Kenya Railways Corporation & another v Milly Glass Works Limited (Civil Appeal E083 of 2022 & E035 of 2023 (Consolidated)) [2024] KECA 1482 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KECA 1482 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E083 OF 2022 & E035 OF 2023 (CONSOLIDATED)

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

OCTOBER 25, 2024

BETWEEN

KENYA RAILWAYS CORPORATION ..... 1ST APPELLANT

PAMELA JOY OUKO T/A SADIQUE ENTERPRISES AUCTIONEERS .... 2ND APPELLANT

AND

MILLY GLASS WORKS LIMITED ..... RESPONDENT

(Being an appeal from the Judgment and Decree, and against the Ruling and Orders of the Environment and Land Court of Kenya at Mombasa (Sila Munyao, J.), delivered on 4th November 2021 and 1st November 2022 respectively in ELC No. 135 of 2012)

JUDGMENT

1. By a Plaint dated 11th July 2012, the respondent, Milly Glass Works Limited, filed suit in Mombasa HCCC No. 135 of 2012 against the 1st appellant, Kenya Railways Corporation, and the 2nd appellant, Pamela Joy Ouko t/a Sadique Enterprises Auctioneers. The respondent's suit was subsequently transferred to the Environment and Land Court at Mombasa and registered as Mombasa ELC No. 135 of 2012.

2. The respondent's case was that the 1st appellant was the registered proprietor of the parcel of land known as Title No. Mombasa/Block XLVIII/134 (the suit property); that, by a lease dated 16th January 1980, the 1st appellant had initially leased the suit property to the respondent's predecessor in title, Kenya Glass Works Limited, for a term of 81 years with effect from 1st January 1977 at an annual rent of Kshs. 22,000 on the terms and conditions set out in the said lease; that, by a transfer of lease dated 26th April 1993, Kenya Glass Works Limited transferred its leasehold interest in the suit property to the respondent, who was then known as Bawazir Glass Works Limited, and the terms of the original lease dated 16th January 1980 became legally binding upon the respondent and the 1st appellant as though

they were upon the original lessee and the 1st appellant; and that a certificate of lease was issued to the respondent on 6th October 2000.

3. The respondent further averred that it was a term of the said lease that, at the expiry of each period of 30 years, the 1st appellant would have a right to raise the annual rent to an amount equivalent to one-twentieth part of the unimproved value of the land comprised in the suit property as at the date of such revision; that, on or about 1st January 1994, the 1st appellant increased the annual rent from Kshs. 22,000 to Kshs. 146,000 in breach of the terms of the lease; that, when the annual rent in respect of the suit property became due for revision after the lapse of the first 30 years on 1st January 2007, the 1st appellant did not exercise its right to raise the rent as agreed; that, in effect, this right was waived/ extinguished when the 1st appellant demanded and accepted from the respondent the rent for the 31st year of the lease/term at the subsisting rate; and that the rent for the property was due for revision upwards again on 1st January 2037 on the 60th anniversary of the lease.

4. The respondent further averred that, by a letter dated 30th September 2011, the 1st appellant purported to unilaterally increase the rent from Kshs. 146,000 to Kshs. 10,200,000 with effect from 1st January 2012; that the 1st appellant had no right under the lease to revise the rent as it had purported to do in the said notice; that the value of the suit property in 2011 was not the same as it was in 2007 and that, as such, the purported rent increment based on the unimproved site value of the suit property as at the year 2011 was highly prejudicial to the respondent; that the purported rent increment was therefore null and void and incapable of conferring upon the 1st appellant the right to recover the new rent from the respondent; that, on 4th July 2012, the 2nd appellant auctioneer, purportedly acting under instructions from the 1st appellant, served a letter dated 28th June 2012 upon the respondent demanding the outstanding rent of Kshs. 10,200,000 and threatened to take action towards recovery thereof if the rent was not paid within 15 days of the date of the said letter; that the 2nd appellant's demand and threatened action for recovery was unlawful since the demanded sum was not due by the respondent to the 1st appellant; and that, unless the appellants were restrained by the court, the appellants may illegally distrain against the respondent or take other steps for the recovery of the purported new rent, actions that would invariably interfere with the respondent's right to quiet, uninterrupted and peaceful enjoyment of the suit property.

5. By reason of the matters aforesaid, the respondent prayed for judgment against the appellants jointly and severally for:

> "(a) A declaration that the 1st Defendant has no right under the terms of the lease dated 16th January 1980 to raise the annual rent payable in respect of the parcel of land known as Mombasa/Block XLVIII/134 until 1st January 2037;
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> b. A declaration that the revision of the annual rent for the parcel of land known as Title No. Mombasa/Block XLVIII/134 from Kshs. 146,000.00 to Kshs. 10,200,000.00 is unlawful, null and void and of no effect;
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> c. An order for a permanent injunction against the Defendants, their servants, employees, officers and/or agents restraining them from interfering in any manner whatsoever with the Plaintiff's quiet and peaceful possession of the suit property and, in particular, restraining them from charging the Plaintiff an annual rent higher than Kshs. 146,000.00 until 1st January 2037, and from levying distress or taking any other action for the recovery of such higher amount;

d. Costs of an incidental to this suit;

e. Any other or further relief that this Honourable Court may deem fit to award."

6. The 1st appellant filed a defence dated 3rd August 2012 in which it averred that it had entered into a lease agreement dated 16th January 1980 with the respondent's predecessor in title; that, under clause 2(a) of the said agreement, the lessor had the right, at the expiration of each period of 30 years, to raise the annual rent to an amount equivalent to one-twentieth (1/20th) part of the unimproved value of the land at the date of such review; that the said 30 years lapsed on 16th January 2010; that, by a notice issued on 30th September 2011, the 1st appellant lawfully exercised its right to increase the annual rent as provided under the terms of the lease; that the 1st appellant was well within its right to review the rent at any time after expiry of 30 years from 16th January 2010 when the lease agreement was entered into; and that the entire suit was calculated to avoid performance of the respondent's contractual obligation to pay rent at the revised rate.

7. In addition to the foregoing, the 1st appellant contended that the court had no jurisdiction to determine the suit because it arose from its exercise of its statutory right under section 13(2) (h) of the *Kenya Railways Corporation Act* (Cap. 397) (the Act) to let immovable property; and because the suit was statute barred under and by virtue of section 83(1) of the Act, which mandatorily enjoined the respondent to attempt direct negotiations with the corporation and, failing agreement, to refer the matter to a single arbitrator appointed by the Chief Justice. The 1st appellant prayed that the suit be dismissed with costs.

8. In its judgment dated 4th November 2021, the ELC (M. Sila, J.) held that section 83 of the Act restricts itself to compensation for damage suffered by the acts or omissions of the Corporation, which would cover torts and not contract; and that the issue in this case had nothing to do with damage caused by the acts or omissions of the 1st respondent, but that it concerned the interpretation of a contract relating to a lease and, therefore, the court had jurisdiction to determine the matter.

9. The trial court was also of the view that, under the lease, the 30 years started running from 16th January 1980, and that the correct date for review would be 16th January 2010 or thereafter; that the lessor could increase rent any time after the lapse of the 30 years, save that the revised rent would take effect from the date of revision; that, if the lessor chose to increase rent early and the lessee acquiesced thereto, the lessor would have to wait until the lapse of 30 years to increase the new rent; and that, barring an express term in the lease, the lessee had the right to contest the valuation of the lease.

10. In addition, the court found that it was apparent that there was a rent increase from Kshs. 22,000 to Kshs. 146,000; that it was pleaded in paragraph 9 of the plaint that this increase took effect from 1st January 1994; that the averments in paragraph 9 of the plaint was not denied in the 1st appellant's defence; that, however, there was variance between the pleading in paragraph 9 of the plaint and the evidence of the respondent's witness who stated that the rent was with effect from 1997 or thereabouts; that the only evidence tendered on the rent increment was an invoice of January 1997 indicating that the annual rent was Kshs. 146,000; that the 1st appellant did not adduce any evidence as to when the rent increase took place, but only acknowledged that the last rent before the proposed increment in the letter served on 30th September 2011 was Kshs. 146,000; and that the court would bind the respondent to its pleading that the last rent was increased on 1st January 1994, as the respondent would stand to benefit from any inference of revision on a later date.

11. The court held further that the rent, having been increased on 1st January 1994, could only be revised in January 2024; that the demand for Kshs. 10,200,000 was illegal and in breach of a consent order

issued by the court on 14th March 2013 barring the 1st appellant from recovering the disputed rent and ordering the respondent to pay the undisputed contractual rent pending hearing and determination of the suit; and that the applicants' continued demand for the sum despite entering into the consent amounted to unjust enrichment. Accordingly, the trial court gave the following orders:

> "19 .... I will use my wide discretion to order the 1st defendant to refund to the plaintiff all sums paid which exceed the annual amount of Kshs. 146,000/= per year. That sum must be refunded forthwith and each instalment paid will attract interest from the time that it was paid at court rates until settlement in full.
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> 20. The only issue left is costs. They will follow the event. Costs to the plaintiff payable by the 1st defendant. There will be no orders as to costs for or against the 2nd defendant for she was an agent of the 1st defendant.
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> 21. Judgment accordingly."

12. In an attempt to enforce the judgment and decree dated 4th November 2021, the respondent instituted garnishee proceedings vide its Notice of Motion dated 6th September 2022 seeking orders that the garnishee bank, Kenya Commercial Bank Limited, be ordered to release to the respondent a sum of Kshs. 126,464,047.67 or such other sum or money that may have been held by the garnishee in the 1st appellant's bank account No. 1108981917 to satisfy the decree issued on 4th November 2021.

13. The respondent's Motion was anchored on the grounds that the amount overpaid to the 1st appellant on account of rent was allegedly ascertained at Kshs. 127,464,047.67; that the sum then duly attracted interest at the rate of 12% per annum with effect from 1st July 2022; that the plaintiff's party-to-party bill of costs has been taxed at Kshs. 2,576,046.67; that the 1st appellant was served with the demand for payment of the monies claimed, but had failed to make any offer as to how it intended to settle the matter, thereby prompting the respondent to move to attach the money held by the 1st appellant in the garnishee bank; and that the said bank account holds funds that would be adequate to settle the decretal sum.

14. In response, the 1st appellant filed a Notice of Preliminary Objection dated 22nd September 2022 contending that the respondent's Notice of Motion was incurably defective and bad in law in that the application was an attempt to execute the decree against the 1st appellant for monies held in the said bank account through garnishee proceedings; that execution against the 1st appellant through garnishee proceedings offended section 88 (a) of the Act, which prohibits any form of execution or attachment of any nature against the Corporation or any of its properties for any judgment or order obtained against the Corporation; that section 88 (b) of the Act prohibits any form of attachment of the Corporation's property; and that the court lacked jurisdiction to order execution against the Corporation's funds held in the said bank account, as was held in the ELC case of Hezron Ossorey Jura vs. Kenya Railways Corporation & another [2013] eKLR. By reason of the matters aforesaid, the 1st appellant prayed that the respondent's application be struck out with costs.

15. In addition to its preliminary objection, and in opposition to the respondent's garnishee proceedings, the 1st appellant also filed a replying affidavit sworn on 27th September 2022 by Christine Macharia, its Senior Legal Officer, in which she deponed that the execution against the 1st appellant by way of garnishee proceedings offended the provisions of section 88 of the Act; that the judgment in issue did not quantify any specific monies to be paid by the 1st appellant; that the decree did not express any judicially quantified amount that could be recovered by execution through garnishee proceedings;

that the 1st appellant disputed the sum of Kshs. 127,464,047.67 claimed in the application because it was grossly exaggerated and had not accrued to the respondent pursuant to the decree; and that the law prohibits delegating the judicial function of determining the quantum of claims to parties, their advocates or any other officer of the court otherwise than in the judgment and decree of the trial Judge.

16. On its part, the garnishee bank filed a replying affidavit sworn by Gordon Winani, the bank's Corporate Service Manager, on 23rd September 2022. The deponent averred that the application was misconceived, bad in law, incompetent, incurably defective and that it ought to be struck out; that the application offended the provisions of section 88 of the Act, which clearly restricts execution or attachment against the 1st appellant and its properties, including the money held in the said bank account; that the respondent was still entitled to apply for execution by way of Judicial Review for mandamus against the Managing Director of the 1st appellant; that the court lacked jurisdiction to allow the application; that, should the court find otherwise, the said bank account held a balance of Kshs. 21,314,179.69 as at 21st September 2022; that the money in the account was not sufficient to settle the entire decretal sum as demanded by the respondent; and that the garnishee was ready and willing to comply with any orders of the court subject, however, to payment of the garnishee costs in the garnishee proceedings amounting to Kshs. 50,000.

17. In its ruling dated 1st November 2022, the ELC (M. Sila, J.) held that, under section 88 of the Act, the Managing Director ought to pay the judgment sum from the revenue of the Corporation without delay or allow for some of the assets of the Corporation to be attached in order to satisfy the decree; that the Act is silent on the consequences that should follow where the Managing Director does not act as contemplated; that to ask a successful litigant to file a second suit for mandamus would be antithetical to the right of access to justice under Article 48 of *the Constitution* and the principle enshrined in Article 159(2) (b) to wit that justice should not be delayed; and that the respondent was at liberty to move the court for orders that give effect to the action that the obligated party has refused to perform by seeking to attach the 1st appellants revenue account.

18. The trial court further held that what the court ordered was a refund of the amount paid in excess of Kshs. 146,000 per year and not damages that required quantification; and that, if the 1st appellant felt that what the respondent had stated as overpayment was exaggerated, nothing stopped it from filing an application for accounts to be taken. Accordingly, the court ordered the 1st appellant's Managing Director to refund the excess money paid by the respondent as rent together with the taxed costs within 30 days of the ruling with interest at court rates from the date of payment; that, in default, the garnishee bank do release all monies contained in the account, but not exceeding the amount claimed in the application; and that there be no withdrawals from the said account pending compliance with the previous court orders.

19. Dissatisfied with the decisions of the trial court, the appellants filed two appeals, the first being Civil Appeal No. E083 OF 2022 from the judgment and decree of the ELC (M. Sila, J.) dated 4th November 2021 in ELC No. 135 of 2012 vide the memorandum of appeal dated 8th September 2022 containing the following 12 grounds:

> " 1. The Learned Judge erred in law and in fact by failing to find that the court lacked jurisdiction to try and determine the dispute which jurisdiction was a preserve of an Arbitration by an arbitrator to be appointed by the Chief Justice in accordance with Section 83(1) of the Kenya Railways Act.
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> 2. The Learned Judge erred in law by holding that the 1st Appellant increased annual rent payable on 1/1/994 from Kshs. 22,000/- to Kshs.146,000/-

without any evidence of an agreement to increase or any other lawful justification.

3. The Learned Judge erred in law and in fact in failing to find that the rights and obligations of the parties were governed by the binding lease agreement entered into on 16/1/1980 and the rights and obligations of the parties could not be validly varied otherwise other than in accordance with the agreement.

4. The Learned Judge erred in law by rewriting and enforcing new terms of a lease despite the lease entered by the parties on 16/1/1980.

5. The Learned Judge erred in law by failing to find that save for the Respondent pleading that the rent was increased in 1994 in paragraph 9 of the plaint dated 11/07/2012 the Respondent did not prove the increment, or the basis of the alleged increment under the lease agreement so as to render the increment enforceable.

6. The Learned Judge erred in law in enforcing the alleged agreement of 1/1/1994 allegedly reviewing the rent without any plea or prayer in the Plaint seeking to recognise and enforce the alleged agreement of 1/1/1994.

7. The Learned Judge erred in law by purporting to enforce the agreement of 1/1/1994 in a suit filed on 12/7/2021 despite Section 4 (a) of the Limitations of Actions Act barring the court from enforcing a cause of action based on a lease contract after the lapse of six (6) years after the breach, since the time for enforcing the action lapsed in 2000.

2. The Learned Judge erred in law and in fact in condemning the 1st Appellant to refund the rent received without any plea of unjust enrichment or a finding of fact of any wrong doing on the part of the 1st Appellant.

3. The Learned Judge erred in law and in fact in failing to quantify the alleged amount to be refunded to the respondent as alleged over unpaid rent which was neither pleaded nor proved.

4. The Learned Judge erred in law and in fact in delegating the judicial function of quantifying the quantum of damages in form of the purported over-paid rent to the parties or their advocates or the deputy registrar or the auctioneer despite the law imposing the obligation to determine quantum on damages on the Honourable Judge.

5. The Learned Judge erred in law and in fact in failing to find that the conduct of the parties demonstrated that the parties intended to review the lease agreement by increasing rent in 2011.

6. The Learned Judge erred in law by failing to award interest on the alleged overpayment from the date of filing the suit or the date of the judgment and instead left it to the parties."

20. The second appeal is Civil Appeal No. E035 of 2023 arising from the ruling of the ELC (M. Sila, J.) dated 1st November 2022 in ELC No. 135 of 2012 vide the Memorandum of Appeal dated 1st February 2023 in which the 1st appellant faults the learned Judge for: failing to appreciate that any form of execution against the 1st appellant by way of garnishee proceedings or otherwise is expressly

barred by the provisions of section 88(a) of the Act; holding that the 1st appellant's property could be attached with the permission of the Managing Director despite the provisions of section 88(a) of the Act; failing to find that the respondent was not entitled to the sum of Kshs. 127,464,047.67 as claimed since the quantum was not judicially determined in the judgment or decree; and for holding that there was a lacuna in the Act where the Managing Director does not act as contemplated, and yet the lawful remedy is for the decree holder to file judicial review for mandamus to compel the Managing Director to perform his public duty to pay.

21. For good order, we begin with the 1st appellant's appeal from the judgment and decree of the ELC (M. Sila, J.) dated 4th November 2021 and take to mind the multitude of grounds on which the appeal is anchored, but which learned counsel conveniently summarised into five general heads, namely: whether the court had jurisdiction to determine the dispute; whether there was any evidence that the 1st appellant increased the annual rent on 1st January 1994; whether the review/increment of rent on 1st January 2012 was valid under the lease agreement; whether the respondent had pleaded or strictly proved the claim for unjust enrichment and/or liquidated damages in the form of a refund for rent received; and whether the learned Judge erred in failing to quantify the amount to be refunded to the respondent, and in failing to award interest on the said amount from either the date of filing suit or from the date of judgment.

22. In support of the appeal, learned counsel for the appellants, M/s. Ndegwa Muthama & Katisya Associates, filed written submissions dated 17th May 2024 citing 6 judicial authorities which we have taken into consideration. On their part, learned counsel for the respondent, M/s. Gikandi & Company, filed written submissions dated 21st May 2024 along with a list and bundle of even date. Counsel cited 13 judicial authorities to which we will shortly return.

23. On the 1st issue as to whether the trial court had jurisdiction to entertain the dispute, learned counsel for the appellants cited the case of Mavumbo Ranch vs. National Land Commission & 3 others [2019] eKLR, submitting that, where the law specifies a particular mechanism for redress of grievances, that mechanism must be invoked and exhausted before a party can seek redress in the courts.

24. According to learned counsel, the dispute arose from the 1st appellant's exercise of its statutory power to let the suit property to the respondent. Counsel submitted that section 83(1) of the Act expressly prohibits actions or suits against the 1st appellant for any act done in exercise of the powers conferred on the 1st appellant under section 13 of the Act, which includes the power to let immovable property as stipulated in section 13(2) (h).

25. Counsel submitted further that the mandatory provisions of section 83(1) of the Act required the respondent to first agree with the 1st appellant on the compensation for the alleged damage suffered; that, in the event of disagreement, that section 83(1) further required the respondent to refer the dispute to a single arbitrator appointed by the Chief Justice; that it is settled law that when a statute provides a procedure for resolving disputes, that procedure must be strictly followed before approaching the court for redress; and that the learned judge failed to appreciate that the jurisdiction to hear and determine the dispute was reserved for an arbitrator appointed by the Chief Justice in accordance with section 83(1) of the Act.

26. In reply, learned counsel for the respondent cited the case of Mt. Kenya University vs. Step Up Holding (K) Ltd [2018] eKLR, submitting that the right to rely on an arbitration clause is lost the moment a party delivers pleadings; that the appellants filed a defence and other pleadings before the trial court, yet this court has repeatedly held that a party invoking an arbitration clause loses that right the moment they deliver any pleading without applying to stay the proceedings; that the learned Judge considered

the objection and found it to be without merit. Concluding in the respondent's favour that he had jurisdiction to entertain the dispute, the learned Judge had this to say:

> As far as I can see, Section 83 restricts itself to compensation for damage suffered by the acts or omissions of the Corporation. These, in my view, would cover torts, and not contracts. My interpretation is not new and was indeed the position taken in three decisions referred to me by Mr. Gikandi, being Peter Nzioka Mani & Another vs Kenya Railways Corporation (2012) eKLR; Ali Yislam Hariz vs Kenya Railways Corporation (2012) eKLR; and Ubah Ismail Mohamed vs Gapco Kenya Limited & Kenya Railways Corporation (2019) eKLR. What is in issue in this case has nothing to do with damage caused by the acts or omissions of the 1st defendant. The matter herein concerns the interpretation of a contract relating to a lease. I am therefore of the view that this court has jurisdiction and I will proceed to determine the matter."

27. Counsel for the respondent submitted further that there is nothing to suggest that, even if section 83 of the Act were applicable, the same would have been applicable in this case in the absence of evidence of the 1st appellant having caused "damage" to the respondent. According to counsel, section 83 of the Act deals with claims for compensation grounded on torts, which is not the case here. On the authority of the Supreme Court's decision in Modern Holdings (EA) Limited vs. Kenya Ports Authority [2020] eKLR in which the Court dealt with an identical issue and overruled a similar objection, counsel submitted that the ground of appeal in this regard is without merit.

28. Learned counsel drew the Court's attention to the impugned judgment where the learned Judge observed that:

> (11). What is in dispute is the legality of the 1st defendant's notice to increase rent, issued on 30 September 2011, increasing the rent to the sum of Kshs. 10,200,000/= per annum. The basis for the increase is hinged on Clause 2 (a) of the lease agreement dated 16 January 1980 entered into between the plaintiff's predecessor in title and the 1st defendant. It is agreed that it is the said lease that governs the relationship of the parties herein."

29. On the authority of Ephraim Miano Thamani vs. Nancy Wanjiru Wangai & 2 others [2022] eKLR, counsel urged the Court not to shy off from taking action to "get rid" of proceedings that, in their view, "... are clearly an abuse of the court process". In addition, counsel cited the cases of Peter Nzioka Mani & another vs. Kenya Railways Corporation [2012] eKLR; Ali Yislam Hariz vs. Kenya Railways Corporation [2012] eKLR; and Modern Holdings (EA) Limited vs. Kenya Ports Authority [2020] eKLR, submitting that section 83 of the Act does not oust the court's jurisdiction on matters that are not covered by section 13 of the Act.

30. To our mind, section 83(1) of the Act addresses itself to compensation for damage suffered as a consequence of the failure to discharge of its functions as set out in section 13 of the Act and, failing agreement of the parties, reference to to alternative dispute resolution mechanisms to wit negotiation or, as a last resort, arbitration. The section provides that:

> 83. Compensation
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> 1. In the exercise of the powers conferred by sections 13, 15, 16 and 17, the Corporation shall do as little damage as possible, and where any person suffers damage no action or suit shall lie but he shall be entitled to such compensation therefor as may be agreed

between him and the Corporation or in default of agreement, as may be determined by a single arbitrator appointed by the Chief Justice.

2. Nothing in this section shall be construed as entitling any person to compensation—

a. for any damage suffered unless he would have been entitled thereto otherwise than under the provisions of this section; or

b. for any damage suffered as a result of the user of any works authorized under this Act unless such damage results from negligence in such user.

31. In [2012] eKLR, Tuiyott, J. (as he then was) considered the applicability of section 83(1) of the Act in a dispute relating to revision of annual rent pursuant to a lease agreement and correctly held that:

> "(11) ... This Court reads this provision as applying to claims for compensation by persons who have suffered damage caused by the Corporation in exercise of its statutory powers. The proceedings before this Court are not about compensation. The claim by the Plaintiff is that the revision of annual rent made by the Defendant is unlawful and any increase of rent must be done only in accordance with the lease agreement of 10th September 1987. This Court doubts that Section 83 was intended to cover claims of this nature.
>
> (12) I would also think that the damage referred to in Section 83 is physical damage that the Corporation may cause to third parties in the exercise of its statutory duties or functions. I say so because although Section 13 of the Act is on the General Powers of the Corporation Sections 15, 16 and 17 (which are also cited in Section 83) are in respect of physical tasks that may be undertaken by the Corporation. That is why the Section enjoins the Corporation, when exercising its powers, to 'do as little damage as possible.' The Plaintiffs claim here is not about any physical damage. I do not find merit in that objection."

32. In the same vein, in Peter Nzioka Mani & Another vs. Kenya Railways Corporation [2012] eKLR, Mwera, J. correctly held that:

> "... actions contemplated in section 83 (1) are those limited to compensation for damage suffered. That could be through negligence or other forms of tort like trespass, nuisance or even breach of contract. Here the plaintiffs are up in arms with the intended revision of rents. They think it is unwarranted and so should be restrained by way of injunction. An injunction can only issue from a court or duly established tribunal or adjudicatory body with powers to issue such. So they can come to this court with such an action to seek remedy and that is what is set out in prayer (b) in the plaint, besides others. Agreement or an arbitrator cannot avail such a remedy." [Emphasis ours]

33. Considering the intent of section 33 of the *Kenya Airports Authority Act*, which mirrors the provisions of section 83 of the *Kenya Railways Corporation Act*, Mabeya, J. had this to say in World Duty Free Company Limited v Kenya Airports Authority [2012] eKLR:

> "In my view therefore, Section 33 does not apply to all or every dispute under Section 12, 14, 15 and 16 of the Act. In order for that Section to apply, such a dispute must arise as a result of the following:-
>
> i. the Authority exercising its powers under Sections 12, 14, 15 and 16 of the Act,

ii. a person suffers damage as a result of such exercise of power, and

iii. that dispute be for compensation.

... .

Indeed if this Court were to seek further assistance in trying to decipher the intention of Parliament, it may look at the marginal notes. Close look at the Section would reveal that the marginal notes reads "compensation". It is not in dispute in my view, that a court can use the marginal notes if necessary in construing a section of a statute."

34. Dealing with the corresponding section of the *Kenya Ports Authority Act*, the Court of Appeal in Kenya Ports Authority v African Line Transport Co. Ltd [2014] eKLR made the following observations regarding section 62(1) of the Kenya Ports Authority Act which mirrors section 83(1) of the *Kenya Railways Corporation Act*:

> "(48) .... In this regard, we can do no more than adopt what this court (differently constituted) said in Kenya Ports Authority v Kustron (Kenya) Limited Civil Appeal No. 315 of 2005 (unreported):
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> > We agree with Mr. Gachuhi, the learned counsel for the appellant that the provision of section 62 touches on the jurisdiction of the superior court and that the parties could not in the face of the Act providing for compulsory statutory arbitration, contract out of a statute and bring the suit instead. The Court's jurisdiction had been ousted by statute and the parties could not confer jurisdiction on the superior Court. There cannot be any waiver just because both parties took part in the suit. Parties cannot as a matter of public policy be allowed to circumvent a statute and once an illegality always an illegality (see cases of Allarakhai v Aga Khan [1969] EA 613 and Mayers & Another v Akira Ranch Ltd (2) [1972] EA 347).'"

35. In Kenya Ports Authority v Modern Holdings [E.A] Limited [2017] eKLR, this Court also held as follows with regard to section 62 of the *Kenya Ports Authority Act*:

> "From its plain and unambiguous language, courts have consistently and unanimously construed section 62 aforesaid, in a long line of cases to deny the court's jurisdiction, in the first instance to entertain any dispute arising from the breach of any of the appellant's powers. We were referred to cases such as, Kenya Ports Authority V Kuston (Kenya) Limited (supra), Kenya Ports Authority V African Line Transport Company Limited (supra) decisions of this Court and *Multi-serve Oasis Company Limited V Kenya Ports Authority, Civil Suit No.252 of 2010*, and Threeways Shipping Services (K) Limited V Kenya Ports Authority (supra), decisions of the High Court....
>
> It is, in our respectful view, a misapprehension of the law to argue that, to the extent that section 62 provides that, "where any person suffers damage, no action or suit shall lie", that that section is inconsistent with *the Constitution* for limiting the right to access to justice. The provision does not at all oust the jurisdiction of the court but merely limits and postpones

it in the first instance. By Article 165 (3) (e) and (6) the High Court retains both appellate supervisory jurisdiction."

36. To our mind, the disputed increment of rent in respect of the appellant's property in issue cannot be reasonably construed as falling within the scope of the 1st appellant's discharge of its statutory functions pursuant to which it may exercise general powers under the Act. Neither do we consider the disputed increment of rent as to constitute "damage" within the meaning of section 83(1) of the Act, and in respect of which the 1st appellant and the respondent would have been enjoined to reach agreement on compensation or, otherwise, refer the dispute to arbitration pursuant to section 83(1) of the Act.

37. The Oxford Languages Dictionary defines "damage" as "physical harm that impairs the value, usefulness or normal function of something." The word denotes, inter alia, harm, injury, ruin, destruction, erosion or attrition. On the other hand, "damage" is defined in legal terms in the FindLaw Dictionary of Legal Terms as "loss or harm resulting from injury to person, property, or reputation."

38. In our considered view, the nature of damage contemplated in section 83(1) of the Act has its locale in the realm of liability in tort to which the disputed rent review in issue has no relation. Considering the contractual nature of the dispute in the instant case, and the orders sought in the trial court, we find that the learned Judge was by no means at fault in dismissing the 1st appellant's preliminary objection and in finding, as we do, that he had jurisdiction to hear and determine the dispute.

39. Turning to the 2nd issue as to whether there was evidence that the 1st appellant increased the annual rent on 1st January 1994, the appellants' case was that the learned Judge erred in fact in finding that the 1st appellant increased the annual rent on 1st January 1994 from the sum of Kshs. 22,000 to Kshs. 146,000 without any or any sufficient evidence on record to prove the alleged increment with effect from that date; that the respondent failed to discharge the evidential burden imposed by section 107(1) of the *Evidence Act*, which stipulates that he who alleges must prove; that the evidence adduced by the respondent was inconsistent, and which the learned Judge failed to appreciate; that the respondent's witness testified to the fact that the 1st appellant increased rent with effect from 1997; that the respondent produced a copy of an invoice dated 22nd August 1997 as the only evidence to prove the allegation that the rent was increased in 1994; and that the learned Judge acknowledged the inconsistencies in the evidence and oral testimony.

40. On the authority of Mbuthia Macharia vs. Annah Mutua Ndwiga & another [2017] eKLR, counsel submitted that, in respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is essential to his case. Citing the decision in Margaret Wanjiru Ndirangu & 4 others vs. Attorney General [2020] eKLR, counsel highlighted the principle that "he who asserts/alleges must prove" to the effect that, if the party seeking judgment in a suit fails to avail evidence, or to avail evidence to the required standard, then such a party would fail to obtain judgment. According to counsel, the respondent had failed to prove the allegations relating to the date on which the 1st appellant revised the rent and, accordingly, it was not entitled to judgment as prayed.

41. Counsel submitted further that, at the trial, the respondent produced in evidence a Statutory Notice to sue dated 22nd May 2012, which stated that, by a letter dated 30th September 2011, the 1st appellant purported to unilaterally increase rent from the sum of Kshs. 22,000 to Kshs. 10,200,000 with effect from 1st January 2012; and that the said statutory notice was inconsistent with the pleading in the plaint where the respondent averred that, by a letter dated 30th September 2011, the 1st appellant purported to unilaterally increase the annual rent from Kshs. 146,000 to the sum of Kshs. 10,200,000.

42. On the authority of CMC Aviation Ltd vs. Crusair Ltd (No. 1) [1987] KLR 103, counsel urged us to disregard the respondent's evidence, submitting that, until pleadings are proved or disproved, they

are not evidence, and no decision could be founded on them. To buttress the appellants' case, counsel relied on the case of Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 others [2014] eKLR, highlighting the immutable principle that parties are bound by their pleadings, and that any evidence led by any of the parties which does not support the averments in the pleadings, or which is at variance with the averments in such pleadings, goes to no issue, and must be disregarded.

43. On their part, learned counsel for the respondent cited the cases of Raghbir Singh Chatte vs. National Bank of Kenya Limited [1996] eKLR for the proposition that a defendant must specifically traverse each allegation of fact, and that failure to do so means that the allegation is admitted; and Synergy Industrial Credit Limited vs. Oxyplus International Limited & 2 others [2021] eKLR, arguing that no evidence is required to prove an admitted fact.**

44. According to counsel, the respondent pleaded at paragraph 9 of the plaint that the 1st appellant increased the annual rent of the suit property from Kshs. 22,000 to 146,000 on or about 1st January 1994; that, in the 1st appellant's statement of defence, there was no denial of the averment at paragraph 9 of the plaint; that the net effect is that paragraph 9 of the plaint was deemed to have been admitted; and that, therefore, the respondent did not need to present evidence to prove an admitted fact. Accordingly, the court was not required to look into evidence to be satisfied that the admitted fact had been proved.

45. Counsel submitted further that, even if such evidence was required, the appellant's witness testified that there was "a revision of rent in 1997" and testified that, before the contested increase in 2012, the previous rent was Kshs. 146,000 per annum; and that, logically, the witnesses could only talk of three different rents if there had been an increase in 1980 when the lease commenced and in 2012 when the contested review was undertaken. In conclusion, counsel urged us to find that, on a balance of probabilities, the scales tilted however narrowly in favour of the respondent on the evidence as presented before the learned Judge.

46. Finding for the appellants, the learned Judge observed that:

> "18. It is apparent that there was an increase in rent from Kshs. 22,000/= to Kshs. 146,000/=. In the plaint, at paragraph 9, it is pleaded that this increase took effect from 1 January 1994. I have perused the defence and the contents of paragraph 9 are not denied. There is however variance between this pleading in paragraph 9 of the plaint and the evidence of the plaintiff's [respondent's] witness, who in his statement, stated that the increase in rent was 'with effect from the year 1997 or thereabouts.' The only evidence tendered on this increase of rent was an invoice of January 1997, which provides as part of its particulars, that the annual rent for the suit property is Kshs. 146,000/=. The 1st defendant did not adduce any evidence on when the rent increase to Kshs. 146,000/= took place. It only acknowledged that the last rent before the proposed increment in the letter of 30 September 2011 was the sum of Kshs. 146,000/=. In this instance, since the plaintiff stands to benefit from time, I will proceed to bind it to its pleadings, which is that the rent was last increased on 1 January 1994."

47. Order 2 rule 11(3) of the Civil Procedure Rules, 2010 lays down the general principle that governs admissions and denials in pleadings and provides that:

> 11. Admissions and denials [Order 2, rule 11]
>
> ... ...

3. Subject to subrule (4), every allegation of fact made in a plaint or counterclaim which the party on whom it is served does not intend to admit shall be specifically traversed by him in his defence or defence to counterclaim; and a general denial of such allegations, or a general statement of non-admission of them, shall not be a sufficient traverse of them.

48. With regard to the rule on tacit admissions and general denials in pleadings, Akiwumi, JA. had this to say in Raghbir Singh Chatte vs. National Bank of Kenya Limited [1996] eKLR:

> " The following comments on the corresponding English rule namely O18 r13, which appear in the Supreme Court Practice 1993, vol. 1 PART 1 p.323 para 18/13/1, also clear[ly] supports [the] view that in a suit for a liquidated demand where the facts are clearly set out in the plaint as in the present appeal, a general denial is of no use and demonstrates not only a reprehensible lack of candidness in defence but also that the defence discloses no reasonable defence:
>
> > " This rule enforces a cardinal principle of the system of pleadings, that every allegation of fact in a statement of claim or in a counterclaim must be traversed specifically, otherwise it is deemed to be admitted. It thus prescribes how the pleader should answer his opponent's pleading, by providing that the penalty for not specifically traversing an allegation of fact is that it will be taken to be admitted, whether this was intended or not. The effect of a traverse, if properly pleaded, is that the party who makes the allegation has to prove it; the effect of an allegation which is treated as admitted is that the party who makes it need not prove it.
> >
> > The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him.'" [Emphasis added]

49. Under and by virtue of Order 2 rule 11(3), the fact that the 1st appellant did not specifically traverse the pleading made in paragraph 9 of the plaint may be viewed as an admission, which did not require the respondent to prove the allegation that the rent was increased on 1st January 1997. However, there is more to the matter than the presumption of admission albeit tacitly.

50. In addition to the 1st appellant's failure or neglect to specifically traverse the allegation, the appellants' witness testified that, before the notice to raise the rent was issued by the 1st appellant on 30th September 2011, the previous rent stood at Kshs. 146,000. Be that as it may, no further evidence was led by the appellants to ascertain the exact date on which the annual rent was raised from the original sum of Kshs. 22,000 to Kshs. 146,000. In the absence of clear evidence from the 1st appellant as to the date of the first rent increment aforesaid, the learned Judge was by no means at fault in concluding that the rent was revised on 1st January 1994 as pleaded in the plaint.

51. Having so found, the only other question falling to be determined was as to whether the revision in 1994 was valid under the lease agreement; and, if the answer was in the affirmative, whether the revision complained of conferred upon the respondent any right of claim in the suit to justify the impugned judgment in that regard. In our considered view, the cause of action (if any) accruing to the

respondent's benefit was invariably subject to the period of limitation within which any related claim should have been raised. However, no such claim was raised within the six (6) years period of limitation prescribed under section 4(1) of the Limitation of Action Act, Cap. 22. In any event, the only relevant issue raised by the parties on appeal to this court in that regard was whether there was a rent increment in 1994 and, if so, whether the increment was conditional to variation of the terms of the lease with regard to the contractual date on which the increment was scheduled to be undertaken.

52. Premised on the strict terms of the lease agreement, the learned Judge concluded that rent could be increased only after the lapse of 30 years; and that the right to increase rent accrues on the 30th year from the date of the agreement, but that it could be exercised any time thereafter. The facts, as the learned judge correctly found, were that there had been a rent increment on 1st January 1994, which was evidently not undertaken strictly under the terms of the lease. However, it is instructive that the respondent did not challenge the 1994 increment in issue, which may presumably have been conceded as a valid exercise of the 1st appellant's right to increase rent in accord with the then prevailing unimproved value of the suit property.

53. We also take to mind the fact that no evidence was tabled to demonstrate that the early revision of the annual rent by the 1st appellant on 1st January 1994 was accepted on condition that the next revision would be on expiration of 30 years from that date, that is, 1st January 2024. In the circumstances, the only reasonable interpretation of the early rent revision outside the terms of the lease agreement is that the 1st appellant proposed to increase the rent to reflect the value of the property as at 1st January 1994, which the respondent did not resist; and that the unconditional revision did not have any impact on the scheduled revision on the 30th anniversary of the lease coming to effect as agreed in Clause 2(a) of the lease agreement. In our considered view, the effect of the respondent's failure or neglect to resist the early rent revision and its continued payment of the revised rent was that the respondent had elected to acquiesce to or affirm the lease agreement despite the unscheduled revision; and that the lease agreement remained in force with all rights and obligations binding on the parties. Consequently, the respondent's suit filed 17 years later to belatedly challenge the 1st appellant's letter dated 30th September 2011 notifying its intention to revise rent pursuant to clause 2(a) of the lease agreement was statute barred and could not found any claim for refund.

54. On the 3rd issue as to whether the review/increment of rent on 1st January 2012 was valid under the lease agreement, learned counsel for the appellants submitted that: the learned Judge erred in failing to find that the review/increment of rent on 1st January 2012 was a valid increment under the lease agreement; that the 1st appellant had a right to increase rent under Clause 2(a) of the lease agreement dated 16th January 1980, as the right to increase rent after a period of 30 years had already accrued by 30th September 2011 when the 1st appellant issued the increment notice; that the recital clause of the lease agreement indicated that the lease was to take effect from 1st January 1977, but that the agreement was executed on 16th January 1980; that the right to increase annual rent accrued on 1st January 2007; that, counting from the date of execution, the right accrued on 16th January 2010; that, by whichever formula, the 30 years had lapsed.

55. According to counsel, the learned Judge was correct in holding that the 1st appellant could increase the rent at any time after the lapse of 30 years; and that, based on the evidence on record, the rent increase by the 1st appellant on 30th September 2011 was the first time the 1st appellant had exercised its right under the lease agreement.

56. On their part, learned Counsel for the respondent submitted that the learned Judge started from the premise that rent could be increased only after the lapse of 30 years; and that the right to increase rent accrues on the 30th year, but that it could be exercised any time thereafter. Counsel submitted that it

was the learned Judge's finding that there had been a rent increment on 1st January 1994, which was not supported by the lease; that the respondent had not challenged the increment; and that it had to be accepted as a valid exercise of the 1st appellant's right to increase rent.

57. Turning to the impugned judgment on the consequences of the 1994 increment, the learned Judge had this to say:

> 11. What is in dispute is the legality of the 1st defendant's notice to increase rent, issued on 30 September 2011, increasing the rent to the sum of Kshs. 10,200,000/= per annum. The basis for the increase is hinged on Clause 2 (a) of the lease agreement dated 16 January 1980 entered into between the plaintiff's predecessor in title and the 1st defendant.
>
> 12. .... I need not torture my mind on the interpretation. It simply means that once thirty years lapse, there is a right to increase rent. Period.
>
> 13. .... My view is that contracts start running from the date of execution, and unless it was made clear that the 30 years start running from 1 January 1977, then in my opinion, the 30 years will need to commence from the date the contract was signed, which is 16 January 1980 .... Being of the above view, 30 years started running from 16 January 1980. The correct date for review would thus be 16 January 2010 or after.
>
> 14. .... Once 30 years lapsed, the lessee had to prepare himself for the possibility of an increase in rent. If the lessor chose to wait for some time before increasing the rent, that would be well and good, but the right would still remain active and would not be considered as extinguished ....
>
> 15. The next issue is, what happens if the rent is increased before the lapse of 30 years. The lease does not contemplate an increase before lapse of 30 years, but if the lessor increases the rent, and there is no complaint raised, then it has to be considered that the lessee has waived his right to contest the new rent, and that this is now the rent that is payable. It would of course be a breach of the lease agreement, but as in all other contracts, the right to contest a breach has a limitation period. The general limitation period in contracts is 6 years. If no issue was raised within the 6 years, then it would have to be considered that the lessee has acquiesced to this new rent and this is what is payable .... The effect is that a new term of 30 years will start running immediately there is an increase in rent which is not contested by the lessee. This is because the right to increase rent kicks in only after expiry of 30 years and not before. If the lessor chose to increase rent early, then he has to wait until the lapse of the 30 years of such increase. He cannot now turn back the clock so that time starts running before the date of such increase, otherwise the effect will be that he is increasing rent more than once in 30 years. The intention of the parties is that rent be increased after 30 years lapse and not before.
>
> 18. .... From my earlier analysis, the right to revise rent would be 30 years from the last increment, and that in our case, will be 30 years from January 1994, which will be January 2024. The lessor therefore had no right to demand for an increment in rent in the year 2011 for 30 years had not lapsed since its last increment."

58. In our considered view, the learned Judge misconstrued the provision of clause 2(a) of the lease agreement in reaching his conclusion in the afore-cited paragraphs 15 and 18 of the impugned judgment. Clause 2(a) reads:

> "That the Lessor shall have the right at the expiration of each period of thirty years to raise the annual rent to a figure equivalent to one-twentieth part of the unimproved value of the land at the date of such revision."

59. Halsbury's Laws of England (4th Edn, 2006 Reissue) Vol. 27(1), para 294 provides as follows with regard to the review date in rent review clauses:

> " The review date, that is to say the date with effect from which the new rent is to run, may be specified by reference to the expiry of a specified year of the term which will normally be computed by reference to the date from which the term is expressed to run rather than the date of grant."

60. On the one hand, the learned Judge was cognizant of the effect of clause 2(a) of the lease agreement to the effect that rent was revisable every 30 years with effect from the date on which the lease was executed to wit 16th January 1980; that the ensuing revision would have been on 16th January 2010; and that the revision in 1994 remained unchallenged, and that, as at the date of filing suit, any challenge in that regard was barred by the statute of limitation as prescribed in section 4(1) of the *Limitation of Actions Act*, Cap. 22.

61. Section 4(1) of Cap. 22 provides:

> 4. Actions of contract and tort and certain other actions
>
> 1. The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
>
> a. actions founded on contract;
>
> b. actions to enforce a recognizance;
>
> c. actions to enforce an award;
>
> d. actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
>
> e. actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

62. In Divecon vs. Samani [1995-1998] 1 EA 48, this Court held

that:

> " ... to us, the meaning of the wording of section 4(1) ... ...is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action ...."

63. We find it necessary to pronounce ourselves on the period of limitation in view of the respondent's attempt to enforce recovery of sums allegedly due on account of belated revision even though, as we will shortly see, such sums were neither pleaded nor proved.

64. With regard to the effect of the impugned revision, it is also instructive that the revision in 1994 was not conditional to rescheduling the timelines for revision under the lease agreement. Yet, the learned Judge concluded that the rent revision on 1st January 1994 had the effect of varying the application of clause 2(a) of the lease agreement so as to reschedule the next revision date to 1st January 2024.

65. We find no evidence on record to suggest that the 1st appellant and the respondent mutually varied the terms of clause 2(a) of the lease agreement to reschedule the next date of rent revision to 1st January 2024. Moreover, the lease agreement did not specify the date to be relied on as a reference in computing the date at which the 1st appellant's right to revise the rent accrued and, therefore, the date that ought to be relied on is the date from which the term of the lease commenced, namely 1st January 1977. Accordingly, the first review date contemplated in clause 2(a) of the lease agreement would have been 1st January 2007 were it not that the lease agreement was formally executed on 16th January 1980. Be that as it may, the 1st appellant does not take issue with the conclusion that the due date would have been 16th January 2010, 30 years from the date the lease was executed.

66. As rightly observed by the learned Judge, the respondent apparently acquiesced to the early rent revision and effectively waived its right to contest the new rent when it duly paid Kshs. 146,000 in settlement of invoices raised by the 1st appellant. As already observed, the respondent did not raise any issue or lodge any claim against that increment within the 6-year limitation period prescribed under Cap. 22. It is also noteworthy that the lease agreement is silent on the effect of a revision of the rent before the lapse of 30 years stipulated in clause 2(a) and, specifically, whether such an early revision would vary the due date contemplated under the lease to be relied on in computing the review date after 30 years pursuant to clause 2(a).

67. In Bernstein R and Reynolds K Essentials of Rent Review (Sweet & Maxwell in collaboration with the Royal Institution of Chartered Surveyors 1995) at p.38-39, the learned authors observe that:

> " The general purpose of a provision for rent review is to enable the landlord to obtain, from time-to-time, the market rental which the premises would command if let on the same terms in the open market at the review dates. Thereby the rent will be adjusted from time to time to reflect the changes in the value of money and real increases in the value of the property during a long term.... Again, there may be special surrounding circumstances which indicate that the parties did intend to reach... an unusual bargain. But in the absence of such clear words or surrounding circumstances the lease should be interpreted so as to give effect to the basic purpose of a rent review clause.
>
> This is an application to the particular nature of rent review of the words of Lord Diplock in The Antaios:
>
> > If a detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.'"

68. To our mind, if the early rent revision in 1994 was intended to vary the terms of the lease agreement, nothing would have been easier than to expressly say so, and nothing stood in the parties' way to amend the lease agreement to reflect such a term that, in our view, would have been fundamental and consequential to the tenancy relationship with regard to the rent charged and revised from time to time.

69. In the circumstances, it would only be reasonable to conclude that the parties' intention was not that an early rent revision would give rise to a fresh term of 30 years before the 1st appellant could review the rent again; but that their intention was to give the 1st appellant an unimpeded right to revise the annual rent after the 30th and 60th anniversaries of the 81-year lease term with effect from the date of execution of the lease agreement. Moreover, the modalities and consequences of rent revision in between these anniversaries were not contemplated by the parties, which explains the absence of any provision in the lease in that regard.

70. We form this view cognisant of the principle expressed in Nakumatt Holdings Limited vs. Junction Limited [2017] eKLR, namely that the interpretation of contracts requires the court to give words their original meaning and a construction that yields to business common sense.

71. In view of the foregoing, the learned Judge's findings amounted to re-writing the contract between the parties against the grain of the principle that parties are bound by the terms of their contract as was enunciated in National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & another [2001] eKLR where this Court held that:

> " A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

72. Be that as it may, the learned Judge was correct in holding, as we do, that barring an express term in the agreement, the respondent would have had had every right to contest the 1st appellant's valuation and revision of the rent in 1994. But, its apparent acquiescence by the absence of any attempt to vary the lease agreement with regard to the contractual timelines for revision of rent on the two anniversaries aforesaid remained undisturbed. It follows therefore that the 1st appellant had the right to revise the rent on any date after 1st January 2007 on the 30th anniversary of the term of lease; and that the rent review notice dated 30th September 2011 was valid to the extent that the 1st appellant was invoking its contractual right to review the annual rent.

73. The respondent contended further that the purported rent increase with effect from 1st January 2012 was based on the unimproved site value of the suit property as at the year 2011 and not the year 2007 which, in its view, was highly prejudicial. We hold a contrary view. The revision was not in breach of the lease agreement.

74. With regard to the valuation date in rent review clauses, Halsbury's Laws of England (4th Edn, 2006 Reissue) Vol. 27(1), para 294 provides as follows:

> " The valuation date, that is to say the date by reference to which the reviewed rent is to be determined, is normally the same as the review date and the court will lean in favour of such a construction; but the court will give effect to a specific direction that the valuation date is to be a different date.
>
> Where the revised rent has not been determined by the date from which it has been stipulated that it is to be paid, the lease often provides expressly for payment of rent at the previous rate until the new rent has been agreed or determined, and then for payment of the shortfall in relation to the period from the review date until the date of determination of the new rate of rent. Even if the lease does not expressly so provide, in the absence of a clear stipulation to the contrary, the new rent, when determined, will be payable retrospectively as from the rent review date."

75. According to the lease agreement, the valuation was to be done with reference to the review/revision date which was 1st January 2007. The appellants' witness testified that the 1st appellant's valuers conducted a valuation in 2010 and prepared a valuation report as at 30th September 2010. Following this valuation, the 1st appellant issued to the respondent the revision notice dated 30th September 2011, which indicated that:

> "Valuation of the Unimproved Site/Land Value (U.S.V.) was carried out on the plot by the Lessor's Valuers. A number of lessees in your locality also caused valuation to be done by their Valuers on their plots in response to invitation to do so through a press publication of January 9, 2011 and our subsequent correspondence in February 2011. We then took fair values in each locality to arrive at rates per square foot to be applied for each plot."

76. It is common ground that the revised rent was based on the unimproved site value of the suit property as at 30th September 2010 instead of the scheduled valuation date of 1st January 2007; that the revised rent demanded by the 1st appellant was computed on the basis of the unimproved site value of the suit property almost three years later than it should have been; and that the belated revision was allegedly prejudicial to the respondent. Having concluded that the revision of rent with effect from 1st January 2012 was not in breach of the express terms of the lease agreement, we now turn to the 4th issue as to whether the respondent specifically pleaded or strictly proved the claim for the alleged unjust enrichment and/or liquidated damages in the form of a refund for rent paid on account of the variation.

77. In this regard, learned counsel for the 1st appellant submitted that the learned Judge erred in failing to appreciate that the respondent had not pleaded and/ or strictly proved the claim for unjust enrichment and/ or liquidated damages in the form of a refund for rent received; that the plaint did not plead any claim for unjust enrichment and/ or any prayer for a refund of the rent paid by the respondent to the 1st appellant; that the learned Judge failed to appreciate that he was bound by the pleadings, and that he adjudicated upon an un-pleaded issue of unjust enrichment and made an order for refund, which had not been sought in the plaint; that the learned Judge entered the realm of speculation and, consequently, denied the appellant a fair hearing by making findings and orders on matters not pleaded; that the respondent had made an application dated 28th April 2020 admitting that the plaint did not contain a prayer for refund; and that the respondent's application for leave to amend the plaint to introduce a prayer for refund was determined vide a ruling delivered on 24th July 2020 in which the learned Judge acknowledged that refund of rent was not pleaded and, therefore, not in issue in the suit, and that the respondent could always sue for a refund of what it had paid in excess if it succeeded in the suit.

78. In conclusion, counsel submitted that, in any event, the respondent had not adduced any evidence to prove unjust enrichment, or that it was entitled to a refund of the rent paid. According to counsel, the respondent failed to prove the amount of rent it was purportedly entitled to be refunded by the 1st appellant.

79. On their part, learned counsel for the respondent submitted that the learned Judge quantified the amount to be refunded when he found that the 1st appellant had been demanding Kshs. 10,200,000 annually when it ought to have been receiving Kshs. 146,000 annually; that the learned Judge directed the 1st appellant to refund all sums paid which exceed the amount of Kshs. 146,000 per year; that the learned Judge was not required to tell the parties that the figure is to be arrived at by subtracting what was lawfully payable from what had been unlawfully received; and that the learned Judge expressly found wrongdoing on the part of the 1st appellant and found that the 1st appellant had breached the

contract by increasing rent when it had no right to do so. According to counsel, the other reason for granting the relief is that the demand by the 1st appellant was done in violation of a court order issued by consent on 12th July 2012.

80. With regard to the pleading or prayer for refund, counsel contended that the respondent sought "Any other or further relief that the Honourable Court may deem fit to award," and that a refund could be ordered under that head if it was a natural consequence of the main reliefs granted. Counsel argued that it would be farcical use of judicial resources to tell the respondent to pursue a secondary civil action to recover monies paid pursuant to an action which has been adjudged to be legally infirm in the primary suit; and that, in ordering refund, the trial court based its reasoning on the equitable doctrine of unjust enrichment.

81. In the words of the learned Judge-

> " 19. That should be the end of the matter but it is apparent that the 1st defendant has been demanding the sum of Kshs. 10,200,000/= from the plaintiff and the plaintiff is paying this sum, clearly under coercion. This demand for the sum of Kshs. 10,200,000/= is to me illegal and in breach of the order of this court issued on 14 March 2013 which order was in fact issued pursuant to a consent between the plaintiff and the 1st defendant. That order is to the effect that pending the hearing and determination of the suit, the plaintiff would pay the undisputed contractual rent, and in addition, the 1st defendant was barred from recovering the disputed annual rent. Now, I wonder why, despite the clear terms of the said orders, the 1st defendant continued to demand the sum of Kshs. 10,200,000/= from the plaintiff. There is clearly an unjust enrichment which I am unable to close my eyes to. I will use my wide discretion to order the 1st defendant to refund to the plaintiff all sums paid which exceed the annual amount of Kshs. 146,000/= per year. That sum must be refunded forthwith and each instalment paid will attract interest from the time that it was paid at court rates until settlement in full."

82. This decision raised the closely related issue as to whether the learned Judge erred in failing to quantify the amount to be refunded to the respondent, and in failing to award interest thereon. Learned counsel for the appellants faulted the learned Judge for failing to quantify the amount to be refunded by the 1st appellant to the respondent, and for failing to award interest thereon from either the date of filing suit or of the impugned judgment; and for delegating the judicial function of determining the quantum of the sums awarded for refund to the parties, their advocates and/ or the deputy registrar.

83. In this regard, counsel cited the case of Kenya Revenue Authority vs. Menginya Salim Murgani [2010] eKLR for the proposition that the award and the determination of the quantum of damages is a judicial function, which cannot be delegated; and that a judgment must be complete and conclusive when pronounced, and cannot be left to the Deputy Registrar to perfect. According to counsel, the learned Judge acted contrary to the principle that the duty to determine quantum of damages rested squarely upon the Court. In conclusion, counsel submitted that the net effect was that the judgment was incomplete and/or inconclusive.

84. In reply, learned Counsel for the respondent submitted that the learned Judge specifically held that "each instalment paid will attract interest from the time that it was paid at court rates until settlement in full," and that the learned Judge exercised his discretion judiciously in this regard; that, as for quantum, the learned Judge, in exercise of his judicial function, gave a specific formula to be applied by the parties

in determining quantum; that it does not follow that, because some figures have to be computed by the parties, then the judge has shirked his judicial function; that in all suits seeking pecuniary relief, the judicial officer only awards the principal and interest, and that the computation of the exact sum payable is left to the parties; and that, if there was to be any dispute on the amount due after applying the judicially ordained formula, that is a dispute which the court deals with under Section 34 of the *Civil Procedure Act*, Cap. 21.

85. To buttress their contention, counsel cited the cases of Amina Abdul Kadir Hawa vs. Rabinder Nath Anand & another [2012] eKLR; and M/s Adhunik Power & Natural Resources Limited vs. Central Coalfields Limited & 2 others 2018 (1) AJR 39 for the proposition that an order for refund could be made as a consequential relief even if not pleaded, provided that it flows directly from the main relief.

86. Counsel submitted further that the sums sought to be recovered constituted unjust enrichment, which the trial court was obligated to redress. Counsel cited the cases of Judicial Service Commission vs. Speaker of the National Assembly & another [2013] eKLR for the proposition that any action done in violation of a contract is a nullity and is set aside as of right; Patrick Kimutai Kiprono vs. Erick Kipkurgat Kiprono [2019] eKLR for the proposition that the courts of equity are bound to provide a remedy for what the law would consider to be unjust enrichment; and Chase International Investment Corporation & Another v Laxman Keshra & 3 others [1978] eKLR, highlighting the principle of unjust enrichment, which presupposes three things: first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff's expense; and, thirdly, that it would be unjust to allow him to retain the benefit.

87. To our mind, these submissions count for little in the absence of specific pleadings and strict proof of the sums sought to be recovered. It is evident from its pleadings that the respondent did not specifically plead, pray for or strictly prove the quantifiable loss allegedly suffered on account thereof but, instead, sought declaratory orders that the rent revision on 1st January 2012 was invalid, a declaration that does not avail for the foregoing reasons. Notwithstanding the glaring formal and procedural infraction, the respondent left it to the trial court to quantify the amount considered as recoverable on the basis of the declaratory orders sought, and the recovery of which it sought to enforce by way of garnishee proceedings in contravention of statute law as aforesaid.

88. We need not overemphasise the fact that the exact amounts allegedly paid on account of revised rent in excess of the previous sum charged at Kshs. 146,000 were not specifically pleaded or strictly proved. Indeed, there was no prayer for a refund in the plaint and, therefore, the trial court had no jurisdiction to sanction recovery of such unquantified sums in the nature of special damages or otherwise falling outside the realm of general damages.

89. Drawing a clear distinction between special and general damages in Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] eKLR, this Court held that:

> " The law on damages stipulates various types of damages.
>
> The distinction between general damages and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded. (See Chitty on Contracts 26 edition para 1772 at p117 et seq.)"

90. In Herbert Hahn vs. Amrik Singh [1985] eKLR, this Court held that:

> "... the next two grounds of the memorandum concern special damages which must be not only claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves."

91. On the afore-cited authorities, the respondent's attempt to recover sums allegedly due on account of rent review on a date other than the contractual review date fails. Moreover, the amounts sought to be recovered by way of garnishee proceedings in contravention of statute law were not prayed for, and neither were they specifically pleaded or strictly proved. Neither did the respondent apply for an account to determine what sum, if any, was recoverable under the lease agreement. Consequently, the appeal succeeds on this score.

92. Turning to the single issue raised by the 1st appellant in Civil Appeal No. 035 of 2023 against the trial court's orders made in determination of its preliminary objection to garnishee proceedings, namely whether the 1st appellant was liable to execution by attachment of its assets or of its bank deposits by way of garnishee proceedings as was the case here, learned Counsel for the appellants, M/s. Ndgewa Muthama & Katisya Associates, filed written submissions, a list and bundle of authorities dated 17th May 2024 urging that execution cannot issue against the government or State corporation.

93. In support of the appeal, counsel cited the cases of Hezron Ossorey Jura vs. Kenya Railways Corporation & another (supra); and Ernest Morara Mokua vs. Kenya .Railway Corporation [2022] eKLR where the High Court cited lack of jurisdiction in view of provisions of Section 88(a) of the Act and struck out a garnishee application seeking to attach funds of the Corporation held in a bank account and set aside the warrants of attachment; Five Star Agencies Limited & another vs. National Land Commission & 2 others [2024] KECA 439 (KLR) for the proposition that, under the provisions of the provisions of Order 23 rule 1 as read with Order 29 Rule (2) (c) of the Civil Procedure Rules, 2010, execution under the Civil Procedure Rules (including garnishee proceedings) is barred in so far as the Government is concerned, and that the procedure with regard to execution of decrees against the Government is stipulated in the *Government Proceedings Act*; Anthony vs. Communications Authority of Kenya & 3 others [2022] KELRC 1117 (KLR) for the proposition that a body corporate established under an Act of Parliament is a State corporation within the meaning of that Act, and that all State Corporations have national outreach by nature and design, and fall squarely under the auspices of the National Government; and Kenya Revenue Authority vs. Menginya Salim Murgani [2010] eKLR for the proposition that the award and the determination of quantum of damages is a judicial function, which cannot be delegated, and that a judgment must be complete and conclusive when pronounced, and that it cannot be left to the deputy Registrar to perfect.

94. In addition, counsel drew our attention to section 88(a) of the Act, submitting that it expressly prohibits any form of execution/ attachment against the property of the 1st appellant; that, as a matter of law, the court that issued the decree has no jurisdiction to order execution, attachment or any processes of similar nature, including garnishee proceedings, against the 1st appellant and/or its property; that Order 29 Rule (2) (b) and (c) of the Civil Procedure Rules, 2010 expressly bars execution and garnishee proceedings against the government, including the 1st appellant herein; and that the 1st appellant forms part of the government since it is a state corporation established under section 3(1) of the Act. Counsel urged us to allow the appeal and set aside the orders of the trial court dismissing the 1st appellant's preliminary objection to the garnishee proceedings.

95. Opposing the appeal, learned Counsel for the respondent, M/s. Gikandi & Company, filed written submissions, a list and bundle of authorities dated 21st May 2024. Urging us to dismiss the appeal, counsel cited the cases of Fiona Ansett vs. George Odinga Oraro & 3 others [2020] eKLR for the proposition that courts frown upon those who abuse the process of the court; Ikon Prints Media Co. Ltd vs. Kenya National Highways Authority & 2 Others [2015] eKLR for the proposition that it is never, and should never be, the intention of any legislation to place parties in a position where the court's judgment is never realized, and that statutory provisions barring execution against state corporations never intended to have a situation whereby the respective corporation runs away from legal liability; Judicial Service Commission vs. Speaker of National Assembly & 8 Others [2014] eKLR for the proposition that anything done contrary to a court order is void, and must be set aside ex debito justitiae; Chase International Investment Corporation and Another vs. Laxman Keshra and 3 Others [1978] eKLR ; and Mistry Amar Sillgli vs. Kulubya (1964) A.C. 1423 ALL ER 499 for the proposition that, in any civilized system of law, those who unjustly enrich themselves would not be allowed by the law to continue retaining the benefit of such unjust enrichment; Nyakundi & Co Advocates vs. Council of Governors; Cooperative Bank of Kenya Limited (Garnishee) [2023] KEHC 1035 (KLR) for the proposition that parties who have not challenged a decree coming to court on post judgment/ decree applications challenging the execution process on technicalities without indicating how they will satisfy the decree exhibit an attitude that pours scorn on court proceedings, is contemptuous of court orders and renders court judgements paper judgements, and that it is a trend that must be nipped at the bud to restore the true force of court judgements as envisaged in our laws; and the case of Absa Bank Kenya PLC vs. Kenya Deposit Insurance Corporation Milimani High Court Commercial Case No. E411 of 2023 [UR] where the High Court declared both section 13A and section 21 of the *Government Proceedings Act* as being in conflict with Article 48 of *the Constitution*.

96. Counsel contended that the learned Judge rightly held that, in this current day and age, it would go against the grain of Articles 27 & 48 of *the Constitution* to hold that entities, such as the 1st appellant, could be shielded from execution of lawful judgments; that section 88 of the Act ought to be given its ordinary and natural meaning to wit that it does not apply to money lying in the 1st appellant's bank account; that, if the law maker intended to insulate money lying in a bank account in the name of the corporation from being attached, the lawmaker would have said so in very simple terms; that section 88 of the *Kenya Railways Corporation Act* is not superior to sections 1A, 1B and 3A of the *Civil Procedure Act* as read with Article 159 of *the Constitution*; that Articles 10 and 47 of *the Constitution* do not allow the 1st appellant to continue holding onto the money that is obtained from the respondent in breach of court orders; and that the 1st appellant is still clinging onto the said money that belongs to the respondent, who is entitled to demand refunds of such "ill-gotten wealth".

97. With all due respect to counsel and to the learned Judge whose orders are faulted on appeal before us, section 88 of the Act (Cap. 397) is couched in no uncertain terms. That section puts the 1st appellant's assets beyond reach with regard to execution or garnishment in satisfaction of any decree or order of a court of competent jurisdiction, and reads:

> 88. Restriction on execution against property of Corporation Notwithstanding anything to the contrary in any law—
>
> a. where any judgment or order has been obtained against the Corporation, no execution or attachment, or process in the nature thereof, shall be issued against the Corporation or against any immovable property of the Corporation or any of its trains, vehicles, vessels or its other operating equipment, machinery, fixtures or fittings; but the Managing Director shall, without delay, cause to be paid out of the revenue of the

Corporation such amounts as may, by the judgment or order, be awarded against the Corporation to the person entitled thereto;

b. no immovable property of the Corporation or any of its trains, vehicles, vessels or its other operating equipment, machinery, fixtures or fittings shall be seized or taken by any person having by law power to attach or distrain property without the previous written permission of the Managing Director.

98. Pronouncing himself on the effect of section 88 of the Act in Hezron Ossorey Jura vs. Kenya Railways Corporation & another (supra) Muchelule, J. (as he then was) correctly observed that:

> "It is clear the section restricts execution against the Corporation, or against property of the Corporation. In the case of Total (kenya) Limited .v. Kenya Railways Corporation [2004] E.A. 339, the court considered the section in an application where the plaintiff sought to garnish the bank balance of the Kenya Railways Corporation. The question was whether execution by attachment of a debt in the nature of the balance at the Kenya Commercial Bank was proper. It was held that the Corporation's money held in the account at the bank was its 'property' which could not be proceeded against by way of execution. The court followed the decision in Wambugu And Co., Advocates.v. Managing Director Kenya Railways Corporation [2001] Llr 4491 (HCK) and observed that if the managing director has failed to pay the decretal sum the applicant should proceed against him by way of Mandamus to compel him to pay the sum claimed from the amounts of the Corporation." [Emphasis added]

99. Be that as it may, it would be remiss of us not to express our view on the contentious issue as to whether the 1st appellant is a state agency deserving of protection from execution under and by virtue of section 88 of the Act. We hasten to observe that the trial court was enjoined to pay homage to the stipulations of the Act notwithstanding the consequent delay occasioned to the respondent in realising the fruits of its judgment. The solution to the emerging mischief lies elsewhere, and no degree of criticism levelled at that section would reverse its effect in the absence of legislative intervention to effectively reverse its express intention.

100. With regard to the nature of state corporations, agencies or instrumentalities, the High Court in the case of Association of Retirement Benefits Scheme vs. Attorney General & 3 Others [2017] eKLR aptly cited with approval the Indian Supreme Court case of International Airport Authority of India & Others (1979) SC. R 1042 in which the test for determining whether an entity was a Government body or not, was stated as follows:

> "(a) Consider whether any share capital of the corporation is held by the Government and if so that would indicate that the corporation is an instrumentality or agency of Government.
>
> (b) Where the financial assistance of the State is so much as to meet almost the entire expenditure of the Corporation, that fact would afford some indication of the corporation being impregnated with Governmental character;
>
> c. It may also be relevant to consider whether the corporation enjoys monopoly status conferred by the State.
>
> d. Whether the body has deep and pervasive State control,

e. Whether the functions of the corporation are of public importance and closely related to Governmental functions then that would be a relevant factor in classifying the corporation as an instrumentality or agency of Government and

f. If a Department of a Government is transferred to a corporation then it becomes an instrumentality or agency of the Government."

101. In the same vein, Rika, J. set aside warrants of attachment obtained against the moveable property of the Corporation in Ernest Morara Mokua v Kenya Railways Corporation [2022] eKLR, holding, as we hereby do, that "Section 88 of the Act prohibits execution of Judgments against the Respondent by way of attachment and sale of its property." So did Majanja, J. in Postal Corporation of Kenya v Ndarua & 4 others [2022] KEHC 13281 where the learned Judge set aside warrants of attachment and sale of moveable assets of the Postal Corporation of Kenya (PCK) in view of section 25 of the Postal Corporation Act, which restricts execution against the property of PCK in an identical manner as section 88 of the Act.

102. Concerned by the delay in satisfaction of the decree in that case, the learned Judge issued summons to the Postmaster General to show cause why PCK had not settled the judgment debt in accordance with the provisions of section 25, observing that:

4. The provisions of the law are straight forward. The plaintiff's assets are protected from attachment and sale except with permission of the Postmaster General. However, as the counsel for the defendant points out, an affirmative statutory duty is placed on the Postmaster General to act without delay in settling any judgment debt. While the court is obliged to enforce the dictates of the statute and set aside the warrants of attachment and sale, it cannot leave a decree holder without a remedy. To do so would amount to violating the right of access of justice protected by article 48 of *the Constitution*. The Postmaster General must come to court and explain why it has not resolved the judgement debt despite the statutory duty cast upon it."

103. In view of the foregoing, we reach the conclusion that section 88 of the Act prohibits execution by garnishment upon its bank deposits or attachment and sale of its property. In effect, the 1st appellant's appeal succeeds as against the ruling and orders of the ELC (M. Sila, J.) dated 1st November 2022.

104. All said and done, and in determination of the two consolidated appeals, we reach the conclusion that:

a. even if any sums were found due and payable by the 1st appellant to the respondent, the 1st appellant was not liable to execution by attachment of its assets or of its bank deposits by way of garnishee proceedings in light of the statute bar imposed by section 88(a) of the *Kenya Railways Corporation Act*;

b. the learned Judge was not at fault in dismissing the 1st appellant's preliminary objection or in finding that he had jurisdiction to hear and determine the dispute;

c. the 1st appellant revised the annual rent on 1st January 1994, but the unscheduled revision did not amount to a variation of the terms of the lease agreement with regard to the two 30 years' anniversaries on which rent was revisable on the basis of the unimproved value of the suit property pursuant to clause 2(a) of the lease agreement;

d. even though the rent revision undertaken in 1994 was not contemplated under the lease agreement, the respondent acquiesced thereto and waived its right of claim thereon, or

otherwise failed to raise any claim within the period of limitation prescribed in section 4(1) of the Limitation of Action Act (Cap. 22) and, as a consequence, was statute barred from raising such claim;

e. the increment aforesaid was not conditional to variation of the terms of the lease with regard to the contractual date on which such increment was scheduled to be undertaken to wit 16th January 2010;

f. the subsequent rent revision with effect from 1st January 2012 was valid and in accord with clause 2(a) of the lease agreement, and was undertaken in exercise of the appellant's right under the lease agreement;

g. the 1st appellant had the right to review the annual rent for the suit property after 1st January 2007 and, more specifically, after 16th January 2010, which was 30 years after execution of the lease agreement;

h. the belated valuation of the suit property as at 30th September 2010, the subsequent revision of rent notified on 30th September 2011, and the demand therefor with effect from 1st January 2012, were by no means in breach of contract; and

i. as the respondent did not pray for or specifically plead and strictly proved the claim for the alleged unjust enrichment and/or liquidated damages in the form of a refund for rent paid on account of the impugned variation of rent, the trial court had no jurisdiction to pronounce itself on matters not pleaded nor prayed for.

105. Having carefully considered the records of the two appeals as consolidated, the grounds on which they are anchored, the impugned ruling, orders and judgment, the rival submissions of learned counsel for the parties, the cited authorities and the law, we find that:

a. The 1st appellant's appeal from the judgment and decree of the ELC (M. Sila, J.) dated 4th November 2021 succeeds, and the said judgment and decree are hereby set aside;

b. Likewise, the appellants' appeal against the ruling and orders of the ELC (M. Sila, J.) dated 1st November 2022 succeeds, and the said ruling and orders are hereby set aside; and

c. Accordingly, we hereby order and direct that the costs of the two consolidated appeals be borne by the respondent.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 25TH DAY OF OCTOBER, 2024.

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR