



REPUBLIC OF KENYA



**Thara & another v Actae Development Limited & another (Civil Appeal E094 of 2022) [2024] KECA 1480 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1480 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL E094 OF 2022  
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA  
OCTOBER 25, 2024**

**BETWEEN**

**MOSES NJOROGE THARA ..... 1<sup>ST</sup> APPELLANT**

**WINIFRED MWENDIA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ACTAE DEVELOPMENT LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**SIX SIXTY ONE GALU BEACH MANAGEMENT LTD ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the Environment and Land Court at Mombasa (N. A. Matheka, J.) delivered on 26th July 2022 in ELC Case No.196 of 2015)*

**JUDGMENT**

1. The appeal before us arises from the judgement delivered by Lady Justice N. A. Matheka in Mombasa Environment and Land Case No. 196 of 2015 on 26<sup>th</sup> July 2022 in which the learned Judge dismissed the appellants' case, allowed the respondents' counterclaim and ordered the appellants to pay Kshs.1,357,542 as at 15<sup>th</sup> October 2015 together with such charges as may be properly levied between 1<sup>st</sup> October 2015 and the conclusion of the suit together with interest thereon from the date the sums accrue until the date of payment. The appellants were also condemned to pay costs of the counter claim.
2. The dispute before us revolves around Land Parcel No. Kwale/Galu Kinondo/561 in Lantana Galu Beach (the suit property) comprising of villas, bungalows, apartments and penthouses with amenities, including a restaurant, bar, cafe, spa, gym, swimming pools, convenience shop, management offices, linen and general stores (Development). The background of this appeal is that, through an Agreement of Lease dated 2<sup>nd</sup> June 2010 entered into by the 1<sup>st</sup> respondent as vendor and the appellants as purchasers, the 1<sup>st</sup> respondent agreed to grant a sub-lease to the appellants on terms and conditions



set out in the said agreement in respect of Villa No. 10 comprised in the Executive Residential Development at Lantana Galu Beach situated on the suit property for a consideration of Kshs. 33,654,364. The terms of the said agreement provided that the 1<sup>st</sup> respondent would procure the formation of the 2<sup>nd</sup> respondent by incorporation under the Companies Act with a nominal share capital of Kshs. 48,000 divided into 48 shares of Kshs. 1,000 each. The said agreement also provided that, simultaneous with the grant of a lease to the appellants and other purchasers as Lessees in respect of all the houses comprised in the Development, each of the Lessees would be granted one share in the capital of the 2<sup>nd</sup> respondent. It was further agreed that, upon conclusion of the grant and registration of leases in respect of the houses comprised in the Development, the reversionary interest of the 1<sup>st</sup> respondent in the subject property would, within 60 days thereof, be transferred at nominal consideration to the 2<sup>nd</sup> respondent. Pursuant to the terms contained in the Agreement for Lease dated 2<sup>nd</sup> June, 2010, the 1<sup>st</sup> respondent as the Lessor and the 2<sup>nd</sup> respondent as the Management Company, entered into a Sub-lease in respect of Villa No. 10 in Lantana Galu Beach within the suit property with the appellants as Lessees.

3. In a cover letter dated 12<sup>th</sup> August, 2010 by the respondents' Advocates forwarding the sub-lease to the appellants' lawyers, the 1<sup>st</sup> respondent advised that the form of lease in respect of the units in the Development would be substantially standard for all the units in the development to ensure uniformity, save for changes necessitated by the differences between apartments and penthouses on the one hand and bungalows and villas on the other hand. The terms of the subject sublease were set out in the instrument creating the sub-lease and the following were inter alia some of the material terms of the Sub-lease:
  - a. Each and every one of the Lessees' covenants in the sub-lease would remain in force both at law and at equity notwithstanding that the Lessor shall have waived or released in any way whatsoever the similar covenant or similar covenants affecting other Lessees of the houses (over than the premises).
  - b. No provision of the lease was to be waived or varied by either party except by agreement in writing which agreement would be duly registered in the Kwale District Registry at the sole cost and expense of the party seeking the waiver or variation.
  - c. If any provision of the lease would be inconsistent with any provision contained in the Agreement of Lease dated 2<sup>nd</sup> June 2010 the relevant provision of the Sub-lease would prevail and such inconsistent provision of the Agreement for Sub-lease would be construed and read as subject to the relevant provision of the Sub-lease.
  - d. The Sub-lease contained the entire agreement and understanding between the parties and superseded all prior discussions and agreements concerning the subject matter. The Lessee acknowledged that the Sub-lease had not been entered into in reliance solely or partly on any statement or representation made by or on behalf of the Lessor or the Management Company expect such statements or representations that were expressly set out in the Sub-lease.
  - e. The right (in common with all other persons entitled to the like right) to utilize the common part for such activities which in the reasonable opinion of the Management Company (which opinion would be final and conclusive) would not become or cause nuisance, annoyance, disturbance, injury or damage to the Lessee, the Management Company or the Lessees or visitors or other occupiers of the houses such use to be subject to such terms and conditions the said management company may from time to time impose.



4. It was a term of the sub-lease that the premises were not to be used for any purpose other than for the permitted user as defined in the Sub-lease.
5. It was the appellants' case that, in breach of the terms of the Agreement of Lease and the terms of the Sub-lease, the respondents unilaterally and without complying with the agreement, concurrence or approval of the appellants converted the permitted user of the executive residential development from the executive residential apartments contracted for by the parties, to hotel type apartments, villas and bungalows.

According to the appellants, the said conversion was not only a breach of the terms agreed upon by the parties, but also a breach of the regulatory approvals upon which the development of the project was authorized. Consequently, it was contended that the respondents curtailed the appellants' enjoyment of the property as had been anticipated by the appellants at the time of entering into the Agreement for Lease and the subsequent Sub-lease. The appellants lamented that, despite numerous raising the issue, the respondents consistently ignored and defiantly brushed aside the appellants' concerns. As a consequence of the breach of the terms of the Sub-lease by the respondents, the appellants contended that they were denied use and enjoyment of their investment and consequently suffered damage, for which they claimed compensation from the respondents.

