



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC SUIT 288 of 2012**

**KOIRA LIMITED.....PLAINTIFF**

**-VERSUS-**

**ABBAS SOUD ALI EL BUSAIDY,**

**ILHAMMOHAMED SAID, AL BUSAIDI**

**ABDULLA SAUD AL- BUSAIDI and SOUD**

**SALIM SOUD (*Administrators of the Estate of***

**SIR ALI SALIM EL BUSAIDI).....1<sup>ST</sup> DEFENDANT**

**MJAD INVESTMENTS LTD.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. This suit is brought by the plaintiff against the defendants vide a plaint dated 7<sup>th</sup> December 2011, amended on the 16<sup>th</sup> January 2013 and later re-amended on the 16<sup>th</sup> June 2017, the plaintiff is seeking judgement to be entered in their favour in the following terms:

a) An order of specific performance of the aforesaid indenture dated 20<sup>th</sup> January 1914 that the 1<sup>ST</sup> and/or 2<sup>ND</sup> Defendant do renew the plaintiffs interest in the suit properties for a further period of 99 years on the same terms contained in the indenture and do execute all necessary documents to renew the lease failing which the deputy registrar do execute all necessary documents so as to facilitate the issuance of new title document to the plaintiff.

b) A permanent injunction to stop the 1<sup>ST</sup> and/or 2<sup>ND</sup> Defendants, its/their officers, its servants, agents, employees directly or indirectly howsoever from selling alienating leasing charging or otherwise dealing in any way whatsoever with the suit properties to any third parties other than the plaintiff.

c) A permanent injunction to stop the First and/or second Defendants its/their officers, its/their servants, agent's employees directly or indirectly from interfering with the tenants of the plaintiff and /or their rights to quiet enjoyment of the suit properties or any part thereof:

d) That the 1<sup>ST</sup> and/or 2<sup>ND</sup> Defendants do take all necessary steps to ensure the Land Titles Registry, Mombasa do endorse the plaintiff interest on their freehold title in the encumbrance section of the said freehold title failure of which the Land Registrar Mombasa be ordered to reflect the said encumbrance on the records at the Land Title Registry, Mombasa.

e) Costs of and incidentals to this suit.

f) Such other or further relief which this honourable court may deem fit or expedient to grant.

2. The 1<sup>ST</sup> defendants filed a statement of defence dated 14<sup>th</sup> January 2013 and the same has not been amended. The 1<sup>ST</sup> defendant avers that the 99 year lease entered between the estate of Sir Ali Bin Salim El Busaidi and Westdeutsche Handel and Plantagen Gessellschaft (herein referred to as the German company) expired on the 31<sup>ST</sup> December 2012 and that the Plaintiff is a trespasser on the suit premises and ought to be compelled as a trespasser to compensate the estate for intermeddling with its property and that an order of specific performance cannot

be ordered on a party who is not privy to the contract and that the estate of Sir Ali can deal with its property the way it chooses to as provided for under Article 40 of the constitution.

3. The 2<sup>nd</sup> defendant filed a statement of defence on the 5<sup>th</sup> February 2013 and an amended defence on the 23<sup>rd</sup> June 2017 in which it avers that it acquired freehold interest on the suit premises. Subsequently it published a Caveat Emptor on the **12<sup>th</sup> January 2013** in the Daily Nation and there were no restrictions on the titles and/or cautions registered against the said title.

4. Also the 2<sup>nd</sup> Defendant averred that it was not aware this Honourable court had issued an ex-parte injunction restraining any dealings of the suit property on the 10<sup>th</sup> December 2012 and that it is not bound as alleged to renew the lease as per the indenture annexed by the plaintiff which expired on the 31<sup>st</sup> December 2012.

5. The parties complied with the provisions of Order 11 of the Civil Procedure Rules by filing their documents and witnesses statements and consequently the suit was set down for hearing.

The parties agreed on the issue for determination as follows:

i) is the 1<sup>st</sup> or 2<sup>nd</sup> Defendant bound under the terms of indenture dated 20<sup>th</sup> January 1914 to grant renewal of the indenture for a further period of 99 years on the same terms contained in the earlier indenture.

ii) If so are the plaintiffs entitled to the prayers in the re-amended plaint.

### **The Plaintiff's case**

6. The plaintiff opened their case on **27<sup>th</sup> July 2017** with the evidence of **Masud M. Ali Rana** stating that he was the plaintiff's director. He adopted as his evidence his witness' statement dated 7<sup>th</sup> December 2012 and a supplementary statement dated 16<sup>th</sup> January 2013. The witness also produced the bundle of documents as exhibits as contained in the list filed on 16<sup>th</sup> June 2017 and a supplementary list of document dated 16<sup>th</sup> January 2013.

7. **PW 1** stated that the plaintiff was claiming renewal of the lease terms under the terms of the original indenture of Jan 1914. The parties to the 1914 lease were the 1<sup>st</sup> defendant and the German company and the indenture was for 99 years. The plaintiff took the remainder of the term from 1977. That the plaintiff is in occupation of the entire premises, there is not a single subtenant.

8. In cross-examination **PW1** said the plaintiff did not have the transfer from the German co. to the 1<sup>st</sup> transferee. The second transfer was in 1931 from Alex smith to Johnson. That the indenture allowed for subletting but there was no consent from the head lessor in the 1931 indenture. That the subsequent indentures equally made reference to the 1914 indenture except the transfer of lease of 1977. The assignment to the plaintiffs name was made under the Registered Land Act (*repealed*). That what was transferred was the leasehold interests in the mentioned titles from City House.

9. The witness further stated that plaintiff did not obtain consent from the head lessor because the original indenture did not require consent to be obtained. **PW1** was not aware why the 1914 indenture was not registered on the suit properties' green cards.

10. **PW1** continued that they did not have proof of payment of rents from **1978 to 1994** but said in the year 1995 the plaintiff paid to Malindi School Trust a sum of kshs.104, 500/=.PW1 did not know what the amount paid to Malindi School Trust was for but assumed Pandya & Talati was informed to make the payment.

11. PW1 in further cross-examination testified that the head lessor never made any demands for the rent. That the plaintiff paid a sum of kshs.94, 710 on the 30<sup>th</sup> November 2010 to Pandya and Talati advocates' clients account since they acted for the estate of Sir Ali. The plaintiffs were not aware who the administrator of the estate of Sir Ali was from 1977 to 2010 so the money was sent to Pandya and Talati advocates who held the amount in trust for the Estate of Sir Ali.

12. Pw1 averred that Pandya and Talati sent a cheque to the Administrator of Sir. Ali's estate which was rejected because they wanted payment from 1977 to 2010. That the letter dated 12<sup>th</sup> May 2011 (in the 1<sup>st</sup> Defendant's bundle) confirmed payment made from 1977. The witness was not aware if the headlessor gave consent to the change in amount of rent payable.

13. Pw1 on cross-examination by the 2<sup>nd</sup> defendant stated that their lease expired on the **31<sup>st</sup> December 2012**. That the plaintiff obtained an injunction against the 1<sup>st</sup> defendant which order was not registered on the titles. Since the injunction was not registered they learnt that the 2<sup>nd</sup> defendant had purchased the suit properties in 2013. That there were previous dealings on the titles and Pandya and Talati acted for both the plaintiff and estate of Sir Ali. The plaintiff did not make any effort to know the administrator of Sir. Ali's estate since they paid rent to Pandya and Talati who held the money in trust for the estate of Sir Ali. That the plaintiff has sued the 2<sup>nd</sup> defendants because they are the current registered holders of the suit titles.

14. In re-exam, PW1 stated that he did not have the first transfer because it was difficult to secure it. That the plaintiff was relying on the clause in the lease which allowed subletting or assign as the reason no consent was required. That the indenture dated 7<sup>th</sup> Feb 1949 to City House made reference to the 1914 indenture. That the plaintiff had not received any demand for ground rent for the period 1977-2010. That they had been making payment for ground rent to Pandya & Talati advocates on behalf of the estate of Sir Ali.

15. Batholomew Mwanyungu testified as **PW2**. He is a licensed surveyor by profession trading under the style of Pimatec Land Surveyors. PW2 stated that he was instructed to conduct a survey on the suit properties titles nos MSA/Block XXI/151,152 & 498 which he did. He prepared his report dated 14<sup>th</sup> August 2012 and which report detailed the structures currently on the suit properties as well as the change in the numbering. **PW2** continued that he also annexed a copy of the indenture of 1914 to his report. That the indenture allowed for construction or removal of buildings. He produced his report as pex2.

16. **Pw2** in cross-exam stated his duty did not include interpreting the terms of the lease. That at page 2 of his report, he needed to understand the history of the plots. That he did not come across the transfer from the lessee in the 1914 indenture. That under Registered Land Act, you require consent of the land owner before transfer. With these evidence, the plaintiff closed its case.

### **1<sup>ST</sup> Defendant's Case**

17. Nicodemus Mwangangi testified as **DW1**. He is a valuer with Paul Wambua Valuers Ltd. On instructions from the 1<sup>st</sup> Defendant, **DW1** carried out a valuation on the suit premises and found that total value is at Kshs 810,000,000. He also got a schedule of tenants from Fontollela agency and that the monthly rental income was @Kshs 1581718. **DW1** produced his report as Dex1.

18. In cross-exam, **DW1** stated that the details of the tenants were provided by the managing agent. That he is not the one who compiled the report but it was done by Paul Wambua. He also did not visit the suit premises. In re-exam, DW1 said the report was prepared by their firm. That the report confirms due procedure was followed and someone from their offices visited the suit property.

19. **Soud Salim Soud** who testified as **DW2** adopted his witness statement filed on the 10<sup>th</sup> May 2017 as his evidence. He averred that he was appointed as one of the legal representatives of Sir Ali's estate in the year 2016 after his father's death. **DW2** testified that the 1914 lease was between Sir Ali and the German company and there is no evidence that the German transferred it to anyone after Germany lost to the British and rescinded all their interests in Kenya. It is DW1's evidence that the plaintiff is on the land illegally because they don't have a lease document or consent of transfer of the lease from the German.

20. **DW2** testified that in 1977 there was an administrator of Sir Ali called Said bin Sefu who was never asked to give his consent to transfer from City House to the plaintiff. That it was important for the administrators to give consent. That the amount of 2790 rupees p.a was for 1914; now the suit properties are worth Kshs 810 million and it is unfair for one to give rent of 2790 rupees. That they were not getting a return for the equivalent of the value of the property.

21. **DW2** averred that the plaintiff did not annex any receipt to show that they indeed paid any monies to the Mombasa municipality as he was required by the lease. That the plaintiff's lease expired on the 31<sup>st</sup> December 2012 and through the 1<sup>st</sup> Defendant's advocate DW2 said the plaintiff was informed of their intention not to renew the lease for a further 99 years. The reason given for not renewing because the lease doesn't benefit them. That they intended to demolish and put up their developments to benefit them as owners.

22. **DW2** denied that the 1<sup>st</sup> defendant has ever sold the suit properties to the 2<sup>nd</sup> defendant. He said an imposter did and the imposter was charged in court. That the estate never received any money from the alleged sale. That the plaintiff was duly notified of the intention not to renew the lease and the Land Registrar was copied. The 1<sup>st</sup> defendant's documents were produced as a bundle as Dex2. **DW2** asked the court to dismiss the plaintiff's suit with costs.

23. **DW2** on cross-examination admitted the copy of his witness statement served on the plaintiff's advocate is neither dated nor signed. That Salim Soud is his father who became an administrator in the year 2009. However as the court order showed the date of appointment of his father was 5<sup>th</sup> March 2010. That **DW2's** name is not on the list of beneficiaries because his father was still alive and his father was number one on the beneficiaries' list.

24. **DW2** continued in cross-examination that in 1977 the administrator was Said bin Seif after the death of Soud bin Ali in 1949. He denied that Said bin Seif lived in Oman all the time. He admitted Pandya & Talati administered the estate from 1977 onwards but denied rent was paid to them. Dw2 also admitted that his father wrote to Pandya & Talati to cease acting for the estate. Further that the new advocate for the 1<sup>st</sup> defendant wrote to Pandya to surrender an account of monies to the estate. **DW2** stated that his father never accepted rent from the plaintiff that was paid through Pandya & Taliti advocates.

25. DW2 stated further that he did not see the assignment from the German to any other person. He wanted to know how the plaintiff acquired its titles. the issue of fraud is not mentioned in their defence. He also agreed that the indenture of 1914 allowed for assignment but that it was oppressive to them. That he has not demanded for rent under the lease. That his father demanded for the rent but later declining receiving the same. DW2 contends that if he is not getting any benefit, it is the same as the land being taken away. He said he cannot renew the lease due to the breach and also because the plaintiff is a trespasser.

26. Under cross exam by 2<sup>nd</sup> defendant, DW2 stated the issue of fraud is not mentioned in his statement. That there was no sale done between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant. DW2 said his father never sold any land and when we learnt of the illegal transfer to the 2<sup>nd</sup> defendant thereafter they reported the matter to criminal investigations department. The original title deeds were retained by the police. That he heard the accused person in the criminal case on the illegal transfer later died. The estate has sued the 2<sup>nd</sup> defendant in ELC 4 OF 2013.

27. In re-exam, the witness said the letter dated 30<sup>th</sup> Nov 2010 produced by the plaintiff stated that the money was for payment of ground rent from 1977-2010. That in 1977, it was the plaintiff who was on the land. That as per the indenture of 1914, the rent was to be paid clear of all deductions at the beginning of the year. That the payment made in 2010 was in breach of the indenture. This also marked the close of the 1<sup>st</sup> defendant's case.

## 2<sup>ND</sup> Defendant's Case

28. The witness for the 2<sup>nd</sup> defendant one **Yakatali Amirali** adopted his statement filed in court on the 5<sup>th</sup> January 2013. **DW3** testified that the estate of Sir Ali gave them a proposal to sell the property in 2012 and they agreed on the price at Kshs 200 million. A sale agreement was executed, they even paid Kshs 12 million as stamp duty hence the 2<sup>nd</sup> Defendant legally acquired the property. That the titles are in the 2<sup>nd</sup> defendant's name since they did not defraud anybody.

29. **DW3** on cross-examination stated that they later learnt the person who sold them the land was charged with a criminal case though they don't know the outcome of that criminal case. The 2<sup>nd</sup> defendant's witness stated that he didn't know why a transfer was effected yet the seller tricked them with a fake title and that the balance of the purchase price is with their advocate. That since the vendor was not represented by an advocate, the 2<sup>nd</sup> Defendant did not have evidence to show that the money was deposited with their advocate on record.

30. **DW3** went ahead to testify that the transaction was not completed as the vendor was arrested by the police though the transfer documents show that the full purchase price was paid. **DW3** averred that a deposit of Kshs 5Million was made to Salim in cash after the agreement was drawn by Oloo & Chatur advocates. That Joseph Mwela (the 2<sup>nd</sup> Defendant's in house counsel) prepared the transfers but the 2<sup>nd</sup> Defendant didn't know there was a restriction when they bought the land or any existence of an administrator but the charge sheet in the criminal trial referred to the property sold to the 2<sup>nd</sup> defendant

### Analysis and Determination:

31. I have considered the pleadings filed together with the evidence adduced on record. I have also read the plaintiff's written submissions and the authorities cited.

The main issues for determination as agreed by the parties are

**a). Is the 1st or 2<sup>nd</sup> Defendant bound under the terms of the indenture dated 20th January 1914 to grant a renewal of the lease for a further period of 99 years on the same terms contained in the earlier indenture.**

**b). If so are the plaintiffs entitled to the prayers in the re-amended plaint.**

32. Before I deal with the agreed issues for determination by the parties, I will briefly touch on the status of the 2<sup>nd</sup> Defendant in this suit. The 2<sup>nd</sup> defendant through its witness in cross-examination stated that it entered into a sale agreement with Salim Abdalla Awadh who passed himself off as Mr Salim Soud Ali Bin Salim to transfer the suit properties. The defendant admitted to having only paid Kshs 5,000,000/= in cash but they had not paid the balance because the police started investigating the transaction and Mr. Salim Abdalla Awadh was subsequently charged in criminal case no. 190 of 2013.

33. The issue of whether the sale to the 2<sup>nd</sup> Defendant was fraudulent or not is pending determination in the suit *ELC Case no 4 of 2013*. However the 2<sup>nd</sup> defendant having admitted that it has not paid the full purchase price and that the money is still being held by its advocate on record can be loosely interpreted to mean that the 2<sup>nd</sup> Defendant is not a direct beneficiary at the moment (until case no 4 of 2013 is determined) under the doctrine of an innocent purchaser for value without notice. **Black's law Dictionary 8<sup>th</sup> Edition** defines "bona fide purchaser" as:

***"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."***

In the Ugandan case of *Katende v. Haridar & Company Limited [2008] 2 E.A.173* it was held:- ***"For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:***

- a. he holds a certificate of title;**
- b. he purchased the property in good faith;**
- c. he had no knowledge of the fraud;**
- d. he purchased for valuable consideration;**
- e. the vendors had apparent valid title;**
- f. he purchased without notice of any fraud;**
- g. he was not party to any fraud.**

34. It is my finding that the pendency of the suit between the two defendants coupled with the fact that the 2<sup>nd</sup> defendant is still holding part

of the consideration for the suit properties denies the 2<sup>nd</sup> defendant the defence and protection an innocent purchaser for value without notice as guaranteed. Without prejudice to what is stated herein, the title to the 2<sup>nd</sup> defendant if at all is subject to the plaintiff's leasehold interest in the event this case is determined in the plaintiff's favour.

35. Now to the question whether the 1<sup>st</sup> Defendant is bound under the terms of indenture dated 20th January 1914 to grant a renewal of the lease for a further period of 99 years on the same terms contained in the earlier indenture. The plaintiff submitted that she had adduced evidence to prove that indeed she is entitled to the orders sought. In support of her case, the plaintiff cited the case of **Brand City Limited v United Housing Estate Limited (2014)eKLR** where Okongo J stated factors to be considered for renewal of a list as follows;

(i) **A right to renew must be rooted in contract, either the primary or a collateral agreement.**

(ii) **A renewal clause in any agreement must provide certainty as to the essential terms that will govern the parties during the renewal term**

(iii) **A renewal clause and any conditions precedent expressed thereon must be properly exercised by the grantee in accordance with its terms subject however to certain common law rules that avoid undue forfeiture of rights**

36. The case of Brand City case *supra* cited by the present plaintiff does not aid her as the Judge dismissed the plaintiff's claim while making reference to the holding in *Sands v Mutual Benefits Ltd (1971) EA156* that;

**“in the absence of agreement or method of securing agreement to the new rent there was no effective renewal of the lease”**

and *Katsuri Ltd v Nyeri Wholesalers Ltd (2014)eKLR* where the Court of Appeal stated that;

**“a tenant cannot impose or force herself on a landlord. In the instant case when the lease expired between the parties it was incumbent upon the appellant to give vacant possession”**

37. I have read the holding in the case of **Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited (2006) eKLR** where Maraga J (as he then was) elaborated on the remedy of specific performance as follows:

***“Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled principles. The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect if damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.”***(emphasis mine).

38. Being an equitable relief, the Courts have also held that an applicant seeking the remedy of specific performance must come to Court with clean hands. See. **Lammers v Kamunge Civil Appeal No.125 of 1990. Has the plaintiff approached this Court with clean hands?** The plaintiff is relying on the Indenture dated **20<sup>th</sup> January 1914**. The said indenture commenced on the **1<sup>st</sup> January 1914**. The plaintiff claim is premised on a lease assigned to it by a company called **City House** pursuant to the indenture of 20<sup>th</sup> January 1914 which expired on the 31<sup>st</sup> December 2012.

39. From the documents produced the dispute arose when the plaintiff by a letter dated **8<sup>th</sup> June 2011** wrote to the 1<sup>st</sup> defendant's advocate notifying them of its intention to renew the lease that was expiring on the 31<sup>st</sup> December 2012. The 1<sup>st</sup> defendant in response expressed his intention of not to renew the said lease on the same terms as those in the indenture dated 20<sup>th</sup> January 1914. The reason has been explained by DW2 as failure to pay rent when due thus the plaintiff is guilty of breach and that the terms of the Indenture of 1914 is not benefiting them given the annual rent payable is way below the market value of the property.

40. The 1<sup>st</sup> defendant pleaded as well as led evidence to state that the plaintiff's lease was irregularly obtained since no administrator consented to the transfer and that the plaintiff has never paid any rent to the estate and the renewal is contrary to the right of ownership provided for under Article 40 of the constitution.

41. I took time to read and consider the terms of the Indenture dated 20<sup>th</sup> January 1914. On the face of it, it provided that; **the annual rent was payable clear of all deductions in advance on the 1<sup>st</sup> day of January of every year. The annual rent was set at Rs.2790/ with the first such yearly payment made on 1<sup>st</sup> January 1914. The Indenture also provided that the lessee was to pay all outgoings in terms of rates and taxes or charges in the nature of land tax or other outgoings. At the expiry of the lease period or sooner determination, the lessee was to yield to the Landlord the said premises together with all buildings and fixtures which may be standing upon the land without payment of any compensation in respect of any such buildings or fixtures by the landlord. The indenture also allowed for assignment and subletting subject to the covenants, conditions and provisions therein contained. There was a proviso that when the lessee defaulted in paying rent for any two calendar months when the rent became due, the Landlord was at liberty to re-enter the premises. Lastly, there is also a provision for option to renew on same terms at the expiration of the lease.**

42. The plaintiff in defence to the accusation of non-payment of annual rent when due submitted that there was never a demand made by the

1<sup>st</sup> defendant's estate from 1977 when they were assigned the lease by **City House**. The plaintiff instead avers that she paid the rent to the estate advocate M/s Pandya & Talati advocates when it was due and the same was held in trust by the said law firm on behalf of the 1<sup>st</sup> defendant's estate. The plaintiff submitted that since Pandya & Talati advocates were acting for them, he used to deduct ground rent from the rental income of the building. However the correspondence produced does not corroborate such averment and in my view this line of evidence is being introduced through submission thus inadmissible.

43. In the indenture of 20<sup>th</sup> January 1914 it was not provided that ground rent was payable on demand. Instead it provided that, **"annual rent of Rs. 2790/= clear of all deduction payable in advance on the 1<sup>st</sup> day of January in every year."** The plaintiff produced the following copies of cheques as evidence of payment of the rent;

1. A cheque of **kshs.104,500/=** to Malindi School Trust dated the **7<sup>th</sup> August 1995**
2. A cheque of **Kshs.94, 710/=** to Messrs Pandya & Talati clients' account dated 30th November 2010.
3. A sum of **Kshs.77, 000/=** to Messrs. Pandya & Talati clients' account dated 31<sup>ST</sup> March 2010.

44. If the ground rents due was deductable from the rental income accruing from the suit properties by Pandya & Talati as submitted by the Plaintiff, then this evidence is contradictory. Why pay for some years directly to the mutual advocates and allege indirect payment for the previous years' rent? Further, the 1<sup>st</sup> defendant stated that it had no association with the entity referred to as Malindi School Trust. The evidence adduce by both the plaintiff and the 1<sup>st</sup> Defendant does show that M/s Pandya & Talati advocates at one time acted for both of them. For the Plaintiff to persuade this court that the payment to Malindi School Trust was in respect of the rent due for the suit premises, she was under obligation to show a nexus between the estate of the 1<sup>st</sup> Defendant and the said entity. The Plaintiff failed to discharge this burden and therefore makes it difficult for this court to credit this to her as payment of ground rent.

45. The plaintiff stated further that the payment made on 31<sup>st</sup> March 2010 was also ground rent made to Pandya & Talati Advocate who was administering the 1<sup>st</sup> Defendant's estate in trust in the absence of an administrator. The 1<sup>st</sup> defendant denied this proposition by stating that there was an administrator before his father and also annexed a copy succession order issued on the 5<sup>th</sup> march 2010 appointing one Salim Soud Ali Bin Salim (1<sup>st</sup> Defendant's father) as an administrator. The 1<sup>st</sup> defendant maintained that Pandya & Talati advocates ought to have been aware of the said appointment of the administrator. Unfortunately the said advocate was no longer in active law practice so neither party could summon them to clarify the true position. Be that as it may, this was the plaintiff's case and section 107 & 109 of the Evidence Act imposed a duty on them to prove that rent was paid on time as per the Indenture of 1914.

46. The uncertainty of the payment period applies to the payment made in November 2010. The fact that the rent was payable annually the Plaintiff needed to justify making a payment twice in the same year? With all these questions of how and when payment for rent not properly answered, I safely conclude that the plaintiff was clearly in violation of the terms of the indenture agreement of the 20<sup>th</sup> January 1914 by failing to pay ground rent every 1<sup>st</sup> January of every year from 1977.

47. The second issue raised by the 1<sup>st</sup> defendant is that the plaintiff was on the premises irregularly for want of consent of the landlord. The lease provided for re-assignment subject to the terms contained in the indenture. However the said terms did not specifically provide that obtaining of the consent of the Landlord was one of them. On this limb, I do not hold that lack of consent amounted to a breach as pleaded by the 1<sup>st</sup> defendant.

48. The option to renew the lease was subject to the covenants contained in the Indenture of 1914. The 1<sup>st</sup> Defendant is therefore justified in refusing to renew the lease assigned to the plaintiff by City House in the year 1977 and which expired on the 31<sup>st</sup> December 2012 for reasons that the same was breached by the plaintiff by failing to pay ground rent when due. The fact that there was no demand made in my view is only be applicable where the 1<sup>st</sup> defendant was seeking re-entry before the expiry thereof and not where it is for renewal.

49. It is also my considered opinion that the clause **"an option to renew on the same terms"** is not a mandatory requirement imposed on a landlord to renew a lease. In my opinion and I so hold, the clause is meant to give the plaintiff preference when the term comes to an end. This is in line with the holding of the Court of Appeal in Katsuri Ltd case *supra* that you cannot impose a tenant on a landlord.

50. In light of the foregoing, it is my finding that the Plaintiff's case cannot succeed and is hereby dismissed. Instead, I find that the 1<sup>st</sup> has proved that it is entitled to vacant possession of the suit premises. Accordingly I enter judgment in his favour as prayed in the counter-claim as follows;

**Dated, Signed and Delivered at Mombasa this 22nd day of March 2019.**