Yusuf Mohammed Jiwa t/a Jiwa Properties & another v Mwangi & 2 others (Civil Appeal E014 of 2021) [2024] KECA 38 (KLR) (26 January 2024) (Judgment)

Neutral citation: [2024] KECA 38 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E014 OF 2021

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

JANUARY 26, 2024

BETWEEN

YUSUF MOHAMMED JIWA T/A JIWA PROPERTIES ..... 1ST APPELLANT

SOROYA INVESTMENTS LIMITED ..... 2ND APPELLANT

AND

FLORENCE WANGARI MWANGI ..... 1ST RESPONDENT

JOYCE NJOKI ..... 2ND RESPONDENT

GRACE NJERI ..... 3RD RESPONDENT

(Being an Appeal from the judgment of the Environment and Land Court at Mombasa (Munyao Sila, J.) delivered on 21st April 2020 in Mombasa ELC case No 389 of 2016)

JUDGMENT

1. Soroya Investments Limited, the 2nd appellant, is the registered proprietor of the land parcel No. Mombasa/Block XX/45A situated along Moi Avenue, Mombasa, popularly known as Yunis Building, while Yusuf Mohammed Jiwa t/a Jiwa Properties, the 1st appellant, is a property manager.

2. The appellants filed suit against the respondents in the Environment and Land Court seeking, inter alia:

    i. a declaration that the offer made to the respondents lapsed for want of acceptance;

    ii. a permanent injunction to restrain the respondents from forcefully occupying the suit premises;

    iii. an order of eviction of the respondents from the suit premises;

iv. an order to have the respondents restore the suit premises back to its original condition or, in the alternative, the money paid by the respondents be utilised towards restoring the suit premises to its original condition; and

v. an order for the respondents to pay mesne profits for the period of their illegal and forceful occupation of the suit premises.

3. It was their case that, on 12th October 2016, they offered the respondents a lease of the premises measuring 600 square feet on the ground floor of the building [the suit premises], to commence on 1st December 2016. The offer made in writing was open for acceptance within 10 days and, among the requirements, was the payment of a deposit of Kshs. 270,000, first quarter rent of Kshs. 270,000, and legal fees of Kshs. 45,132. They stated that the 1st respondent collected the Letter of offer on 12th October 2016 and returned it on 27th October 2016 together with a banker's cheque of Kshs. 270,000 for the deposit and two personal cheques for the first quarter rent and legal fees. She then requested to access the premises in order to have her contractor take measurements to which the 1st appellant was agreeable.

4. According to the appellants, the personal cheque for Kshs. 270,000 [being advance quarterly rent] was returned unpaid due to insufficient funds, and that this was communicated to the 1st respondent, who promised to replace it by close of business on 24th November 2016: that no replacement cheque was provided and that, on 25th November 2016, they wrote to inform the 1st respondent that the offer had lapsed.

5. The appellants claimed that the respondents refused to stop the renovation works they had commenced and vacate the suit premises: that, in total disregard of the letter of offer which required them to obtain prior written consent, the respondents undertook substantial structural alterations to the suit premises, and that they had to forcefully remove the respondents' locks. Hence this suit.

6. On their part, the respondents denied the claims and filed a defence and counterclaim. They stated that they paid the deposit of Kshs. 270,000 and issued two personal cheques, which they advised the appellants not to present on the same day. However, the appellants nevertheless banked them, and they were returned unpaid. They agreed to replace the cheques by 24th November 2016 and, when they tried to do so on that date, the appellants declined to accept them. They further denied being notified that the offer had lapsed, and claimed that the appellants begun interfering with their peaceful occupation by locking the suit premises despite having given them permission to access and renovate it. In their counterclaim, they sought the following orders:

a. An order of refund of the deposit paid together with the legal fees for the lease;

b. An order that the appellants refund them the cost of renovation;

c. An order that the appellants pay them for the loss of business as from 1st December 2006 to date; and

d. Costs of the counterclaim and interest.

7. During the hearing, PW1, the 1st appellant, reiterated the averments in the plaint save to confirm that, after returning the offer letter together with the deposit, he was agreeable to the respondents' accessing the suit premises to enable their contractor take measurements.

