identity of the premises to be occupied, the parties and the rent payable per square foot per annum.

Mr Fraser urged the Court to accept that a lease for the twelfth floor had been concluded because the five elements essential to constitute a lease had been concluded. These were: (a) the identity of the parties; (b) the identity of the premises; (c) the consideration; (d) the demise lease; and (e) the term of the lease of six years.

I am unable to agree with Mr Fraser that all the essential elements to constitute the lease had been concluded with regard to the lease of the twelfth floor. It is clear that the parties, the premises and the rent had been agreed. However, the conditions of the lease and the term of the lease had not been agreed when the NSSF went into occupation of the twelfth floor. This is clear from the correspondence exchanged between the parties during the period preceding the occupation of the twelfth floor by the NSSF.

The parties agreed that the NSSF should go into occupation in circumstances which did not amount to trespass. The NSSF did. There was no concluded lease yet and the only reasonable inference was that the NSSF went into occupation of the twelfth floor with an implied condition that a formal lease would be negotiated. If there was a formal agreement for a lease, the situation would have been different. There was no such formal agreement for the lease. The NSSF went into occupation of the twelfth floor without any such formal agreement or a concluded lease. If there was a concluded formal lease, I would agree with Mr Fraser that the NSSF went into occupation as a monthly tenant. Unfortunately, this was not the case.

With regard to sub-issue (b) above, the position does not appear to have altered between April/May 1971 and 3rd April 1973. In the first place, the plaintiff's agents did not give any concession with regard to the draft lease of the twelfth floor for the NSSF. This is clear from their letters dated 21st, 22nd and 24th June 1971. There appears to have been no attempt made to resolve the deadlock

In an attempt to resolve the deadlock, the Ministry of Works wrote on 3rd January 1972 pointing out the points of dispute. The draft lease of the twelfth floor submitted by the plaintiff's agents did not incorporate the comments or points of dispute. This was pointed out by the Ministry of Works; see their letter of 26th July 1972. With regard to the lease of the twelfth floor for the NSSF, the matter rested there with the points of dispute unresolved.

With regard to the other leases, negotiations continued. The leases for the sixth, seventh, eighth and thirteenth floors were agreed to commence on 1st June 1971. Nothing further was mentioned with regard to the lease of the twelfth floor. The letter of 6th September 1972 from the plaintiff's agents and the letter from the Ministry of Works dated 3rd October 1972 specifically excluded the, twelfth floor as well as the fifth floor (with which this suit is not concerned). No satisfactory explanation was given for the exclusion of the twelfth floor. The letters must speak for themselves.

I am satisfied that the twelfth floor was deliberately excluded along with the fifth floor because agreement had not been reached as to the conditions or terms of the leases. The agents were not prepared to give any concessions with regard to the suggested comments. The deadlock had long been reached.

By excluding the fifth and twelfth floors specifically (ie in the letters of 6th September 1972 and 3rd October 1972), the Ministry of Works must be deemed to have given a green light for engrossment of the leases of the sixth, seventh, eighth and thirteenth floors. Notwithstanding this, the agents went ahead to engross the leases for the fifth and twelfth floors along with the leases for the other floors for which the Ministry had given a green light. I am of the opinion that the relationship of the parties remained unaltered with regard to the occupation of the twelfth floor by the NSSF. This remained the position until 3rd April 1973 when the NSSF vacated the twelfth floor.

With regard to sub-issue (c) above, the relationship between the plaintiff and the Government of Kenya

henceforth remained unaltered for the reasons I have given in relation to sub-issue (b) above.

The result was that the relationship between the NSSF or the Government of Kenya and the plaintiff remained unaltered from October 1970 until the NSSF vacated the twelfth floor and thereafter. I am informed that, with regard to the other leases, the dispute was subsequently resolved and the engrossed leases were duly executed for the fifth, sixth, seventh, eighth and thirteenth floors of Electricity House. This suit is not concerned with these floors.

It remains for me to determine what sort of tenancy existed between the plaintiff and the Government of Kenya or the NSSF during the entire period. This was, the main general issue.

Mr Fraser who appeared for the plaintiff submitted that the Government of Kenya had a monthly tenancy right from October 1970. The Government was duty-bound, to give notice of intention to terminate the monthly tenancy. The Government was duty-bound to give effective surrender of the lease to the plaintiff, which the Government failed to do. The Government was duty-bound to pay rent and other charges until the 30th September 1974 after which date the plaintiff was able to obtain another tenant. In effect, Mr Fraser's contentions were that the plaintiff accepted surrender of the lease with effect from 1st October 1974. Alternatively, the Government of Kenya occupied the premises from March 1971 and failed to give effective notice of intention to terminate the tenancy and that the plaintiff is entitled to the arrears of rent, service charges and legal costs in the sum claimed.

In summary, the plaintiff's case is that prior to 3rd April 1973 there was an agreement or concluded lease between the plaintiff and the Government of Kenya for a lease of the twelfth floor for a term of six years; and that the essential terms had been duly agreed upon between the parties before vacation of the suit premises on or before 3rd April 1973.

The agreed lease was not registered with the result that, in view of the decision of the Court of Appeal for East Africa in *Rogan-Kamper v Lord Grosvenor (No 2),* page 123, *ante* and assuming that there was a concluded and enforceable lease, I must find that the relationship between the plaintiff and the Government of Kenya was a monthly tenancy. If there was a concluded lease, I would agree with Mr Fraser that I am bound to find that a monthly tenancy existed, being bound by the majority decision of the Court of Appeal in *Rogan-Kamper's* case.

The facts in *Rogan-Kamper's* case were different. In that case there was a formal agreement duly entered into between the parties. This was followed by taking possession of the premises and paying the agreed rent. This was followed by a draft lease in terms of the formal agreement and that draft lease was never approved; no lease was ever executed or registered.

It was found that the doctrine in *Walsh v Lonsdale* (1882) 21 Ch D 9 did not apply and that, in absence of a contract to the contrary regulating the giving of notice prior to the determination of the lease, the tenancy created by possession by agreement of parties and payment and receipt of rent was a monthly, tenancy terminable on fifteen days' notice in terms of section 106 of the Transfer of Property Act (India).

I am of the opinion that from the facts of that case, this decision was the logical conclusion in view of the fact that there was a formal agreement duly signed by the parties and that the draft lease which was not subsequently executed or registered contained those agreed terms and conditions or covenants. In other words, the five essential elements of a lease had been agreed between the parties before the tenant took possession of the premises and there was no contract to the contrary regulating termination of the lease or whether it was to be a tenancy at will.

In the present case there was no formal agreement and the NSSF went into occupation of the premises with only unilateral confirmation that "we shall take the twelfth floor at the already agreed rental of Shs 18 per square foot per annum".

I find nothing in evidence to show that the landlord agreed to this, but I observe that the Government or the NSSF went into occupation in circumstances which did not amount to trespass.

Mr Fraser contended that in view of the decision in *Rogan-Kamper's* case and in absence of the agreement to the contrary, the relationship created was that of a monthly tenancy; there was no contract to the contrary that the tenancy to be created was that of a tenant at will. He argued that all the five essential elements of a lease had been concluded before occupation of the premises. The special conditions, such as service charges, the increase of rates over the year 1971 and the car park charges had also been agreed. Hence, he submitted that there was a concluded lease before the NSSF went into occupation of the twelfth floor of Electricity House and that, by virtue of section 106 of the Transfer of Property Act and in absence of a contract to the contrary, a monthly tenancy was created. This was confirmed by the fact that the NSSF paid rent monthly. He submitted that the English cases referred to (in which a tenancy at will arose by implication of law) are of no effect in Kenya. In Kenya where there is a concluded lease, a tenancy at will can never arise unless there is an agreement to that effect.

Mr Fraser's submissions appear to be plausible in view of the wording of section 106 of the Transfer of Property Act (India) which provides:

In absence of a contract ... to the contrary .... a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month terminable ... by fifteen days' notice expiring with the end of a month of the tenancy.

This section pre-supposes a concluded lease. But the crux of the matter is whether there was a concluded lease or agreement for the lease at the time the NSSF went into occupation of the twelfth floor of Electricity House.

As I have stated earlier, no formal agreement for the lease of the twelfth floor was produced. However, on 22nd January 1971, the Government confirmed acceptance of the twelfth floor for the NSSF at the agreed rental of Shs 18 per square foot per annum. As at that date the only following essential elements of the lease can safely be said to have been agreed: (l) the parties (i.e. the Government on behalf of the NSSF and the landlord); (2) the premises, the subject-matter of the intended lease (ie the twelfth floor); and (3) the consideration, namely rental of Shs 18 per square foot per annum.

Mr Ole Keiwua submitted that there were five points of dispute essential to the creation of the lease which had not been agreed upon. He said that these were duration, legal costs, service charges, Transfer of Property Act and the breach-clause. I think the issue of the breach-clause is tied up with that of duration and I will deal with some of these presently. The above essential elements were undoubtedly agreed and the only ones at issue were the duration and some conditions of the lease. Mr Ole Keiwua's other points appear to me to be special conditions.

With regard to the demise or the lease, it cannot be said that the conditions thereof had been finally agreed. The letter of 21st June 1971 makes this very clear. The conditions incorporating comments already made by the Government in respect of the draft lease for the NHIF were to apply to the draft lease for the NSSF *mutatis mutandis*. The draft lease for the NSSF was to be approved on behalf of the Government. The comments for the draft lease for the NHIF were not acceptable to the plaintiff's agents. The Government was given an ultimatum to vacate the fifth floor or agree the draft lease as amended by the plaintiffs agents. There were to be no further concessions for the draft leases for either the NHIF or the NSSF. The result was that the NSSF went into occupation of the twelfth floor before the conditions of the demise or lease were finally agreed upon.

This was still the position as at 3rd January 1972 when the Government raised afresh the points in dispute with regard to the Government leases of Electricity House including the leases for the NHIF and the NSSF.

With regard to the special conditions, ie the service and parking charges, although the NSSF paid these originally, these were included amongst the points in dispute. However the NSSF appear to have acceded to pay service charges as submitted by the plaintiff. The basis of agreement to these charges is not clear; but it would appear that there was a basis for charging these service charges, although the Government appears to have continued to negotiate them. Agreement of these special conditions may properly be

implied in the letters I have referred to.

Then the draft lease for the NSSF was eventually submitted on 25th April 1972. The Government objected to the draft leases because it considered that the points of dispute or comments submitted earlier had not been incorporated in the draft leases for all the Government leases (including the one for the NSSF). On 27th July 1972 the plaintiff's agents made their position clear with regard to the comments raised on the points of disagreements. In this letter the issue of service charges was not finalized as it was to be investigated. This was yet another special condition to be negotiated.

It is clear, therefore, that up to this date, the conditions of the lease had not been concluded and in particular those of the twelfth floor for the NSSF. Mr Fraser argued that this was the opening of negotiations of the conditions of the leases already concluded, including that of the NSSF. I do not consider this to be so. At best, the parties were talking at crosspurposes and their minds were not *ad idem*. The letters speak for themselves: the conditions of the leases were still being negotiated. Nothing further appeared to have transpired with regard to the conditions of the leases and in particular that of the twelfth floor for the NSSF until 21st August 1972, when the commencement of all the leases was agreed to be from 1st June 1971. From thereon, the lease of the twelfth floor for the NSSF was excluded from subsequent relevant correspondence and, in particular, the letters dated 6th September 1972 and 3rd October 1972 which culminated in the Government giving the green light for engrossment of the leases for the floors other than the fifth and twelfth floors.

Despite this exclusion of the twelfth floor in particular, the plaintiff's agents submitted, along with the other leases, the engrossment of the lease of the twelfth floor for execution by the Government. No action appears to have been taken with regard to the execution of the lease of the twelfth floor for the NSSF. No explanation was ever given for this. The NSSF was, in the meantime, contemplating vacating the twelfth floor and moving to their newly-built premises. The NSSF then vacated the premises on 3rd April 1973, before the lease was executed.

It is quite clear that, with regard to the fifth and twelfth floors, the conditions of the leases were never fina1ised in view of their exclusion from the letters of 6th September 1972 and 3rd October 1972, which dealt exclusively with floors other than the fifth and the twelfth. No green light was ever given for the engrossment of the leases for these floors. The lease of the twelfth floor was never executed, whatever might have happened to that of the NHIF. The effect of this was that there was no concluded lease right up to the time the NSSF vacated the twelfth floor on 3rd April 1973.

With regard to the term of the intended lease of six years, the Government agreed to the duration but wished to have a breach-clause incorporated in the draft leases to enable it to vacate the premises at reasonable notice should Government accommodation become available during the subsistence of the intended lease. This was the first point of dispute or comment in the Government's letter of 3rd January 1972. In the absence of a formal agreement for the leases, this breach-clause formed part and parcel of the terms of the lease. This point of dispute was not resolved until 27th July 1972 when the plaintiff indicated willingness to have a breach-clause after three years. Even then the matter was not conclusive and it remained in abeyance up to the time the NSSF vacated the twelfth floor on 3rd April 1973.

The net result was that two essential elements of the lease were not finally agreed prior to the time when the NSSF went into occupation and even up to the time it vacated the twelfth floor, or thereafter. In my opinion, with regard to the twelfth floor, there was no concluded lease for the NSSF as Mr Fraser contended.

Mr Fraser submitted further that, even if there was no concluded lease when the NSSF went into occupation, unless there were clear words to the effect that parties did not intend the agreement to take effect until the formal lease was executed the agreement became effective immediately on occupation. He submitted that there were no such words or agreement to suggest that the agreement was to become operative on execution of the leases. The Government, having gone into occupation and paid rent monthly, a month-to-month tenancy within the meaning of section 106 of Transfer of Property Act was created. I would have agreed with Mr Fraser on this point if all the essential elements of a lease had been

agreed before the NSSF went into occupation. Either there was a concluded lease for six years, which was rendered a monthly tenancy by the non-registration of the lease, or there was no such concluded lease for twelfth floor. I have already held that all the essential terms of the intended lease for the NSSF were never agreed upon up to the time when the NSSF vacated the premises, and after. At best, the monthly tenancy, which could have been converted for non-registration of the completed lease, was never created and no subsequent monthly tenancy could be created after occupation before the essential elements of the, intended lease were agreed upon.

Mr Ole Keiwua, who appeared for the Attorney-General, contended that if there be an agreement that the NSSF go into occupation of the twelfth floor and pay the agreed rent, there was an implied condition that the conditions and terms of the lease would be negotiated. The NSSF went into occupation under the implied condition that the relationship was that of a tenant at will or, alternatively, a tenancy at will was implied by law. He referred to *Birsingh v Khetia* [1967] E A 741 and the judgment of Platt J in *Rogan-Kamper v Lord Grosvenor (No 2)*, page 123, *ante*. He submitted that, on consideration of all surrounding circumstances of this transaction and in the absence of a formal agreement for the lease and the protracted negotiations as to essential elements of the lease and special covenants, the relationship that was created *ab initio* and which never altered was that of a tenancy at will.

In the alternative, Mr Ole Keiwua contended that if there was a monthly tenancy, the plaintiff had constructive notice that the NSSF was vacating the premises and that the NSSF paid rent in lieu of that notice. As to surrender, there was effective surrender as the keys were handed over to the plaintiff's representative against proper hand-over notes.

As I have held that there was never a concluded lease of the twelfth floor for the NSSF, section 106 of the Transfer of Property Act (India) cannot properly be invoked. lf there was a concluded unregistered lease, I would inevitably have agreed with Mr Fraser that there was a monthly tenancy in view of the decision of the Court of Appeal in *Rogan-Kamper v Lord Grosvenor (No 2).* I agree with Mr Ole Keiwua that there was an implied condition that the NSSF went into occupation pending negotiations of the conditions of the intended lease, some of which were never agreed upon up to the time when the NSSF vacated the premises. There was no concluded lease which was capable of conversion into monthly tenancy by virtue of the non-registration of the lease. Mere payment of the rent and the taking of occupation on the agreed premises alone were not sufficient to create a monthly tenancy. From the evidence before me and the facts surrounding these negotiations, I have reluctantly come to the conclusion that there was no present lease or even a formal agreement for the lease on which a present lease could be implied. The agreement, if any, was executory, yielding the relationship of tenancy at will. Whether or not proceedings for specific performance could have been proper in these circumstances, I would express no view.

The inescapable conclusion was that the relationship between the plaintiff and the Government was that of tenancy at will by implication of law. This resolves the first issue. I am now able to answer the other issues. (2) "No". (Although the manner in which the Government terminated the tenancy cannot be said to be plausible in the circumstances.) (3) "No". (Although in view of the way enquiries were made by the plaintiff's agent it would have been prudent for the Government to make its position clear with regard to occupation or otherwise of the twelfth floor of Electricity House.) (4) Not necessary in view of the above. (5) "Yes". (6) There was a tenancy at will. The issues of notice and surrender do not arise but, in case they did, I have considered these points. I have held that no notice was required. In any case one month's rent was paid. The issue of constructive notice does not arise. The manner in which the vacation and hand-over of the premises occupied under a tenancy at will was given was not plausible. However, the keys were handed over to the day watchman who was always with the caretaker when he made inspection rounds. I am of the opinion that the day watchman held himself out as the person with authority to receive the keys. He signed the hand-over note and it cannot be said that he had no authority to do so. The result is that the surrender of the tenancy at will was proper in the circumstances and the plaintiffs must be deemed to have accepted the surrender when the NSSF vacated the premises. I have considered the evidence adduced by all the witnesses called on behalf of the parties; but for small variances the witnesses agreed on all major issues. As I have said earlier the parties appear to have negotiated on assumption which rendered the negotiations protracted. In view of my finding of fact, I do not consider it necessary to review all the decisions cited to me. (7) The Attorney-General conceded that the cost of repairs which

were agreed, subject to liability, were properly charged and payable. I allow this claim in the sum of Shs 2516. Excess rates for 1971 were also conceded in the sum of Shs 627/05. With regard to the legal costs, these were waived by the plaintiff in respect of all the Government leases and I see no justification in reviving the claim. I disallow this claim.

The result is that the plaintiff's claim succeeds only to the extent of the cost of repairs or redecoration in the sum of Shs 2516 and excess rates for 1971 in the sum of Shs 627/05, making a total of Shs 3145/05. I enter judgment for the plaintiff in the sum of Shs 3143/05 together with interest thereon at court rates.

The plaintiff has succeeded in his claim to a very small extent. I award it costs on the sum hereby awarded together with interest at court rates from time of suit until payment in full. I must thank both counsel for the clear manner in which they represented their respective cases and submissions on very complex issues.

Order accordingly.

Dated and Delivered at Nairobi this 16th day of December 1977.

M.G.MULI

JUDGE