6. It was the appellants' case that, notwithstanding the fact that they were paying a service charge of Kshs.136,595 quarterly from 4<sup>th</sup> March 2011, the respondents deliberately changed the residential user stipulated in the sub- lease to hotel type commercial user, which action caused them inconvenience, general disturbance annoyance and fear of insecurity. To the appellants, the respondents' action denied them the continued peaceful and quiet use of their residential home and communal facilities which was the reason they bought the residential home in the first place. It was their case that they used to visit and stay in the suit property for a minimum of ten days in a month. The appellants, as a consequence, sought the following prayers as against the respondents jointly and severally:
  - a. An order of permanent injunction restraining the respondents, their servants and agents from breaching the terms of the sub-lease dated 4<sup>th</sup> March, 2011 entered into by the appellants as Lessees, the 1<sup>st</sup> respondent as Lessor and the 2<sup>nd</sup> respondent as the Management Company and, more particularly, from breaching the covenant respecting the permitted user of units constructed in the development situate on all that piece of land comprised in the certificate of lease in respect of plot number Kwale/Galu Kinondo/661.
  - b. General damages for loss of use and quiet enjoyment by the appellants of Villa 10 situated in plot number Kwale/Galu Kinondo/661.
  - c. Special damages as pleaded in paragraph 16 above.
  - d. Interest on (a) and (b) above.
  - e. Costs of this suit.
  - f. Any further relief that the Court may deem just and fit to grant.
7. In their defence and counterclaim, the respondents' case was that the 1<sup>st</sup> respondent is the registered proprietor of the leasehold interest in the suit property which it acquired by way of a Transfer of Land dated 19<sup>th</sup> November 2007. The 2<sup>nd</sup> respondent, on the other hand, is the management company incorporated by the 1<sup>st</sup> respondent to manage the Development and also to hold the reversionary interest in the land presently held by the 1<sup>st</sup> respondent. As at the date of the Statement of Defence, whereas 31 out of 47 units in the Development had been sold with a share each in the 2<sup>nd</sup> respondent,



- the reversionary interest continued to be held by the 1<sup>st</sup> respondent pending the disposal of all units in the Development and the acquisition of shares in the 2<sup>nd</sup> respondent by the buyers.
8. According to the respondents, in order to comply with regulations of the County Council of Kwale (Council), the 1<sup>st</sup> respondent obtained the conversion of the use of the land from agricultural to residential cum commercial on 2<sup>nd</sup> October 2008 on condition that the interest in the land would be converted from freehold to leasehold. Consequently, the Council issued a Certificate of Lease to the 1<sup>st</sup> respondent effective 1<sup>st</sup> August 2009 containing a Special Condition 3 to the effect that the land "shall only be used for commercial cum residential purposes". In its brochure, the 1<sup>st</sup> respondent marketed the Development as beach front holiday homes in which the concept of the management and maintenance of the facilities were set out.
  9. By a letter of offer dated 28<sup>th</sup> April 2010, the appellants expressed interest in acquiring a villa in the Development on the basis of the description in the aforesaid brochure, and the villa was sold subject to restrictions contained therein which restrictions the appellants acknowledged. Accordingly, it averred, the appellants confirmed that they were entering into the Agreement for Lease (the Agreement) on the basis that they had inspected the documents, and not on the reliance on any statements made by the 1<sup>st</sup> respondent. It was the respondents' case that the Agreement was explicit that it was to operate as an executory agreement, and was not to be construed as a lease over the villa, and that the Agreement was superseded by the Sub-lease dated 4<sup>th</sup> March 2011, which incorporated the obligation on the 1<sup>st</sup> respondent to transfer to the 2<sup>nd</sup> respondent the reversionary interest over the land on which the Development is situated after the sale of all units. To ensure that the Development was understood clearly, in a letter dated 13<sup>th</sup> July 2010, the 1<sup>st</sup> respondent explained to all buyers at the time, including the appellants, what the Rental Scheme was and how it would operate. The 1<sup>st</sup> respondent in an email dated 14<sup>th</sup> July 2010 to the 1<sup>st</sup> appellant (which was acknowledged), attached a Rental Scheme Report which it had commissioned, and which formed the basis of, how the scheme as adopted would be operated.
  10. According to the respondents, vide a letter dated 12<sup>th</sup> August 2010, the 1<sup>st</sup> respondents' Advocates forwarded Sub Contractual and Facilities Management Agreement dated 1<sup>st</sup> November 2011, Hotel Type Agreement, Deed of Adherence and Sub-lease to the appellants' Advocates. It was contended that the nature and function of each document was explained in the said letter and, in particular, that the appellants would be required, as a condition precedent, to sign the Deed of Adherence accepting the terms contained in the Sub Contractual and Facilities Management Agreement (SCFMA) between the respondents and Synad Properties Limited (Synad). The SCFMA, it was contended, was entered into on the basis that the 2<sup>nd</sup> respondent was obligated under the 9<sup>th</sup> Schedule of each Leasee to manage and maintain the Development, but was also entitled to transfer and/or sub• contract the said obligations.
  11. Consequently, Synad was subcontracted by the 2<sup>nd</sup> respondent to provide for and on behalf of the 2<sup>nd</sup> respondent the core services of managing and maintaining the Development as set out in Part 3 of the 8<sup>th</sup> Schedule to the Sub-lease. The 2<sup>nd</sup> respondent was also to provide additional services to the buyers who opted for the Rental Scheme, as well as, and at its discretion and at a fee, recreational services set out in the 5<sup>th</sup> Schedule to the SCFMA, enjoyable by buyers whether or not they were part of the Rental Scheme. In addition, Synad was to provide, at a fee, the services set out in the 6<sup>th</sup> Schedule to the SCFMA, Rental of staff quarters, Business centre, Mini Shop, and Restaurant, bar and coffee shop which were similarly enjoyable by buyers whether or not they were part of the Rental Scheme.
  12. It was the respondents' case that each buyer had the choice to opt for the Rental Scheme by signing the Hotel Type Agreement, which the appellants did not do. However, the appellants signed the Deed of Adherence by which they accepted the terms of the SCFMA. In the months of October, November



and December 2010, there were written and oral questions from the appellants to the respondents regarding the sub-contracting of services by the 2<sup>nd</sup> respondent to Synad, computation of service charge and common areas, which were responded to before the signing of the Sub-lease on 4<sup>th</sup> March 2011. The respondents asserted that the appellants were estopped from denying knowledge of the use to which the Development would be put because the appellants signed the Deed of Adherence and with full knowledge of the terms of the Sub Contractual and Facilities Agreement. The respondents maintained that, since the appellants took possession of the villa in November 2011, they have enjoyed use of their villa regularly and used the facilities arranged for and provided by the 2<sup>nd</sup> respondent, such as the restaurant, which forms part of the common area. Further, the appellants have been active participants at meetings convened by the 2<sup>nd</sup> respondent since they acquired their villa and that, in October 2013, the appellants visited their villa during which they raised complaints that some of the units which are part of the Rental Scheme were hired out to unsuitable and unauthorized occupants, allegations which were investigated by the 2<sup>nd</sup> respondent and established that the occupants were authorized to be at the Development and use the common areas. These findings were communicated to the appellants who nevertheless were not satisfied with the 2<sup>nd</sup> respondent's findings.

13. According to the respondents, under the provisions of the Sub- lease, all the Lessees are required to pay service charge as computed by the 2<sup>nd</sup> respondent and, while it is true that the appellants have been paying the service charge of Kshs 136,595.67 quarterly, being the estimate from the Tamarind Report for the year 2010 referred to in the Sub-lease as the "Initial Provisional Service Charge", the Sub-lease provides that the service charge would be computed on the basis of periodical expenditure incurred by the 2<sup>nd</sup> respondent in providing the appellants with the services listed at Part Three of the Schedule. It is on this basis that the 2<sup>nd</sup> respondent computed and revised the service charge based on the actual periodical expenditure and informed the Lessees of the sums they were expected to pay as service charge. The appellants, however, refused to pay any of the revised sums insisting on paying the service charge computed in 2010. According to the respondents, as at 1<sup>st</sup> October 2015, the appellants were in arrears of service charge in the sum of Kshs 1,357,542 which amount continued to increase. The 2<sup>nd</sup> respondent therefore prayed for judgment against the appellants jointly and severally for:
  - a. Kshs 1,357,542 as at 1<sup>st</sup> October 2015 and such charges as may be properly levied between 1<sup>st</sup> October 2015 and the conclusion of this suit together with interest thereon from the date the sums accrue until the date of payment.
  - b. A declaration that the 2<sup>nd</sup> respondent has the right to withhold the services provided at Part Three of the Seventh Schedule to the appellants until full payment is received.
  - c. Costs of the counterclaim.
14. In her judgement, the learned Judge found that the appellants confirmed having signed the Sub-lease, Deed of Adherence in respect of the SCFMA and the SCFMA itself; that the Sub-lease was between Actae Development Limited (the lessor), Six Sixty- One Galu Beach Management Limited (Management Company) and the appellants; that the 2<sup>nd</sup> agreement binding on the appellants was the SCFMA dated 1<sup>st</sup> November 2010 between the respondents and Synad under which an individual lessee may execute the Hotel-Type agreement and join the Hotel-Type scheme and be provided with Hotel-Type services, whereby the lessee shall be entitled to share in the Hotel-Type revenue; and that the 3<sup>rd</sup> agreement that bound the appellants was the Deed of Adherence, which was executed on 10<sup>th</sup> May 2011 between the respondents and Synad on one side and the appellants on the other. The learned Judge relied on the decision of this Court in the case of Feba Radio (Kenya) Limited t/a Feba Radio v Ikiyu Enterprises Limited [2017] eKLR for the proposition that, where there is no ambiguity in an agreement, it must be construed according to the clear words used by the parties.



15. The learned Judge held that the appellants could not plead ignorance that the respondents were developing and creating a mixed development of residential and hotel type villas, as well as the fact of the additional service charge levied on them; that the appellants as the Lessees could not claim to have been side lined on the change of permitted user for the reasons that they were provided with relevant information during the negotiation process of the Sub-lease to make an informed decision; that the respondents furnished them with information on the hotel type scheme that was envisioned; and that the 1<sup>st</sup> respondent sent a letter dated 13<sup>th</sup> July 2010 to the appellants setting out in details the Lantana Galu Rental Scheme to be managed by Actae Development Limited and also issued them with the Rental Scheme Report by Tamarind Hospitality Consulting of June 2010. According to the learned Judge, and on the authority of the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another (2001) eKLR, parties to a contract entered into voluntarily are bound by its terms and conditions; and on Trollope Colls Ltd vs North West Metropolitan Regional Hospital Board (1973) 1 WLR 601 at 609 to the effect that that a court of law cannot re-write a contract between the parties.
16. It was held by the learned Judge that the appellants are bound by the provisions of the Sub-lease dated 4<sup>th</sup> March 2011, Deed of Adherence in respect of the SCFMA dated 10<sup>th</sup> May 2011 and the SCFMA dated 1<sup>st</sup> November 2010, and that they could not turn around and claim that the manner in which the suit property was being used was not in line with the permitted user requirement under the Sub-lease; that the respondents informed the appellants before execution of the Sub-lease of the existence of a hotel type scheme that they were required to be bound by; that the appellants entered into a Sub-lease agreement with a lessor who was looking to make revenue from the villas of other Lessees under the Hotel-type scheme; that the appellants had enjoyed the social and recreational amenities that come with the suit premises, and could not escape liability; and that, by virtue of staying in their villa, they made use of these amenities since 2011 and were obligated to pay service charge on account of such use. It was on that basis that the learned Judge dismissed the suit with costs and found the counterclaim merited and awarded the respondents Kshs.1,357,542 as at 1<sup>st</sup> October 2015 and such charges as may be properly levied between 1<sup>st</sup> October 2015 and the conclusion of the suit together with interest thereon from the date the sums accrue until the date of payment. The appellants were also directed to bear the costs of the counterclaim.
17. It was that decision that provoked the instant appeal, which is based on the rather long and argumentative grounds contrary to the edict of rule 88 of the Court of Appeal Rules, 2022 which enjoins appellants to “... concisely set forth under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against”. The practice of drafting argumentative grounds was deprecated by the Supreme Court of Uganda in Kamurasi v Accord Properties Ltd [2000] 1 EA 90 (SCU) in which the Court, while forming a dim view of the way the grounds of appeal were framed and noting that such practice reveals the failure by parties to acquaint themselves with the rules applicable to appeals before the Court, reiterated that a memorandum of appeal should neither be argumentative nor narrative. See also Moses Kipkolum Kogo v David Malakwen Civil Appeal No. 74 of 1998. We also noted that there is no consistency in the description of the parties by making references to respondents, plaintiffs, applicants and defendants interchangeably instead of restricting the parties to the description assigned to them in the title of the appeal and the Rules of this Court. We need not overemphasise the general rule that grounds of appeal ought to be formulated in short and precise sentences leaving the details to be expounded in the submissions.
18. According to the appellants, the learned Judge erred: in failing to find as a matter of fact that the respondents unilaterally and without complying with their obligations under the sub lease dated 4<sup>th</sup> March 2011 and without the concurrence or approval of the appellants converted and thereby extended the permitted user of the suit property comprising executive residential development from



the permitted executive residential apartments, villas, bungalows and penthouses that was contracted for by the parties, to hotel type apartments, villas, bungalows and penthouses; in finding that the primary contract applicable to the parties was the SCFMA without taking into account the express provisions of the Sub-lease that the SCFMA was merely a subcontract between the 1<sup>st</sup> and 2<sup>nd</sup> respondent and its purpose as provided for in the Sub-lease was merely for the 1<sup>st</sup> respondent to subcontract its management functions as prescribed under the Sub-lease to the 2<sup>nd</sup> respondent and not to amend or vary or extend the permitted user under the Sub-lease; in failing to appreciate that, where there is a conflict between the express provisions of the Sub-lease and the provisions of the SCFMA, the provisions of the Sub-lease prevails; in failing to appreciate that, Synad having been subcontracted by the 2<sup>nd</sup> respondent as the management company to perform functions that the 2<sup>nd</sup> respondent was meant to perform, could not do more than that which the 2<sup>nd</sup> respondent was empowered to do under the Sub-lease; in failing to appreciate that the parties were bound by the terms of the lease agreement and the subsequent Sub- lease which instruments both contained ‘Entire Agreement and Representations’ clauses which expressly excluded any prior representations that may have been made; in failing to appreciate the distinction between change of user under the Physical Planning Act Cap 296 and permitted user under Paragraph 29.1 of the 5<sup>th</sup> Schedule to the Sub-lease as read together with Paragraph 9 of the 10<sup>th</sup> Schedule to the Sub-lease dated 4<sup>th</sup> March 2011; in failing to appreciate that the Sub-lease presented to the appellants did not provide or give the option to the applicants or Lessees to enter into hotel-type agreements taking into account the express provisions of the permitted user as defined in the Sub-lease; in failing to appreciate that the appellants paid the provisional service charge as provided for in the Sub-lease and were not in law or in contract obligated to pay the service charge demanded by the respondents on the basis that the extended user beyond the permitted user distorted the service charge and by finding that, by virtue of staying in their villa, the appellants had made use of the social and recreational amenities and that, therefore, they were obligated to pay service charge on that account; in ordering the appellants to pay service charge to the respondents whereas no evidence was led by the respondents in support of the claim for service charge; and in entering judgement for both respondents whereas the 1<sup>st</sup> respondent had no counterclaim in the proceedings.

19. At the virtual plenary hearing, on 27<sup>th</sup> May, 20204, learned counsel, Mr. Chacha Odera, appeared with Ms. Anne Kadima for the appellants while learned counsel, Mr. Abbas Ismail, appeared with Ms. Priscilla Onesmus for the respondents. Both learned counsel relied on their submissions which they highlighted orally.
20. In their written submissions, the appellants cited the case of Lalji t/a Vakkep Building Contractors v Carousel Limited [1989] eKLR for the proposition that, when a deed is expressed to be supplemental to the previous instrument, such a supplemental deed, has to be read in conjunction with the deed to which it is expressed to be made supplemental in order to see that the terms of the latter deed have been duly complied with; Siree v Turkana El Molo Lodges Limited [200] 1 EA 521; and Charles Sande v Co-operative Creameries Limited Civil Appeal No. 154 of 1992, highlighting the obligation to specifically plead and prove special damages (if any) claim; Galaxy Paints Company Limited v Falcon Guards Limited [2000] eKLR; and North Kisii Central Farmers Limited v Jeremiah Mayaka Ombui & 4 Others [2014] eKLR, stressing that the issues for determination in a suit generally flow from the pleadings, and that judgement can only be pronounced on such issues or issues framed for determination; and Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR, highlighting the binding effect of the pleading.
21. On their part, the respondents likewise relied on Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others (supra) on the binding effect of pleadings.
22. On the basis of the submissions made before us, we distil the issues falling for determination to three:



- i. Whether the learned Judge was at fault in not finding that the respondents breached the terms of the Sub-lease;
  - ii. Whether the learned Judge erred in allowing the respondents' counterclaim and finding that the appellants were entitled to the revised service charge to the respondents; and
  - iii. Whether the learned Judge erred in entering judgement for both respondents.
23. In determining this appeal, being a first appeal from the decision of the trial court, we are alive to our mandate as espoused in the case of Ng'ati Farmers' Co-operative Society Ltd vs. Ledidi & 15 Others [2009] KLR 331 that:

“An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

24. It was submitted by the appellants that the respondents unilaterally and without their concurrence or approval changed the permitted user of the premises from the permitted executive residential apartments, villas, bungalows and penthouses that was contracted for by the parties, to hotel type apartments, villas, bungalows and penthouses thereby breaching the provisions of the Sub-lease; that the Sub-lease contained the entire agreement and understanding between the parties and superseded all prior discussions and agreements concerning the property, and that the parties expressed their intention to be bound by the Sub- lease; that Part Three of the Fifth Schedule to the Sub-lease provided for the user restriction and expressly stated that the premises would not be used for any other purpose than the permitted user which, in the context of the Sub-lease, meant the use of the premises as a residential home for the lessee, his/her immediate family and occasional house guests not exceeding the number reasonably specified by the Management Company; that the respondents, by introducing a Hotel-Type Scheme under the SCFMA that is not aligned to the provisions of the Sub-lease and without consultation and agreement by the parties in writing and subsequent registration with Kwale District Registry, breached the Agreement of Lease and the terms of the Sub-lease; that the ancillary agreement signed by the respondents and the homeowners can only be for the sole purpose of operationalising the Sub-lease and not to override it; that, where there is a conflict between the express provisions of the Sub-lease and the other agreements being the Agreement of Lease, the SCFMA and the Deed of Adherence, the Sub-lease prevails; that the SCFMA cannot therefore extend the permitted user of the premises beyond that which is provided under the Sub-lease which is to use the premises as a residential home as opposed to the hotel- type use; that, since Synad was subcontracted to perform the functions of the 2<sup>nd</sup> respondent set out in the Ninth Schedule to the Sub-lease as read with the Management Company's Covenants, Synad could not provide any service not prescribed in the Ninth Schedule to the Sub-lease; that the 2<sup>nd</sup> respondent, being the main contractor, could not assign more duties than are assigned to it under the main contract to Synad as the sub- contractor; that, when a contract makes reference to another, it needs to comply with the terms of the document referred to; that the SCFMA must abide by the service which otherwise the management company would undertake under the provisions of the Sub-lease; that, therefore, the learned Judge erred in finding that the primary contract applicable to the parties was the SCFMA when the SCFMA was merely



a subcontract between the respondents and Synad enabling the 2<sup>nd</sup> respondent to subcontract its management functions as prescribed under the Sub-lease to Synad, and did not amount to amending or varying the permitted user of the premises unilaterally; that the learned Judge failed to appreciate that, Synad having been contracted by the 2<sup>nd</sup> respondent as the management company to perform functions that ought to have been performed by the 2<sup>nd</sup> respondent, could not do more than the 2<sup>nd</sup> respondent was empowered to do under the Sub-lease; and that the learned Judge erred in failing to find that the respondents unilaterally and without complying with their obligations under the Sub-lease, and without concurrence or approval of the appellants, converted and extended the permitted user of the suit premises.

25. On their part, the respondents submitted that, in construing the Sub-lease, it has to be read together with the Deed of Adherence; that the permitted user of the premises under the Sub-lease includes occasional house guests not more than the number specified by the Management Company; that the owner of a residential premises or home has the constitutional right to either reside in it or let it out to third parties, and that the lease did not contain any provision prohibiting sub-letting; that the Sub-lease repeatedly referred to not just the Lessee but also other ‘occupiers’ of the ‘Houses’; that the term occupier is distinct from the Lessee or the owner and that, therefore, persons who are not the Lessee or owner could be in occupation of the premises; that, according to Black’s Law Dictionary (9<sup>th</sup> Edition) the phrase “occasional house guests” can be either a paying or non-paying guest; that the construction of the permitted user clause cannot be read in isolation and must be read as a whole with reference to all the clauses in the Sub-lease which allows for guests, whether paying or non-paying to occupy any other house, apartment or penthouse within the Development; that the Sub-lease, the SCFMA and the Deed of Adherence contain the totality of the parties’ bargain and were binding on the appellants; and that, when read together, the agreements provide for the rental scheme in the Development and how it is supposed to operate.
26. It was further contended that the appellants and their advocates were made aware of the specific contractual arrangements that were proposed to be put in place in respect of the rental scheme and the hotel type agreement; that the appellants’ advocates approved the and accepted the drafts and requested that they be engrossed for the appellants’ execution; that the SCFMA provided for the rental scheme; that the Deed of Adherence provided that it would be executed simultaneously with the Sub-lease so as to confirm the Lessee’s acceptance of the terms of the SCFMA and made the Lessee a party to the SCFMA; that, after the approval of the terms of the SCFMA coupled by the signing of the Deed of Adherence, the appellants became parties to the SCFMA at the time of the signing of the Sub-lease and is therefore binding on the appellants; and that the appellants’ submission on the conflict between the terms of the Sub-lease and the SCFMA was not one of the issues pleaded before the trial court; that it is not open to the appellants to raise new issues outside the scope of the pleadings at this stage.
27. In the respondents’ submission, the appellants have not specified, to any degree of particularity what conflict exist between the SCFMA and the Sub-lease; that the issue of subcontracting under the SCFMA was never pleaded for determination before the trial court; that, because Synad was not a party before the trial court or in this appeal, it is impermissible to make allegations against it; that the appellants signed up to and contracted to be bound by the terms of the SCFMA; that the Sub-lease acknowledged that the respondents had negotiated a management contract with a third party, and that a copy of the management contract had been provided to the appellants; that the Lessee undertook to execute the Deed of Adherence to the said management contract provided by the Lessor; and that the Lessee would be treated as a party to, and as Lessee for the purpose of the management contract and would be bound by its terms; and that, by signing the Sub-lease, the appellants signed up to an contracted to be bound by the terms of both the SCFMA and the Deed of Adherence, and cannot resile therefrom.



28. In our considered view, the determination of this issue depends on the construction of the contractual documents between the parties herein. In doing so, we are guided by the principles of construction of contracts as laid down by this Court in the case of John Njoroge Michuki v Kenya Shell Ltd. Civil Appeal No.227 of 1999 (UR) where it was held that:

“As regards contracts between persons not under disability or at arms length, the Courts of law should maintain the performance of contracts according to the intention of the parties and should not overrule any clearly expressed intention on the basis that the Judges know the business of the parties better than the parties themselves...In construing a contractual document, the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further...Whatever the document, it must receive a construction according to the plain meaning of the words and sentences contained therein; for the interpreters of any document have to deal with the written expression of the writer’s intention and the Courts of law have to carry into effect what the writer has written and not what it may be surmised, on whatever probable grounds, that he intended to have written. What a man has written ought to be acted on unless it is clearly proved that he meant something different from what he said.”

29. It is true that Clause 9.1 of the Sub-lease provided that the Sub- lease contained the entire agreement and understanding between the parties and superseded all prior discussions and agreements concerning the property. Part Three of the Fifth Schedule to the Sub-lease at paragraph 29.1 provided for the user restriction by stating that “the premises are not to be used for any purpose other than the permitted user”. “Permitted user” is defined in the Tenth Schedule to mean “use of the premises as a residential home for the Lessee, his/her immediate family and occasional house guests, provided that at no time would more than such number as may be reasonably specified by the Management Company be entitled to occupy the Premises.” The parties in this appeal are not in agreement on the purport of the phrase “occasional house guests”. In his evidence, PW1 complained that:

“We used to go 2 weeks in a month but the entire development was converted to a hotel. A conference was held there, weddings, been (sic) festivals, marketing etc. The attendees were not the owners...I complained about the conference to the defendants...They were not house owners and were not guests. The defendants never said so it was not possible to have service at the restaurant. Guests were rowdy and unruly behaviour was going on. Management never denied the functions. They said they were having conference facilities. These functions were not presented to me as being permissible. I retired and we wanted a retirement home which was quiet in Diani.”

30. On cross-examination, PW1 stated:

“My issue is he permitted user...I have issues with change of user...Guests can access the premises. It is what they do when they come there...There is no express provision forbidding weddings or conferences in the common areas...I had legal representation. I saw hotel type agreement mentioned on page 62 but I did not sign it. It was for the developer. It was to be signed by the lessees who were interested in the rental pool. The lawyers approved the document. The approval for construction was residential not a chattel. I did not raise the issue of hotel before completion. The issues can be hotel type but not a chattel. Some owners signed the agreement of hotel type.”



31. In his evidence, DW1 stated that:

“There was a deed of adherence. It refers to the service agreement...Page 69 has a definition of hotel type services e.g. restaurants, check in and check out, guest room amenities. It was an intention that a buyer would understand all the facilities. The units are rented out in short term as a hotel”

32. With respect to the appellants’ complaint, DW1 stated that:

“There was no conference it was a work retreat. We offer the accommodation. The conference facilities were to be provided by Neptune next door.”

33. From that discourse, we gather that the appellants were aware of the provision for the option of the Rental Scheme but declined to sign the Hotel Type Agreement. However, they did dispute its inclusion in the Sub-lease or the ability of other lessees to opt into the said Rental Scheme. The appellants contend that they complained about the behaviour of the guests occupying the properties. While the behaviour of such guests may have amounted to a breach of the respondents’ covenants, it is not the same thing as saying that the respondents converted the Development into something else, which is the crux of the appellants’ case.

34. In their submissions, the appellants contended that the term “occasional house guests” does not encompass hotel type apartments. On their part, the respondents relied on Black’s Law Dictionary (9<sup>th</sup> Edition) which defines “occasional house guest” to mean:

“1. A person who is entertained or to whom hospitality is extended. 2. A person who pays for services at an establishment, esp a hotel or restaurant.”

35. In our view, there is no ambiguity as regards the term “occasional house guest”. We associate ourselves with this Court’s decision in *Feba Radio (Kenya) Limited t/a Feba Radio v Ikiyu Enterprises Limited* [2017] eKLR where it was held that:

“JIWAJI v JIWAJI [1968] E.A. 547, the predecessor of this Court held that “where there is no ambiguity in an agreement it must be construed according to the clear words used by the parties.”

36. The term “occasional house guests” was not defined in the Sub- lease and, that being the case, we must apply the ordinary meaning of that term which, according to Black’s Law Dictionary (9<sup>th</sup> Edition), included a person who pays for services at an establishment, especially a hotel or restaurant. That being the position, we have no basis for restricting the terms “occasional house guests” to only non-paying guests, particularly for those Lessees who opted into Rental Scheme by signing the Hotel Type Agreement. To do so would amount to us rewriting the contract for the parties, which we ought not to do. As held in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another* (2001) eKLR:

“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....As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000)* (unreported):



‘It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain’.

37. The appellants appear to be urging us to interpret the Sub-lease in a manner that would preserve their privacy and promote their comfort away from the eyes of “other occupiers” because, as they submitted, “due to change of the permitted user, the appellants have not been able to enjoy their quiet possession over the suit property, following the advertisement of Lantana Galu Beach as a family holiday getaway and holiday homes”. It may well be true that the activities done on the Lantana Galu Beach in pursuance of its use as a Hotel Type Apartment have, in the applicants’ view, caused them “inconvenience, general disturbance annoyance and fear of insecurity” and have denied them “the continued peaceful and quiet use of their residential home and communal facilities which was the reason they bought the residential home in the first place”. However, as was held in the case of *Trollope Colls Ltd v North West Metropolitan Regional Hospital Board* (1973) 1 WLR 601 at 609:

“The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.”

38. Our reading of the Sub-lease reveals that the discretion as to who meets the criteria of “occasional house guests” was left to the Management Company because it was expressly provided that it was the Management Company to specify the number of such guests. It is however clear that the Sub-lease distinguished the said occasional house guests from the Lessees because in a number of clauses references was made to “Lessees” on one hand and “other occupiers” on the other hand. By way of example, Clause 1.1.5 defines “common parts” as meaning:

“any pedestrian ways, concourses, entrance, halls, landings and circulation areas, staircases, passages, ramps, service roads, parking areas, garden and pond areas, swimming pool, gymnasium, restaurant, bar, business buildings and the land (excluding the houses) which are from time to time during the Term provided by the Lessor for common use by the Lessees of the Houses or other occupiers of the Buildings or persons expressly or by implication authorised by them.”

39. The term “other occupiers” is replicated in clauses 1.116 and 3.1 of the Sub-lease, paragraph 8 of the 3<sup>rd</sup> Schedule, paragraph 14.1 of the 5<sup>th</sup> Schedule Part 2, paragraph 29.8 of the 5<sup>th</sup> Schedule Part 3, paragraph 31 of the 5<sup>th</sup> Schedule Part 3 and paragraph 1.18 of the 7<sup>th</sup> schedule.

40. While it is true that the Sub-lease stated that it was the entire agreement and understanding between the parties and superseded all prior discussions and agreements concerning the property, Clause 6.2 thereof provided that:

“It is hereby acknowledged that the Lessor and the Management Company have negotiated a management contract with a third party (a copy of which has been provided to the Lessee) and simultaneously with and as condition of the Lessor agreeing to grant this Lease, the Lessee undertakes to execute a deed of adherence to the said management contract in the form provided by the Lessor. Notwithstanding any provision to the contrary, it is hereby further acknowledged that the failure by the Lessee to execute the deed of adherence shall not in any way prejudice or affect the validity of the management contract and the Lessee



shall, upon entry into the Lease be treated as a party to, and (where relevant) as a Lessee for the purposes of, the management contract and shall be bound by its terms. In addition, it shall be a condition precedent to the right of any Lessee to effect any alienation that the transferee or assignee enters into a deed of adherence in the form provided by the Lessor or the Management Company.”

41. It is clear from the foregoing that the Sub-lease itself contemplated the existence of both the SCFMA and the Deed of Adherence in the form provided by the Lessor. While the appellants contend that the Hotel-Type scheme was not contemplated when the Sub-lease was entered into, the lease did not define the term “occasional house guests” and, as we have stated above, the details of who fits that description was left to the Management Company which seems to have come up with its description in the SCFMA and the Deed of Adherence, both of which were expressly contemplated in the Sub-lease. To our mind, the contents of the SCFMA and the Deeds of Adherence did not amount to conversion or extension of the permitted user of the suit property. To the contrary, the two documents were necessary in order to give effect to the terms of the Sub-lease, particularly as regards the term “occasional house guests”. Without the two documents, the Lessees would not have been able to know the basis upon which “occasional house guests not exceeding the number reasonably specified by the Management Company” would be determined. We find no inconsistency between the terms of the Sub-lease on the one hand and the provisions of the SCFMA and the Deed of Adherence on the other in so far as the introduction of the option to the Lessees to enter into hotel-type agreements was concerned.
42. We agree that the SCFMA was substantially a contract between the respondents and Synad regarding the management of the Development, and that Synad could not undertake more duties than the ones assigned to the 2<sup>nd</sup> respondent. We also agree with the position in *Lalji t/a Vakkep Building Contractors v Carousel Limited* (supra) that:
- “...when a deed is expressed to be supplemental to the previous instrument such a supplemental deed has to be read in conjunction with the deed to which it is expressed to be made supplemental in order to see that the terms of the latter deed have been duly complied with.”
43. In this case, we find that the two documents, the SCFMA and the Deed of Adherence, were not only meant to effectuate the terms of the Sub-lease, but that they were contemplated in the lease. All the three documents were, in the terms of the Sub-lease, to be read together. We agree with the learned Judge’s observation that:
- “The Plaintiffs are bound by the provisions of the Sub-lease dated 4<sup>th</sup> March 2011, Deed of Adherence in respect of the Sub-contractual and facilities Management Agreement dated 10<sup>th</sup> May 2011 and the Sub-contractual and facilities Management Agreement dated 1<sup>st</sup> November 2010. The Plaintiffs cannot turn around and claim that the manner in which the suit property is being used is not in line with the permitted user requirement under the sublease which amounts to a material change of use.”
44. In view of the foregoing, we are of the considered view that the first set of grounds of appeal must fail.
45. The second issue, as submitted by the appellants, was that the learned Judge erred in finding that the appellants were entitled to pay service charge to the respondents; that the appellants were paying the interim service charge of Kshs.136,595 quarterly from November 2014; that the change of user invariably increased the costs hence the hefty service charge claimed in the counterclaim of Kshs.1,357,542; that the appellants were not in law or in contract obliged to pay the service charge



demanded by the respondents on the basis that the extended user beyond the permitted user distorted the service charge; that no evidence was led by the respondents in support of their claim for service charge; that there was no evidence adduced by the respondents as to the amount of service charge that the appellants were to pay monthly; that the respondents only adduced a ledger of the estimated monthly service charge for the villa type units, but adduced no primary documents as to how these figures were arrived at whether there is a difference in the amounts paid by those in the Hotel Type Rental Scheme and those not in it; and that the learned Judge erred by ordering the appellants to pay the respondents service charge in the amount of Kshs 1,357,542 as at 1<sup>st</sup> October 2015 and such other charges as may be properly levied between 1<sup>st</sup> October 2015 and the conclusion of the suit together with the interest thereon.

46. Responding to the said submissions, the 1<sup>st</sup> respondent contended that the claim for service charge, an ongoing obligation, was properly pleaded and that the appellants were given sufficient clarity about the outstanding amount; that the appellants themselves tendered in evidence the service charge statements, annual reports and financial statements issued to them by the 2<sup>nd</sup> respondent and service charge invoice for the 1<sup>st</sup> quarter of 2016; that, although the respondents had claimed service charge as at October 2015, the evidence on record was a statement showing service charge due and payable, including the arrears, as at March 2016; that, in their defence to the counterclaim, the appellants did not, in line with paragraph 2.5 of the 7<sup>th</sup> Schedule, qualify their objection to the service charge levied; that the appellants did not raise any objection to the payment of the service charge in the manner required under the Sub-lease; and that the service charge levied by the 2<sup>nd</sup> respondent was required to be paid as demanded.
47. From the submissions made by the parties, two issues arise in respect of payment of the service charge. The first question is whether the enhanced service charge was payable. Paragraph 1.1.10 in 7<sup>th</sup> Schedule to the Sub-lease defines service charge as the service charge percentage of the periodical expenditure, the electricity charges and water charges. Paragraph 1.1.8 of the 7<sup>th</sup> Schedule to the Sub-lease provides that a charge shall be imposed on the Lessee depending on a reasonable proportion of such expenditure as is reasonably attributable to the Lessee. Under paragraph 2.2.3, the Lessee is expected to pay for the next and each subsequent financial period a provisional sum calculated by the management by quarterly instalments in advance. The view taken by the appellants is that they were not, in law or in contract, obliged to pay the service charge demanded by the respondents on the basis that the extended user beyond the permitted user distorted the service charge. We have already found that there was no extended user beyond the permitted user.
48. The second issue is whether the 1<sup>st</sup> respondent is entitled to the sum claimed in the counterclaim as service charge. Although, there is evidence that the appellants were notified of what they were required to pay, the claim for service charge was a claim in the nature of special damages and if the 2<sup>nd</sup> respondent wanted the court to award the same, it had to not only lead the same with the necessary specificity but to also strictly prove the same. The respondents in their submissions did not address the issue whether the claim for the specific sum claimed was proved. They contented themselves by submitting that the appellants were liable to pay service charge and that no objection was raised to the sum claimed. This Court in *Coast Bus Services Ltd v Sisco E. Murunga Ndanyi & Another* Civil Appeal No. 129 of 1992 had this to say:-

“It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of *Kampala City Council v Nakaye* [1972] EA 446, *Ouma v Nairobi City Council* [1976] KLR 297 and the latest decision of this Court on this point which appears to be *Eldama Ravine Distributors Ltd and Another v Samson Kipruto Chebon*, Civil Appeal No 22 of



1991 (unreported). In the latest case, Cockar, JA who dealt with the issue of special damages said in his judgment:-

‘It has time and again been held by the Courts in Kenya that a claim for each particular type of special damage must be pleaded. In *Ouma v Nairobi City Council* [1976] KLR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages, Chesoni, J quoted in support the following passage from Bowen, LJ’s judgment on pages 532, 533 in *Ratcliffe v Evans* (1892) 2 QB 524, an English leading case of pleading and proof of damage: The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularly must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.’”

49. In this case, in an attempt to justify the amount of service charge due, it was contended by the 1<sup>st</sup> respondent that:

“The computation of service charge is based on a formula contained in the Service Charge Report which takes into account the actual costs incurred in a given year to give projections of the anticipated costs of the coming year and the same formula is used to share this anticipated cost among the lessees. There have been 3 years of Audited Accounts demonstrating what the actual amounts incurred have been. All owners are sent statements quarterly showing the sum of service charge that they owe as aforesaid but the Plaintiffs continually ignore the statements that are sent to them with the result that they are in arrears of Kshs 1,357,542 as at 1 October 2015. This sum increases every quarter. This is despite the fact (sic) they have had access to the financial records and held a number of meetings with the Financial Controller and been supplied with various ledgers requested. Below is the estimated monthly service charge a Villa type unit such as the one owned by the Plaintiffs.”

50. In cross-examination, DW2 conceded that:

“I have not attached any of the accounts in my exhibits.”

51. From the foregoing, it is clear that the amount claimed in the counterclaim was partly based on projections of the anticipated costs of the coming year on the basis of which the anticipated cost was shared among the lessees. We appreciate the position of this Court in the case of *Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited* Civil Appeal No. 88 of 2002 [2004] 2 KLR 269, where it was held that:

“the degree of certainty and particularity of proof required depends on the circumstances and the nature of acts complained of.”

52. In this case, where there was a dispute as to the amount, if any, of the service charge owed, the respondents ought to have explained with as much clarity as possible how they came by the figure of Kshs. 1,357,542 and not any other figure. It is one thing to find that the appellants were liable to pay service charge but another thing altogether to find that they were indebted to the 2<sup>nd</sup> respondent in the



sum of Kshs. 1,357,542. It was not enough to simply state that the statement was sent to the appellants. In the event of a dispute paragraph 2.5 of the 7<sup>th</sup> Schedule provided that:

“If the Lessee shall at any time during the Term object to any item of the Service Charge as being unreasonable or the insurance mentioned in the Eighth Schedule as being insufficient then the matter in dispute shall be determined by a person to be appointed by the Chairman for the time being of the Institute of Surveyors of Kenya (or such institution’s successor or assign) who shall in making his determination act as an expert and not as an arbitrator and whose decision shall be final and binding on the parties provided that any objection by the Lessee under this paragraph 2.5 shall not affect the obligation of the Lessee to pay to the Management Company the Service Charge in accordance with the terms of this Lease and after the decision of the person appointed as aforesaid any overpayment by the Lessee shall be either credited against the future payments due from the Lessee to the Management Company under this Seventh Schedule or (if the Lessee so requests) repaid by the Management Company.”

53. On our own consideration of the evidence placed before the Court, we find that the 2<sup>nd</sup> respondent failed to satisfy the standard for proof of special damages which requires that the same be proved with much certainty and particularity.
54. With regard to the last issue taken by the appellants, it was submitted that, the 1<sup>st</sup> respondent not being a party to the counterclaim, could not benefit from the prayers sought by the 2<sup>nd</sup> respondent, yet in her judgement, the learned Judge stated that she found “merit in the Defendants’ Counterclaim”; and that the learned Judge erred in entering judgement for both respondents even though the 1<sup>st</sup> respondent had no counterclaim in the proceedings. In response, the respondents conceded that the 1<sup>st</sup> respondent was not party to the counterclaim and submitted that judgement in respect of the counterclaim ought to be in favour of the 2<sup>nd</sup> respondent only; that the error apparent on the face of the judgement is capable of being rectified under the slip rule in section 99 of the *Civil Procedure Act*; and that there is no prejudice suffered by the appellants as a result of the error.
55. We agree with the appellants and the respondents that there was an error in entering judgement in respect of the counterclaim for both the respondents when the counterclaim was only raised by the 2<sup>nd</sup> respondent. A party who has not raised a counterclaim is not entitled to judgement in his favour as was appreciated by the predecessor to this Court in *Abdul Rehman v R H Gudka* [1957] EA 4 where it was held that:

“In the absence of any counterclaim, the learned Judge had no jurisdiction to make in favour of the defendant the declaration. A declaration should not be made in favour of the Defendant, unless there is a counterclaim for it, or perhaps, where it is merely the negative of a declaration claimed in the plaint.”
56. It was similarly held by this Court in *Nairobi City Council v Thabiti Enterprises Ltd Civil Appeal No. 264 of 1996* [1995-1998] 2 EA 231 that a court should not grant a counterclaim unless pleaded. The learned Judge therefore erred in arriving at a finding whose effect was to find for both respondents in the counterclaim. Nothing however turns on that finding in light of our finding above in respect of proof of the amount claimed in the counterclaim.
57. Consequently, we find that the learned Judge erred in allowing the 2<sup>nd</sup> respondent’s counterclaim. We set aside that award and substitute therefor an order dismissing the counterclaim. Save for that, the appeal otherwise fails.



58. As none of the parties can be said to have been wholly successful in this appeal, we make no order as to the costs of this appeal.

59. Those shall be our orders.

**DATED AND DELIVERED AT MOMBASA THIS 25<sup>TH</sup> DAY OF OCTOBER, 2024.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CARb, FCIArb.**

.....

**JUDGE OF APPEAL**

**G. V. ODUNGA**

.....

**JUDGE OF APPEAL**

I certify that this is the true copy of the original

Signed

**DEPUTY REGISTRAR**