8. The witness went on to state that the personal cheque for Kshs.270,000, being the advance quarterly rent, was returned unpaid due to insufficient funds and, despite promising to replace it by close of

business on 24th November 2016, the 1st respondent failed to do so, and that the respondents refused to vacate the premises, forcing him to padlock the door and secure it. On 7th December 2016, the 1st respondent accompanied by seven men overpowered their security guards, broke the locks and entered the suit premises. He asserted that the respondents did not fulfil the requirements of the letter of offer on rent because, even though he gave them permission to access the premises, he had not allowed them to make any alterations. He stated that they have been unable to access the premises since 2016.

9. During cross-examination, he stated that he gave the respondents the keys on the strict understanding that it was for inspection of the suit premises.

10. He conceded that they requested him not to bank the personal cheque until a later date, but that he banked it anyway, only for it to be dishonoured.

11. The 1st respondent, DW1, testified that, after she signed the Letter of offer for the lease that was to commence in 1st December 2016, she made out a post-dated cheque to the 1st appellant, who promised not to bank it unless he first called her. She was given keys to the suit premises and commenced renovations for an executive barber shop and salon. Contrary to their agreement, the 1st appellant went ahead to bank the personal cheque, which was dishonoured. The 1st appellant then demanded cash and threatened to remove her workers if she did not pay. On 25th November 2016, she tried to pay them in cash, but they refused to accept the money. She reported the matter to the police who forced the 1st appellant to open the suit premises whereupon they continued with renovations. The following day, the 1st appellant locked the premises and refused to cooperate. They also refused to accept a banker's cheque. She testified that she did not receive the cancellation letter of 25th November 2016.

12. During cross-examination, she stated that the personal cheque she gave was to be deposited 10 days from the date of issue. She stated that she filed a suit before the Business Premises Rent Tribunal and, thereafter, issued a cheque dated 6th December 2012. She conceded that she did not have a letter allowing her to commence renovations, but that the 1st appellant gave her permission to renovate the suit premises, and that the works were undertaken over a period of 3 weeks.

13. Harris Kirombo, DW2, a Quantity Surveyor, presented a report valuing the works that the respondents had undertaken in the suit premises, and that the works remained incomplete and unfinished, with materials left onsite. He stated that the respondents created a mezzanine floor using steel, MDF Boards and a false gypsum ceiling on aluminium channels. Granite tiles were affixed in front. The works were divided into 3 sections: the preparation works, work done, and the materials on site to finish the works. He estimated the cost of improvement at Kshs. 997,930.60, that no walls were demolished, but that only the door, the floor and a stone block partition between a toilet and shower were removed. He assessed that minimal work would be required to restore the premises back to its pre-existing condition, but opined that restoration of the suit premises back to its original state was unnecessary since the renovations had improved the suit premises, and that the mezzanine floor had created extra space.

14. Upon considering the issues in contention, the trial Judge held that no formal lease was executed between the appellants and the respondents and that, therefore, no formal landlord-tenant relationship existed between the parties. He ordered:

    i) that the appellants jointly and severally do refund to the respondents the renovation costs of Kshs. 997,930.60 with interest at court rates from the time of filing of the counterclaim until payment in full, and

    ii) refund the respondents Kshs. 270,000 being the deposit paid, together with interest at court rates from the date of payment until settlement in full. The learned Judge made no order in

respect of mesne profits or loss of business in favour or against either the appellants or the respondents. The appellants were ordered to pay the costs of the suit.

15. The appellants were dissatisfied with the trial judge's decision and have brought this appeal on the grounds that the learned Judge was in error in failing to find: that the Letter of offer constituted a valid contract between the appellants and the respondents, and that the respondents were in breach of the terms of the Letter of offer. They also faulted the learned Judge for: awarding the respondents Kshs. 997,930.60 as costs of renovations with interest at court rates when this was neither specifically pleaded nor proved, failing to award the appellants mesne profits when the respondents failed to remove their materials from the suit premises, failing to consider the appellants' evidence in support of its claim, and in opposition to the respondents' counterclaim. According to the appellants, the learned Judge's judgement was contrary to the weight of evidence and liable to be set aside.

16. The appellants filed written submissions, which their learned counsel, Mr. Otiende, highlighted during the hearing on a virtual platform. Counsel submitted that an offer to lease the suit premises was made to the respondents on condition that Kshs. 535,132 was to be paid on acceptance within 10 days from the date of the letter of offer, and that the 2nd appellant was within its right to withdraw the offer to lease the premises when the respondents failed to pay the conditional amounts in full within the stipulated period.

17. Counsel further submitted that the learned Judge wrongly awarded the respondents Kshs. 997,930.60 as costs of renovations with interest at court rates, and yet the amount was neither specifically pleaded nor proved. The case of Capital Fish Kenya Limited vs. The Kenya Power & Lighting Company Limited [2016] eKLR was cited for the position that statements of account did not constitute sufficient evidence of the special damages pleaded.

18. Counsel contended further that clauses 12 and 17 of the Letter of offer required the respondents to submit the renovation plans to the appellants for their written approval, and that the appellants clearly stipulated that the respondents could access the suit premises strictly for inspection and measurement purposes only; and that the respondents issuance of the cheques was intended to insinuate that the acceptance of the Letter of offer was complete and enable them to obtain possession of the suit premises, whereupon they went on to alter the structural design of the suit premises without the appellants' approval.

19. Counsel faulted the learned Judge for ignoring the appellants' testimony on the extent of the works carried out by the respondents without the appellants' authorisation, and for awarding them compensation for renovations that were of no value to them, that, in any event, since the claim for the costs of renovations were in the nature of special damages, they were required to be specifically pleaded and proved with a degree of certainty.

20. On the claim for mesne profits for the period the respondents remained in possession of the suit premises, counsel submitted that the Judge's refusal to award mesne profits because there was no lease that subsisted between the parties was erroneous because mesne profit is not contingent upon the existence or non-existence of a lease agreement between parties. It was further submitted that, although the respondents executed the Letter of offer on time to signify acceptance, their failure to comply with the conditions for acceptance resulted in lapse of the Letter of offer for want of acceptance; and that the appellants were unable to lease out the suit premises to other tenants given its state.

21. Although counsel for the respondents was not present in Court during the hearing of the appeal, they stated in their written submissions that the learned Judge was correct in finding that, indeed, there was a contract between the parties and, further, that there was no breach by the respondents; that the appellants were estopped from alleging that there was no contract, yet they were paid a deposit; that,

by their actions, the appellants accepted the existence of the contract when they gave the 1st respondent keys to the suit premises.

22. On the award of Kshs. 997,930.60, counsel asserted that this was specified in the respondent's counter-claim, and that the amount was supported and proved by the quantity surveyor's report produced by DW2; that the appellants' adduced evidence of valuation of the renovations, which was a demonstration that the respondents incurred costs in the renovation of the suit premises.

23. In reply, counsel for the appellants stated that the renovations took 6 months, but that they had at all times assumed that the respondents were merely taking measurements in the suit premises.

24. In a first appeal from the decision of the High Court, rule 31[1] of the Court of Appeal rules mandates this Court as a first appellate court to re- appraise, re-evaluate and re-analyze the record and draw its own conclusions thereon. See Selle & another vs. Associated Motor Boat Co. Ltd & others [1968] EA 123. This Court will only depart from the finding by the trial court if it is not based on evidence on record, or where the trial court is shown to have acted on the wrong principles of law. See Jabane vs. Olenja [1986] KLR 661.

25. Given this guidance, the issues that fall for this Court's consideration are:

    i) whether a valid contract to lease the suit premises existed between the parties,

    ii) whether the respondents were in breach of the terms of the offer letter,

    iii) whether the appellants permitted the renovations works,

    iv) whether the respondents were entitled to a refund of the renovation costs, and

    v) whether the appellants were entitled to mesne profits as claimed.

26. Beginning with whether a valid and enforceable contract to lease the suit premises came into existence between the parties, the appellants are aggrieved because the learned Judge failed to find that a valid contract existed between the parties.

27. Addressing this issue, the learned Judge was satisfied that, even though the letter of offer was signed and the conditions accepted, a landlord- tenant relationship did not come into existence since a formal lease was yet to be signed.

28. It is not in dispute that, by a Letter of offer dated 12th October 2016, the appellants offered to lease the suit premises to the respondents for a term of 5 years and 6 months from 1st December 2016 subject to their compliance with the conditions set out in the Letter of offer. It is not also disputed that the respondents signed and accepted the offer and paid a deposit of Kshs. 270,000 to the appellants as stipulated in the offer letter.

29. As to whether an enforceable contract came into existence, this Court in the case of Kenya Commercial Bank Limited vs. Popatlal Madhavji & Another [2019] eKLR held that a letter of offer created a binding and enforceable contract when it observed that:

> " In seeking to explain the purport of section 106 of the Transfer of Property Act, this Court in the case of Mega Garment Limited vs Mistry Jadva Parbat & Co. [Epz] Limited [2016] eKLR succinctly put it thus:
>
> > "The time-honoured decision of this Court in Bachelor's Bakery Ltd v Westlands Securities Ltd [1982] KLR 366 which has been followed in a long line of subsequent decisions elucidates the status of an unregistered lease.

> It reiterates and confirms the firmly settled law, first, that a lease for immovable property for a term exceeding one year can only be made by a registered instrument; that a document merely creating a right to obtain another document, like the one in this dispute, does not require to be registered to be enforceable; that such an agreement is valid inter- partes even in the absence of registration, but gives no protection against the rights of third parties. That exposition of the law holds true in this case."
>
> Therefore, by virtue of the existence of the agreement of lease in the terms spelt out in the letter of 23rd December 1998, a valid, binding and enforceable agreement for a fixed term period of 5 years and 3 months came into existence as between the parties and we so find."

30. In other words, once accepted and signed, the Letter of offer created a binding enforceable agreement between the parties. In this case, the appellants' Letter of offer and the terms set out constituted an offer to lease the suit premises, which the respondents' accepted by signing, and simultaneously paying a deposit as consideration. They even went so far as to commence renovation of the premises. Once the offer was accepted, a valid binding and enforceable agreement for a fixed term period of 5 years and 6 months was held to have come into existence between the parties.

31. The appellants argue that the learned Judge wrongly found that the letter of offer did not constitute a binding agreement between the parties. But, having considered the judgment, it is clear that although the learned Judge did not express one way or the other that the letter of offer created a binding agreement, there is no doubt that the Judge appreciated that the terms of the letter of offer were binding on the parties, and determined that neither the bounced cheques nor failure by the respondents to obtained permission to renovate the premises established the basis for cancellation.

32. It was the same offer letter and its terms and conditions that formed the basis upon which the parties would enter into a formal lease agreement but, as the learned Judge rightly observed, the appellants did not make available a formal lease agreement for the respondents to sign. Be that as it may, the respondents having signed the Letter of offer meant that the parties were bound by the terms, which included an agreement to lease the suit premises to the respondents for a fixed term of 5 years and 6 months. And having so found, we consider that the appellants misconstrued the judgment when they concluded that the learned Judge was wrong to find that the Letter of offer did not create a binding agreement between the parties.

33. That said, the appellants also argue that the respondents were in breach of the contractual terms when they failed to return the Letter of offer within 10 days and to pay the rent in the manner stipulated in the offer letter. According to them, this entitled them to rescind the offer. In this regard, the learned Judge had this to say:

> " ...the letter of authority did stipulate at Clause 8, that together with the acceptance, the tenant [defendants] needed to pay a deposit of quarter rent being Kshs. 270,000/=. I have gone through the letter of offer, and I have not seen any other payment that was required to be paid together with the acceptance...As far as I can see, once the acceptance was signed and a sum of Kshs. 270,000/= made, the other payments would have had to wait for formal execution of the lease once the document was available. I do not see how the plaintiffs can now claim that the defendants were in breach of the terms in the condition of offer...What the plaintiffs needed to do, was to forward the lease for execution and then await payment of the first quarter rent and the money for registration of the lease, which in any case could have awaited a demand by either the landlord or the advocates preparing the lease who in

any case where the landlord's advocates. It is therefore my opinion that the plaintiffs could not cancel the Letter of Offer based on the bounced cheque, for it was not a requirement for the payments in the bounced cheque to be made before the lease was formally drawn and executed..."

34. On the question of whether the respondents breached the terms of offer, the last paragraph of the Letter states:

> " This invitation will remain open for acceptance until the close of business on the 10th day from the date hereof and may be accepted upon the following terms:
>
> This letter is sent to you in triplicate. Acceptance shall be in writing on the duplicates of this letter and shall be effective only when signed in duplicates of this letter together with unconditional payment of the deposit specified hereunder shall be received by us. If such written acceptance and payment under deposits specified hereunder is not received within the above-stipulated period this offer will lapse.
>
> Upon receipt of your confirmation and the deposits required and subject to confirmation from the Landlord, we will arrange for the Lease to be sent to you for execution. The Lease must be executed within Seven [7] days of its delivery to you, failure to which negotiations may be terminated without reference to you.
>
> The lease will become binding upon execution by the tenant, the Landlord and any chargee whose consent may be required. Possession shall be granted upon the signing of the Lease by the tenant and payments of the sum of Kenya Shillings Five Hundred and Eighty
>
> Five Thousand, One Hundred and Thirty Two [Kshs. 585,132.00] in cleared funds.
>
> Notwithstanding, this matter remains subject to lease, the Landlord will be entitled to retain out of the deposits paid under this letter any costs and expenses incurred in preparing and negotiating the lease if you do not execute the lease within the period specified above. Any balance will then be returned to you."

35. The above extract is clear that the respondents were to return the Letter of offer within 10 days. The provision also specified that the offer would lapse if it was not returned together with the deposit within the specified period. The 1st respondent's evidence was that she collected the Letter of offer on 12th October 2016 and returned it on 27th October 2016 with a banker's cheque of Kshs.270,000 [being the deposit] and two personal cheques for the first quarter rent and legal fees. This was 5 days after the specified period had lapsed. Despite the delay in returning the offer letter, the record shows that the appellants unconditionally accepted the signed Letter of offer and the deposit from the respondents. Essentially, by accepting the signed letter of offer and the deposit contrary to the express terms of the Letter of offer, the appellants acquiesced and assented to a mutual variation of the terms of offer.

36. On the doctrine of acquiescence, Halsbury's Laws of England, vol 16 [Butterworth's, 4th Ed Reissue, 2000] at para 924 puts it thus:

> " The term acquiescence is ... properly used where a person having a right and seeing another person about to commit, or in the course of committing an act infringing that right, stands by in such a manner as really to induce the person committing the act and who might otherwise have abstained from it, to believe that he consents to its being committed; a person so standing-by cannot afterwards be heard to complain of the act. In that sense the doctrine of acquiescence may be defined as quiescence under such circumstances that assent may

reasonably be inferred from it and is no more than an instance of the law of estoppel by words or conduct ..."

37. Explaining acquiescence in the English case of Duke of Amherst vs. Earl of Leeds 41 ER 886, 888 [1846], the court stated that:

> " A party, having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence."

38. The Supreme Court of India in the case of Chairman, State Bank of India & Anr. Vs. M.J. [2022] 2 SCC 301 elaborated on the doctrine of acquiescence thus:

> " Doctrine of acquiescence is an equitable doctrine which applies when a party having a right stands by and sees another dealing in a manner inconsistent with that right, while the act is in progress and after violation is completed, which conduct reflects his assent or accord. He cannot afterwards complain. In literal sense, the term acquiescence means silent assent, tacit consent, concurrence, or acceptance, which denotes conduct that is evidence of an intention of a party to abandon an equitable right and also to denote conduct from which another party will be justified in inferring such an intention. Acquiescence can be either direct with full knowledge and express approbation, or indirect where a person having the right to set aside the action stands by and sees another dealing in a manner inconsistent with that right and in spite of the infringement takes no action mirroring acceptance."

39. When the above cited authorities are applied to the circumstances of the instant case, it becomes clear that the appellants' acquiescence and acceptance of the signed offer letter and the deposit notwithstanding that they were returned after the stipulated 10 days' period had lapsed, amounted to a waiver and variation of the original terms. By so doing, we find that they were bound by the varied terms of acceptance and estopped from claiming that the respondents were in breach of the terms of offer that they effectively waived.

40. The appellants' other contention was that they were entitled to rescind the Letter of offer when the respondents' cheque for the first quarter rent was returned unpaid. The respondents replied that they provided the appellants with post-dated cheques on the understanding that they would not bank until a week later. In disregard of their understanding, the appellants went ahead to bank the cheques which were then returned unpaid. The respondents stated that, after the appellants requested for replacement cheques, they nonetheless refused to accept either the replacement cheques or cash.

41. As to whether the appellants' demands for rent payment were liable to result in the offer being rescinded, the terms of the Letter of offer expressly provided that, the respondents were to pay a deposit at the time of returning the signed Letter of offer. Thereafter, it was upon the appellants to send them the formal lease agreement for execution within seven [7] days of its delivery to the respondents. The offer letter also stipulated that it was subsequent to signing of the Lease agreement, that the respondents were then required to pay Kshs. 585,132.00, which was inclusive of the first quarter rent, following which they would be granted possession of the suit premises.

42. The evidence does not disclose that the appellants provided the respondents with a formal lease agreement so as to pave way for payment of the first quarter rent. It would therefore follow that, the appellants having failed to provide the lease agreement, meant that payment of the first quarter rent had yet to become due. In the circumstances, we agree with the learned Judge that, "... the plaintiffs needed ... to forward the lease for execution and then await payment of the first quarter rent and the

money for registration of the lease." Without having provided a formal lease for the respondents to execute as stipulated in the offer letter, there was no justification for rescinding the offer on the basis that the respondents' cheques for the first quarter rent were returned unpaid.

43. We now turn to the issue as to whether the appellants consented to the renovations in issue, and whether the respondents are entitled to refund of the costs incurred.

44. In determining the issue, the learned Judge observed:

> "...the plaintiffs opened the premises to the defendants for renovation. They cannot now claim that they were not aware of the ongoing renovations for these were not done under the cover of darkness or any stealth. DW-1 testified that these renovations went on for a period of 3 weeks. The plaintiffs do not pretend to say that they issued any written or verbal warning to the defendants to stop the renovations. If they felt prejudiced by the renovations, all the plaintiffs needed to do was to inform the defendants not to proceed, for a reason that they have not approved the said renovations. As I have mentioned, by not taking any action, any reasonable person would deem that the plaintiffs have no problem with the renovations, and thus, the doctrine of estoppel comes into play to stop the plaintiffs from now claiming the rights under Clause 23 of the Letter of Offer..."

45. Concerning the renovations, the letter of offer specified that:

> "Clause 12: Partitioning, Fixtures and Fittings – You will be responsible to provide such partitioning, fixtures and fittings as you may require subject to the Landlord's prior written approval.
>
> As such you will be required to obtain the Landlord's prior written approval through its architects at your costs [sic] of the purposed design and layout of the interior of the premises. Before commencing of any alteration or improvement to the interior you will submit plans of the intended layout and design specifying the materials to be used and shall not carry out improvements or alterations without the Landlord's prior written consent.
>
> The tenant will be responsible for the partitioning of the office to meet its requirements such as partitioning to the specification of the building architect.
>
> Clause 17 – Possession of the Premises – You will not be entitled to take possession of the Premises until such time as you execute a formal Lease and pay all sums specified in this Letter of Offer. We may however at our discretion, allow you access to the Premises to carry out the fit outs provided you have executed the Letter of Offer and paid all the sums mentioned there in. Should the Landlord grant possession prior to these conditions being fulfilled and/or the Lease being executed by the parties, the Company agrees and confirms that the use and/or occupation of the Premises in such manner shall not create a "controlled tenancy" as defined by the Landlord and Tenants [Shops, Hotels & Catering Establishments] Act Cap 301, Laws of Kenya".

46. In effect, clause 12 of the Letter of offer clearly provided that before commencement of any partitioning, the respondents were required to make available to the Landlord the renovation plans and obtain their written approval. In addition, Clause 17 specified that the appellants would allow possession of the premises for purposes of renovation pending execution of the formal lease, provided that all the amounts specified in the offer letter were paid.

47. The appellants deny giving written authority to the respondents to undertake renovations. On their part, the respondents' case is that they were granted permission and access to the suit premises to undertake the renovations, which they commenced immediately and carried out over a period of 3 weeks, after which the appellants locked them out.

48. Our consideration of the evidence would lead us to conclude, as did the learned Judge, that the appellants were fully aware that the respondents were renovating the premises and allowed the ongoing works to continue while they stood by and watched as it proceeded. By their conduct of having allowed the respondents to undertake the renovations works contrary to the terms of the offer letter, they were held to have acquiesced to those works and, once again, we find that they were estopped from rescinding the offer on the grounds that the respondents were not permitted to carry out the renovation works in the suit premises.

49. Having found that the appellants were aware of, and allowed the respondents to undertake, the renovation works in the suit premises, the trial Judge ordered the appellants to compensate the respondents for the renovation costs in the sum of Kshs 997,930.60.

50. The appellants' complaint is that the trial judge awarded the amount as special damages, yet the amount awarded was neither pleaded nor proved. A reading of the counterclaim shows that the respondents generally prayed for costs of renovation, but did not specifically plead the amount incurred with particularity.

51. In this regard, it is trite law that a claim for special damages should be specifically pleaded and proved. This Court in the case of Ikumbu vs. Wanjiru [Civil Appeal 157 of 2017] [2022] KECA 81 [KLR] while dealing with similar circumstances held that:

> "Having laid the basis for the claim, we now proceed to address the prerequisites for sustaining a claim of this nature, being a special damages claim. We take it from the decision of this court in Hahn vs. Singh [1985] KLR 716 for the holding, inter alia, that special damages must not only be claimed specifically but must also be proved strictly, with a caveat that the degree of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves. In this appeal, as we have already alluded to above, the respondent tendered evidence through PW2 a registered valuer. She admitted on oath that she did not have receipts to show the costs of the improvements. There was no further pressure for her to avail them. Neither did the appellant seek the court's authority to have these renovations valued by a valuer of his own choice. The trial Judge cannot therefore be faulted for allowing the same."

55. The record discloses that the appellants did not dispute that renovations were carried out. In point of fact, they went on to produce their own valuation report that assessed the costs of the renovation at Kshs. 729,301.28. The respondents' valuer on the other hand assessed the works at Kshs.997,930.60.

56. Although the appellants' grievance was that the renovation costs were not specifically pleaded, having themselves produced a valuation report meant that the issue for determination at this juncture was not whether renovation works were carried out, but whether the award of Kshs.997,930.60 was excessive. A review of the record does not disclose that the appellants pointed to any discrepancies in the respondents' valuation or indicated that the claim was unsubstantiated, or that it lacked specificity or certainty. Since there was nothing to show that the respondents' renovation cost were not specifically proved, we are satisfied that the trial Judge was right to find that the respondents' renovation costs were incurred, and rightly awarded Kshs. 997, 930.60 to the respondents.

57. Finally, on the question of whether the appellants were entitled to mesne profits, section 2 of the *Civil Procedure Act* defines 'mesne profits' in relation to property as, "... those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession". Further, Order 21 Rule 13 of the Civil Procedure Rules provides for the manner in which courts may deal with awards for mesne profits.

58. This Court in the case of Attorney General vs. Halal Meat Products Limited [2016] eKLR considered when claims for mesne profits arise and stated:

> " ... where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18th Ed. para 34-42."

59. In the cases of Bolori vs Offorke [2010] LPELR – 3886 [CA] and Osawaru vs Ezeiruka [1978] NSCC [Vol. 11] 390, the Supreme Court of Nigeria explained the rationale behind the claim for mesne profits thus:

> " In a claim for mesne profits the landlord by implication is challenging the continued occupation of the premises by the tenant whom he now regards as a trespasser, and is therefore claiming damages, which he has suffered through being out of possession of the premises. Mesne profits being, therefore, damages for trespass can be claimed from the date when the Defendant ceased to hold the premises as a tenant and became a trespasser"

60. In the case of Bramwell vs. Bramwell [1942] 1 K.B. 370: [1942] 1 ALL ELR. 137 at p.13S, Goddard, L.J. described the expression: "mesne profits" as "only another term for damages for trespass arising from the particular relationship of landlord and tenant" that the expression "...mesne profits" simply means intermediate profits – that is, profits accruing between two points of time that is between the date when the Defendant ceased to hold the premises as a tenant and the date he gives up possession."

61. The above decisions are clear that, for the appellants to be awarded mesne profits, it must be demonstrated that the respondents were trespassers in the suit premises. As already observed, the appellants granted the respondents access to renovate the suit premises. They cannot be heard to say that the respondents were in illegal and forceful occupation after three weeks following which they terminated the agreement to lease on 25th November 2016 and thereafter denied the respondents' access. Considering that they were no longer in occupation, the respondents could not be considered trespassers. Consequently, the claim for mesne profits could not be said to have arisen. Accordingly, we find this ground to be unfounded and it is hereby dismissed.

62. In sum, the appeal has no merit and is hereby dismissed with costs to the respondents.

63. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY, 2024

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR