



**Koira Limited v El Busaidy & 2 others (Administrators of the Estate of Sir Ali Bin Salim El Busaidi) & another (Civil Appeal 98 of 2019) [2023] KECA 434 (KLR) (14 April 2023) (Judgment)**

Neutral citation: [2023] KECA 434 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL 98 OF 2019  
AK MURGOR, P NYAMWEYA & JW LESSIT, JJA  
APRIL 14, 2023**

**BETWEEN**

**KOIRA LIMITED ..... APPELLANT**

**AND**

**SALIM SOUD ALI EL BUSAIDY, AL BUSAIDI ABDULLA SAUD ALBUSAIDI & SOUD SALIM SOUD (ADMINISTRATORS OF THE ESTATE OF SIR ALI BIN SALIM EL BUSAIDI) ..... 1<sup>ST</sup> RESPONDENT**

**MJAD INVESTMENTS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the decision of the Environment and Land Court delivered by Hon. A. Omollo, J. on 22nd March 2019 in ELC No. 288 of 2012)*

**JUDGMENT**

1. This appeal arises from the judgment of the Environment and Land Court [ELC] at Mombasa delivered on 22<sup>nd</sup> March 2019 in which the suit by Koira Limited, the appellant herein was dismissed. The appellant instituted a suit against Abbas Soud Ali El Busaidy, Ilham Mohammed Said, Albusaidi Abdulla and Soud Salim Soud, being the administrators of the estate of Sir Ali Salim El Busaidy (hereinafter deceased), who are the 1<sup>st</sup> respondent in this appeal and Mjad Investments Limited, the 2<sup>nd</sup> respondent herein. The appellant claimed renewal of lease over the 1<sup>st</sup> respondent's freehold interest in the properties known as Title numbers Mombasa/Block XXI/151, 152 and 498 (hereinafter the suit properties), in terms under the original indenture of 20<sup>th</sup> January 1914.
2. The appellant's case was that by a transfer of leasehold interest to itself dated 27<sup>th</sup> June 1977, the suit properties were lawfully transferred and registered to the appellant. The underlying terms of the lease were contained in an Indenture dated 20<sup>th</sup> January 1914 between the estate of Ali Bin Salim El Busaidy (hereinafter the deceased lessor) and Westdeutsche Handel & Plantagen Gesellschaft. Under



the terms of the Indenture, the leasehold interest over the suit properties was to expire on 31<sup>st</sup> December 2012. On 8<sup>th</sup> June 2011, the appellant's advocate Fayaz Anjarwalla & Co., wrote to the 1<sup>st</sup> respondent's advocate, informing them that the appellant wished to exercise the right to renew the lease for a period of 99 years upon expiry of the existing term.

3. In a series of exchanges of correspondence between the advocates to the appellant and the 1<sup>st</sup> respondent, the 1<sup>st</sup> respondent asserted that they did not recognize the appellant's lease over the suit properties as valid on the premise that the appellant unlawfully entered the suit properties in 1977 without first considering the necessity of obtaining consent from the administrators of the estate of the deceased lessor, and that thus that rendered its lease null and void. The appellant's position was that the lease allowed for assigning and subletting; that it had taken over the remainder of the lease in 1977, which was assigned to his name.
4. At the same time the 1<sup>st</sup> respondent withdrew instructions from their advocates, Messrs. Pandya & Talati & Co. advocates (hereinafter Pandya) and the new advocates instructed to take over from them, Hassan Abdi & Co. advocates (herein after Hassan) wrote to Pandya and demanded for accounts of the sub-lease and rental collected from the appellant. Hassan also rejected a cheque forwarded to them by Pandya for ground rent collected from the appellant. The 1<sup>st</sup> respondent declined to renew the appellant's lease which led to the appellant instituting the suit in the ELC. In its re-amended plaint dated 17<sup>th</sup> June 2017, the appellant sought the following orders:
  - a. Specific performance of an indenture dated 20<sup>th</sup> January 1914 compelling the 1<sup>st</sup> and 2<sup>nd</sup> respondent to renew the appellant's interest in the suit properties for a further period of 99 years on the same terms contained in the indenture and execute all necessary documents to renew the lease failure of which the deputy registrar do execute all necessary documents so as to facilitate the issuance of a new title document in favour of the appellant.
  - b. A permanent injunction to stop the respondents, their officers, their servants, agents, employees directly or indirectly from selling, alienating, leasing, charging or otherwise dealing in any way whatsoever with the suit properties to any third parties other than the appellant.
  - c. A permanent injunction to stop the respondents, their officers, servants, agents, employees directly or indirectly from interfering with the appellant's tenants and their right to quiet enjoyment of the suit properties or any part thereof,
  - d. That, the 1<sup>st</sup> and 2<sup>nd</sup> respondents do take all necessary steps to ensure the Lands Titles Registry, Mombasa do endorse the appellant's interest on their freehold title in the encumbrance on the records at the Land Title Registry, Mombasa.
5. The 1<sup>st</sup> respondent in its defence dated 14th January 2013 averred that, the 99 year lease entered between the estate of the deceased lessor and Westdeutsche Handel & Plantagen Gesellschaft expired on 31<sup>st</sup> December 2012; that the 1<sup>st</sup> respondent has never had any dealings with the appellant, that there was no privity of contract between the 1<sup>st</sup> respondent and the appellant; that the appellant was a total stranger and a trespasser on the suit premises and as such should compensate the estate for intermeddling with the suit properties. The 1<sup>st</sup> respondent averred that it cannot be forced to extend the purported lease over the suit properties; and further that the 1<sup>st</sup> respondent never granted any consent to the purported transfer of lease to the appellant dated 27<sup>th</sup> June 1977, that the same was unlawful, null and void. The 1<sup>st</sup> respondent averred that it was entitled to obtain freehold titles over the suit properties without the appellant's name endorsed thereon as the appellant was not their lessee.

They asked that the appellant's case be dismissed.



6. The 2<sup>nd</sup> respondent in its amended defence dated 23<sup>rd</sup> June 2013 averred that it acquired freehold interest over the suit properties and subsequently published a *Caveat Emptor* on 12<sup>th</sup> January 2013. It averred that at the time it acquired the suit property, there were no restrictions or cautions registered against the suit properties, and that it was unaware of the letters of restrictions dated 23<sup>rd</sup> April 2012 from Gikandi & Co. advocates, and those of the Land Registry dated 15<sup>th</sup> May 2012 concerning the titles. It averred further that it was not aware that the Court had issued an ex-parte injunction to restrain any dealings over the suit properties on the 10<sup>th</sup> December, 2012 as it had not been served. The 2<sup>nd</sup> respondent denied that it was bound to renew the lease as per the Indenture referred to, which, it averred expired on 31<sup>st</sup> December 2012. It prayed that the suit be dismissed.
7. The appellant in its amended reply to the 1<sup>st</sup> respondent's defence dated 13<sup>th</sup> February 2013 averred that it lawfully acquired the leases over the suit properties and was lawfully registered as the leasehold owner, and that it was entitled to renewal of the lease. It averred that the Indenture allowed the leasehold interest in the suit properties to be transferred without any consent.
8. In the alternative the appellant averred that the 1<sup>st</sup> respondent was only appointed in March 2010 despite the fact the deceased lessor died on 4<sup>th</sup> December 1940, and that the 1<sup>st</sup> respondent was guilty of laches and thus estopped from claiming that no consent was obtained to register the Transfer of Lease under the provisions of the *Registered Land Act*, and is also barred from making such a claim under *Limitation of Actions Act*. The appellant denied that it was a trespasser or a stranger on the suit properties having lawfully purchased the leasehold interest. The appellant averred that should the Court uphold the allegations set out in the 1<sup>st</sup> respondent's defence, then it will contend that it was at all times in adverse possession of the suit properties.
9. In answer to the 2<sup>nd</sup> respondent's defence the appellant averred that it was obvious from its statement in defence that the 2<sup>nd</sup> respondent was not dealing with the 1<sup>st</sup> respondent when it purchased the suit properties.

### **The Appellant's Case**

10. At the trial before the ELC, the matter was canvassed by way of viva voce evidence. The appellant's witness was a director of the company, Masud Mohamed Ali Rana. He relied on his filed statement dated 7<sup>th</sup> December 2012, the supplementary statement dated 16<sup>th</sup> January 2013 and an affidavit filed in support of an application for injunction dated 16<sup>th</sup> January 2013. The appellant's case was that it was claiming a renewal of the leases over the suit properties under the terms contained in the original Indenture dated 20<sup>th</sup> January 1914, which governed the terms of the leases over the suit properties, on the basis of a proviso within the Indenture which provided for an option to renew. It was its case that it acquired the leases over the suit properties on 17<sup>th</sup> June 1977, and registered them with the Land Registry on 12<sup>th</sup> July 1977, and that even though it was not mentioned in the lease, the same was based on the terms of the 1914 Indenture. It was the appellant's evidence that it did not know who the administrator of the deceased head lessor was but that it was aware that Pandya were the advocates who acted for them, and that from 1977 when it took over the leases, it faithfully paid Rates to the Municipal Council of Mombasa, and Land Rent to Pandya. It was also the appellant's evidence that the administrator's consent before the transfer of lease to the 1<sup>st</sup> respondent was not required, and that in any event in the various transfers to different lessees between 1931 and 1977, the 1<sup>st</sup> respondent did not give its consent.
11. It was the appellant's evidence that rent payable to the estate of the deceased lessor/administrators of the estate of the deceased was Rupees 2700 per annum. In cross-examination the appellant's witness



admitted that he had no proof of payment between 1978 to 1994; that in 1995 the appellant paid to Malindi School Trust the sum of Kshs. 104, 000/= but could not tell what the payment was for; that on 30<sup>th</sup> November 2010 it paid Kshs. 95, 000/= to Pandya & Talati Co. advocates. The witness in cross-examination stated that Pandya & Talati advocates advised the appellant to make payment of the full rent for period between 1977 to 2012, but that the cheque for the said payment was rejected by the 1<sup>st</sup> respondent, and the renewal of the lease declined. It was the appellant's case that the rent was not due unless demand [for rent] was made and payment not made before expiry of two months from the date of the demand letter.

12. The appellant called a second witness, Bathomomen Mwanyungu, a Surveyor. He gave a report of a survey of the suit properties he prepared on instructions of the appellant. He testified that his report included the topographical location plans of the three plots which comprise the suit properties.

### **The 1<sup>st</sup> Respondent's case**

13. The 1<sup>st</sup> respondent called two witnesses. Nicodemus Mwangangi Muvu was a Valuer with the firm of Paul Wambua Valuers Ltd which prepared the Valuation Report on the request of the 1<sup>st</sup> respondent. He produced the Report which gave details of structures on the suit properties, described as three storied buildings on each of the three plots, with both commercial and residential buildings, and with open spaces. He valued the properties at Kshs. 810, 000, 000/=, and the actual monthly income from the buildings at Kshs. 1, 158, 718/=.
14. The second witness, Soud Salim Soud, was one of the administrators of the estate of the deceased, and he testified that he and his co-administrators were appointed in 2016 after the previous administrator, one Salim Soud Salim, who was his father, died. He testified that the suit properties comprised three plots which had buildings popularly known as Fontenella, and that the land on which the buildings stood belonged to the deceased lessor. He testified that the appellant was on the land illegally because it did not have a lease document or consent for the transfer of lease; that the administrator of the estate of the deceased in 1977 was his late father, and that he was not asked to sign any transfer of lease to the appellant.
15. Soud testified that the 1<sup>st</sup> respondent's case was that the rent of Rupees 2700/= per annum provided in the 1914 agreement was too low for the suit properties now valued at 810million. He also testified that the appellant did not make any payment for rent at any time. Further, that the lease the appellant was relying on expired in 2012, and that they have declined to renew the lease because the appellant was on the land illegally, that it was in breach and also because the lease was oppressive and was not benefitting the estate of the deceased.
16. In cross-examination he admitted that Pandya were the deceased estate's advocates from 1977. He stated that his father wrote to Pandya advocates the letter dated 10<sup>th</sup> December 2012, informing them to cease acting for the estate of the deceased and directing that they surrender the records and monies of the estate to the newly appointed advocates, Hassan Abdi & Co advocates; that both requests remained outstanding. He stated that the newly appointed advocates were asked to decline to receive the cheque of payment of rent from Pandya, for reasons that any payment was in breach of the 1914 Indenture which provided that payment of ground rent should be made at the beginning of each year, and that no ground rent had ever been paid at any time by the appellant. Concerning the 2<sup>nd</sup> respondent, he said that their defence made no mention of it, and denied that there was ever any sale agreement between the 2<sup>nd</sup> respondent and the Salim Soud Ali Bin Salim, the administrator of the deceased estate at the time, and further that the matter of the alleged sale was before a criminal court.



## The 2<sup>nd</sup> Respondent's case

17. The only witness for the 2<sup>nd</sup> respondent, was Makatali Amirah, its Finance Manager. He relied on his filed statement and the exhibits. His evidence was that an administrator of the estate of Sir Ali, the deceased lessor, approached the company with a proposal to sell the three suit properties to the company at the price of Kshs. 200million. That after their in-house lawyer verified that the offer was genuine, they executed the sale agreement and partly paid for the properties as well as the Stamp Duty. He stated that the 2<sup>nd</sup> respondent legally owned the suit properties. He admitted that the person who sold the suit properties to their company was charged with a criminal case, and that he later died.
18. The learned Judge of the ELC considered the evidence adduced before her, submissions by counsel and the documents and cases relied upon. The ELC identified the issues for determination as two: firstly, whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents were bound under the terms of the Indenture dated 20<sup>th</sup> January 1914 to grant renewal of the appellant's lease for a further period of 99 years on the same terms contained in the Indenture; and secondly, if so whether the appellant was entitled to the prayers in the re-amended plaint.

## Decision of the Trial Court

19. After hearing the parties, the learned Judge of the ELC concluded that the appellant was in violation of the terms of the Indenture agreement of the 20<sup>th</sup> January 1914 for failing to pay ground rent every 1<sup>st</sup> January of every year from 1977; that the appellant's adverse possession claim to the suit property failed since it entered the suit premises pursuant to an existing lease; that the (renewal) clause was meant to give the appellant preference when the term came to an end; and, that the issue raised by the 1<sup>st</sup> respondent that renewing the lease on the same terms of the Indenture of 1914 was unconscionable since the amount of Rs. 2790 p.a payable from 1914 had definitely depreciated with the changes occasioned by inflation rates, made sense.
20. Concerning the 2<sup>nd</sup> respondent, the ELC found that the 2<sup>nd</sup> respondent had no interest in the suit property as the purported sale transaction was incomplete, and that thus it could not claim protection as an innocent purchaser for value without notice. The 2<sup>nd</sup> respondent did not cross-appeal, thus this appeal is between the appellant and the 1<sup>st</sup> respondent.
21. As between the 1<sup>st</sup> respondent and the appellant, the learned ELC Judge entered judgment in favour of the 1<sup>st</sup> respondent, and against the appellant. In addition the ELC ordered the appellant to surrender vacant possession of the suit premises to the 1<sup>st</sup> respondent within 6 months from the date of judgment, and that in default the 1<sup>st</sup> respondent was at liberty to follow the laid down procedures in obtaining vacant possession.
22. The appellant was aggrieved by the decision of the ELC and lodged an appeal before this Court faulting the learned Judge for;
  - a. Failing to determine the agreed issues and in dismissing the appellant's suit with costs.
  - b. Issuing an order that the appellant do surrender vacant possession of the suit premises to the 1<sup>st</sup> respondent within 6 months when the court lacked jurisdiction to make such an order.
  - c. Ignoring the fact that the option to renew clause set out in the Indenture dated 20<sup>th</sup> January 1914 was not only mandatory but that its terms were unequivocal and unconditional in respect of which the respondents were contractually bound.
  - d. Ignoring the two agreed issues for determination



- e. Ignoring the fact that the evidence given by the 1<sup>st</sup> respondent was entirely inconsistent and contradictory to the issues arising from the 1<sup>st</sup> respondents defence.
  - f. Failing to address the fact that both the 1<sup>st</sup> and 2<sup>nd</sup> respondents had not filed any written submissions in reply to the appellant's submissions and thereby the court failed to confine itself to the pleadings and relevant evidence adduced before it.
  - g. Departing from the agreed issues and coming up with its own independent findings on extraneous issues based on irrelevant facts and on the evidence by introducing and determining an entirely new issue of whether ground rent had been paid in terms of the indenture.
  - h. Distinguishing the authorities cited by the appellant without any proper consideration of the actual wording of the option to renew clause in the indenture.
  - i. Finding that ground rent in terms of the indenture was not paid resulting in a breach of the lease and in any event when it was not an issue for determination.
  - j. Holding that the option to renew clause in the indenture was rightly declined by the 1<sup>st</sup> respondents because the ground rent payable was not benefitting them as owners thus contravening the purpose of Article 40 of the *Constitution*.
23. We heard this appeal on the virtual platform on 17<sup>th</sup> May 2022 during which time learned counsels Mr. Sanjeev Khagram and Mr. Okullo were present for the appellant, while learned counsel Mr. Sagana was present for the 1<sup>st</sup> respondent. There was no appearance for the 2<sup>nd</sup> respondent despite service of the hearing notice upon their counsel Mr. Busieka.

### **Appellant's Submissions**

24. Mr. Khagram urged the appeal on behalf of the appellant and relied on the written submissions dated 1<sup>st</sup> November 2021 as well as the appellant's case and authorities digest of even date; and on the supplementary submissions dated 3<sup>rd</sup> March 2022 as well as the appellant's case and authorities digest of even date. In brief counsel urged that the issue leading to the institution of the case appealed from arose out of an option to renew a lease, whose terms were contained in an indenture dated 20<sup>th</sup> January 1914, in which the bone of contention was whether or not the appellant had paid ground rent; that the appellant's position was that payment of rent is an extraneous matter to the renewal of the lease, and that in any event the same was paid and acknowledged by counsel for the 1<sup>st</sup> respondent. He urged that what was leased in 1914 was a piece of land and that any developments on the land has been undertaken by the appellant. He urged that his client exercised the option to renew calling upon the 1<sup>st</sup> respondent to renew the lease in terms of the Indenture of 1914 in June 2012 before the expiry in December 2012, and that the 1<sup>st</sup> respondent had no option but to renew.

### **The 1<sup>st</sup> Respondent's submissions**

25. Mr. Sagana for the 1<sup>st</sup> respondent relied on the written submissions of the 1<sup>st</sup> respondent and the 1<sup>st</sup> respondent's list and bundle of authorities of even date. In brief counsel urged that there was no privity of contract between the 1<sup>st</sup> respondent and the appellant as far as the 1914 indenture was concerned as it was between the 1<sup>st</sup> respondent and the German company, and that there was no evidence that the German company assigned the lease to any party, and that therefore the appellant could not enforce the terms of the indenture, specifically the renewal clause. Mr. Sagana urged that payment of rent was a condition precedent to renewal of the lease, that since renewal was predicated on the appellant's past performance, he urged the appellant could not succeed in having the same as it had failed to abide by



the terms of the lease. Counsel urged that furthermore, the terms of the lease were unconscionable due to the great disparity between the rent payable under the lease which was a pittance in Indian Rupees, a currency that was no longer in use, and that was incomparable to the value of the suit property, was against public policy, inequitable, harsh, unreasonable and grossly unfair.

### **A Second Sitting of the Court**

26. There was a second sitting of the Court in this matter that took place on the 29<sup>th</sup> September 2022. This was necessitated due to technical hitches Mr. Khagram experienced occasioned by a power blackout in his office towards the end of the proceedings. The Court had put a question to Mr. Khagram on the issue of payment of ground rent and the currency of payment in Indian Rupees. As Mr. Khagram replied he fell off the virtual platform. On the resumed brief session, learned counsel Mr. Khanna held brief for Mr. Khagram, and appeared with Mr. Okullo for the appellant. Learned counsel Mr. Sagana was present for the 1<sup>st</sup> respondent, and was given an opportunity to respond after Mr. Khanna. In attendance was learned counsel Mr. Ajigo for Mr. Busieka for the 2<sup>nd</sup> respondent, who did not participate as the 2<sup>nd</sup> respondent had not filed any submissions.
27. The issue that was on the floor during the second sitting was in regard to the ground rent which, under the Indenture was prescribed in Indian Rupees at 2700/- per annum. Mr. Khanna clarified that there were three plots out of the original one, being the suit properties, and that the appellant had been issued Plot No. 151 and was paying in Kenya Shillings since the lease was issued to it in 1977. Mr. Sagana on his part in response urged that the appellant had unilaterally converted the ground rent payable from Rupees to Kenya Shillings 8, 370/= .

### **Analysis and Determination**

28. This being a first appeal, it behooves this Court, by dint of Rule 31 of the *Court of Appeal Rules* [2022] to re-evaluate, re- assess and re-analyze the evidence on record and then determine whether the conclusions reached by the learned trial Judge should hold. In the case of *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2EA 212 this Court espoused that mandate or duty as follows:-
- “On a first appeal from the High Court, the Court of Appeal should 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 witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”
29. We have considered the appeal, the submissions by counsels both oral and written, as well as the cases and the law relied upon by the parties. We have also analyzed, examined and evaluated afresh the evidence adduced before the trial court. Having so considered , we think that in the main only two issues fall for our determination, which are:
- i. Whether the 1<sup>st</sup> respondent was bound under the terms of the Indenture dated 20<sup>th</sup> January 1914 to grant renewal of the Indenture for a further period of 99 years, and if so on what terms;
  - ii. Whether the appellant was entitled to the prayers it sought in the re-amended plaint.
30. We have outlined herein above in detail the evidence adduced before the trial court. The history and ownership of the suit property is to a large extent not contested. The original owner of the suit property was Sir Ali Bin Salim El-Busaidi, the deceased lessor in this case. From the witness statement of the 1<sup>st</sup> respondent, and further details contained in Court orders and correspondences in the Record of Appeal, more details concerning the successive administrators of the estate of the deceased lessor



emerge. The deceased lessor died on 4<sup>th</sup> December 1940. No administrator was appointed over the estate of the deceased lessor from 1940 until 25<sup>th</sup> October, 1949 when the High Court issued grant of letters of administration *de bonis non*, to one Said Bin Seif. Said Bin Seif died in Muscat on 23<sup>rd</sup> February 1999. From 1999, the estate had no administrator until Salim Soud Ali bin Salim was appointed on 5<sup>th</sup> March 2010, through a Succession Order issued by the Chief Kadhi, Mombasa. Soud, the witness for the 1<sup>st</sup> respondent was clear that he and his co-administrators took over from his father Soud in 2016, after his father's death.

### **Whether the appellant had a valid lease**

31. In order to determine whether the 1<sup>st</sup> respondent was bound to renew the appellant's lease we must consider whether it had a valid lease. The first challenge raised against the appellant's title by the 1<sup>st</sup> respondent was that they did not recognize it because of the manner in which it was acquired. The appellant maintains that it lawfully acquired the Certificates of Leases over the suit properties and that they were lawfully registered, and that it was entitled to renewal of the lease. It averred that the Indenture allowed the leasehold interest in the suit properties to be transferred without any consent from the head lessor. That in the alternative the appellant averred that the 1<sup>st</sup> respondent was only appointed in March 2010 despite the fact Ali Bin Salim died on 4<sup>th</sup> December 1940, and that the 1<sup>st</sup> respondent was guilty of laches and thus estopped from claiming no consent was obtained to register the Transfer of Lease under the provisions of the *Registered Land Act*, and also that it was barred from making such a claim under *Limitation of Actions Act*.
32. The 1<sup>st</sup> respondent's case was that the appellant was undeserving of the prayers it sought as there was no privity of contract between them and the appellant for lack of consent before the transfer of the lease to it; and that they do not recognize the appellant's tenancy over the suit properties.
33. We note that the 1<sup>st</sup> respondent alluded to this issue of lack of privity of contract at paragraphs 3, 4, 5 and 8 of the statement of defence. The learned ELC judge at paragraph 46 of her judgment considered the issue whether the appellant was on the premises irregularly for lack of consent of the landlord/lessor, as the 1<sup>st</sup> respondent had posited, and found:

“The lease provided for re-assignment subject to the terms contained in the indenture. However the said terms did not specifically provide obtaining the consent of the landlord was mandatory. On this limb I hold that the lack of consent did not amount to a breach as pleaded by the 1<sup>st</sup> respondent...”
34. We note that when the appellant's leases over the suit properties were registered in 1977, Said Bin Seif was the administrator of the estate of the deceased lessor, and had letters of administration *de bonis non*, which were fitting to the circumstances, the administrator having taken over administration of an estate that had a previous administrator preceding him. Unfortunately, he died in 1999. As noted above, the next appointment of an administrator was done in 2010.
35. The parties to this appeal did not call witnesses that had first - hand information of the issues before Court, to give information of what actually transpired in 1977 in regard to the assignment of the leases. We noted that the ELC Judge did mention that Pandya advocate could not be called as a witness, having ceased from active practice, and we presume that given her comment the learned trial Judge must have had some more information regarding him. We have then to contend with the evidence that was presented to Court, both *viva voce* and documentary evidence.



36. The Indenture of 1914 provided as follows as regards assignment or subletting:
- “...and that the lessees may assign or underlet the said premises or any part thereof such assignment and underletting being subject to all the covenants, conditions and provisions herein contained...”
37. The covenants, conditions and provisions under the Indenture are varied. These include and pertain to: the description of the actual location and size of the land leased; the duty of the lessees to pay rent, given as Rupees 2700/-, the duty to pay rates and taxes to the government when due; the length of the lease [given as 99 years from 1914]; the power of the lessees to assign or sublet the lease; duty of the lessees to obtain consent before digging the ground and before making any constructions on the land; the power of the lessors to terminate the lease for non- payment of rent or any other breach; and the right of the lessees to exercise option to renew lease at the end of the term.
38. The appellant came in as an assignee of City House, which was the lessee up to 1977. There is no dispute that neither City House nor the appellant sought nor obtained any consent from the 1<sup>st</sup> respondent or previous personal representatives of the deceased lessor before the assignment and transfer of the leases to the appellant. Considering the terms of the Indenture, nowhere does it make it a requirement that the consent of the head lessor had to be obtained before such assignment.
39. Even if the consent was a condition precedent before the assignment, the Registered Land Act [RLA] Cap 300 Laws of Kenya [since repelled by the *Land Act* 2012], which was in force when the appellant’s leasehold titles were registered gives an answer to this issue. Section 48 of the Registered Land Act deals with issues of Lessor’s consent dealing with lease and prescribes:
- “48. Upon the registration of a lease containing an agreement, express or implied, by the lessee that he will not transfer, sub-let, charge or part with possession of the land leased or any part thereof without the written consent of the lessor, the agreement shall be noted in the register of the lease, and no dealing with the lease shall be registered until the consent of the lessor, verified in accordance with section 110, has been produced to the Registrar:
- Provided that the Registrar may, upon receipt of adequate proof, dispense with the consent of the lessor –
- a. if he is satisfied that the lessor is dead and that there is no personal representative of the lessor; or
  - b. if he considers that the consent of the lessor or the personal representative, as the case may be, cannot be obtained or that it can be obtained only with difficulty or at unreasonable expense and shall, after making such enquiries as he may deem necessary in the circumstances, record on the document his reasons for dispensing with the consent and note such dispensation in the register.
40. No evidence was adduced by the parties to the suit of what transpired at the time the appellant was assigned the leases over the suit properties by City House Ltd. However, in the Record of Appeal, there is a letter by Pandya advocate dated 15<sup>th</sup> May 2012, addressed to the Land Registrar Mombasa. It enclosed copies of :



1. Indenture dated 20<sup>th</sup> January 1914;
  2. Succession Order dated 5<sup>th</sup> March, 2010 registered as Entry No. B2 on 15<sup>th</sup> July, 2010;
  3. Title Deeds dated 15<sup>th</sup> July, 2010;
  4. Transfer of Lease dated 27<sup>th</sup> June, 1977 by City Hose Ltd to Koira Ltd registered as Entires Nos. B2, B2 and B2 against titles of the Land; and,
  5. Certificate of Lease dated 20<sup>th</sup> August, 1977.
41. Pandya then made an explanation to the Land Registrar which included:
- “At the material time in June, 1977 the registered Lessor Sir Ali bin Salim Elbusaidi was dead and no one was registered in his place as his personal representative against the three plots and no one could consent. It appears that under Section 48 proviso (1) the Registrar probably dispensed with the consent of the Lessor as he was dead and registered the Transfer of Lease as presented...
- Please place the titles in restriction to avoid any complication pending decision of the Court on the dispute being raised by Salim Soud Ali bin Salim Elbusaidi.
- Signed
- K.M. Pandya.”
42. From the foregoing, it would appear that Pandya, who was advocate for the deceased estate was aware of the transactions around the suit property in 1977. Some of what he says in the letter maybe controversial, [for instance that the estate had no personal representative at the time, which is not correct], as is his action to give the documents to the Registrar more than one year after the 1<sup>st</sup> respondent sacked him from representing the deceased estate. However, the controversial issues do not fall for our determination as they were not raised by any of the parties. It cannot be a contested fact that Pandya kept in his possession the above referenced relevant documentation to the suit properties, from 1977 until the surrender to the Land Registrar Mombasa in 2012. He quoted Section 48 of the RLA, as the Law the Registrar may have invoked to register the appellant’s leases to the suit properties.
43. There is at page 287 of the Record of Appeal a letter from the Land Registrar Mombasa to the Principle Registrar of Titles dated 6<sup>th</sup> June 2012. It is titled, “Nullification of Lease on Plot No. Mombasa/Block XXI/151, 152 & 498: Lessor Ali Bin Salim Elbusaida (deceased).” The letter says in part “According to the records held herein there was no consent from the lessor during the registration of transfer to Koira Ltd...”
44. Furthermore, Section 27 of the [Registered Land Act](#) (or Registration of Titles Act) provides for interest conferred upon registration thus:
- “27. Subject to this Act –
- a. ...
  - b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.



45. It is clear from this provision that a certificate of title issued by the Registrar to, *inter alia* a purchaser of land upon a transfer, is *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner. The 1<sup>st</sup> respondent has not pleaded that the appellant's title was acquired illegally, unprocedurally or through a corrupt deal. Instead, the 1<sup>st</sup> respondent complaint was that its consent was never sought or obtained before the transfer was effected.
46. The evidence and the position on the ground is that the appellant has been in possession of the suit properties for 34 years since 1977. There is no evidence tendered that the 1<sup>st</sup> respondent objected to their possession and for that reason the doctrine of estoppel applies against the 1<sup>st</sup> respondent from denying that there exists a tenancy between it and the appellant. [See *Kanje Naranjee Ltd v. Tulsidas Dharamshi Ghadiyal* [1965] E.A. 171 and *Taylor Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd* [1981] 1All E.R. 897], The appellant's position that it lawfully acquired the leases and lawfully registered them with the Land Registry was not challenged on basis of impropriety. We agree with the learned trial Judge that the appellant's leases over the suit properties were, on a balance of probabilities valid, and therefore the 1<sup>st</sup> respondent's contention that the appellant was a trespasser and a stranger falls by the way side.

### **The Option to Renew**

47. The other issue to consider is the option to renew. The appellant urges that the lease agreement, on the face of it, allowed it to exercise the option to renew the lease, and that it indeed exercised that option in writing to the 1<sup>st</sup> respondent; and so it is wrongful for the 1<sup>st</sup> respondent to refuse to recognize its tenancy and to demand vacant possession of the premises. The appellant's position is that once the terms on the option to renew were agreed upon, and the requisite steps in that regard followed, the 1<sup>st</sup> respondent had no option but to oblige the lessee and renew the lease and on the same terms as the 1914 Indenture.
48. The 1<sup>st</sup> respondent on its part urged that the option to renew the leases was not open to the appellant for reason of breach in payment of rent, which conduct was a relevant consideration, as renewal was dependent on the appellant's past conduct; and that due to the great disparity between the rent payable and the value of the land, the lease was oppressive and not benefitting the estate of the deceased.
49. The learned Judge of the ELC, on the issue of renewal of the lease found:

“the issue raised by the 1<sup>st</sup> respondent that if the lease is renewed on the same terms, is unconscionable makes sense for two reasons. First, the amount of Rs2790 p.a. payable from 1914 has definitely depreciated with the changes occasioned by inflation rates. Secondly, if comparison is taken with the renewal of government leases, in nearly all instances Stand Premiums are usually imposed on lessee to pay to the government and the renewal is not automatic for a further period of 99 years, but it could be for less. Consequently I hold that the clause was meant to give the appellant preference when the lease came to an end at the same time weighing in the interest of the landlord. This is in line with the holdings of the Court of Appeal in *Sands v Mutual Benefits Ltd and Kitsuri Ltd*, cases *supra* that you cannot impose a tenant on a landlord.”

50. We shall first consider the general principles that apply to leases with the option to renew. [\*Halsbury Laws of England\*](#) Vol. 27 – Landlord and Tenant paragraph 359 states;

“If the renewed lease is not conditional on the observance of covenants, the court will not refuse to enforce the renewal on the ground of breach of covenant unless the breach is



serious and willful, or unless the landlord could immediately put an end to the renewed lease under the proviso for re-entry”.(emphasis added) (See *Hare v. Burgess* (1857) 5 WR 585; *Thompson v Guyon* (1831) 5 Sim 65).

51. In a persuasive decision of *Ramanbhai Fulabhai Patel & 2 Others v General Equipment Corporation Ltd* [1979]eKLR, the High Court expressed itself on the nature of an option clause in a lease as follows;

Where a lease contains a covenant on the part of the lessor that he will, at the end of the term or at some period within the term, grant a renewal of the lease if so required by the lessee, such a lease confers on the lessee an immediate term with a right to the further term. The option is an irrevocable offer, to be accepted or not by the tenant (see *Stromdale & Ball Ltd v Bruden* [1952] Ch 223, *Beesley v Hallwood Estates Ltd* [1960] 2 All ER 314).

When the offer is accepted there is an agreement for a lease, and the lease (if executed) will tend in general (as a renewal) to be a new lease. This is because the general idea of the renewal is to grant a further term after termination but, as the agreement is made before the termination, it has been thought necessary to imply a surrender of the first term to make sure that the landlord has title to pass to the tenant for the second term. Such a new lease is seen in *Habib Punja v Agas* [1968] EA 160. It may, however, not result in a fresh lease being granted. *Gardner v Blaxile* [1960] 2 All ER 457 and *Baker v Merckel* [1960] 1 All ER 668 offer illustrations of the case where the option operated to extend the original lease. Very clear words were used to effect that purpose. As far as the demise itself is concerned, the option is collateral; but in some sense it may be a part of the agreement on the strength of which the lease was granted *Griffith v Pelton* [1958] Ch 205 (an option to purchase case) and *Beesley v Hallwood Estates Ltd* [1960] 2 All ER 314 (an option to renew case).”

52. The above authorities show that the terms of a lease must be clear and unambiguous and that these terms determine the intention of the parties, and the court must respect them.

Turning now to the leases under consideration, the option clause in the indenture of 20<sup>th</sup> January 1914 reads as follows;

“Now this Indenture witnesseth that the landlord in consideration of rent hereby reserved and of covenants and conditions on the part of the lessees to be informed and observed hereinafter contained doth hereby demise into the lessees all that rectangular area...

To Hold the said premises for a term of 99 years from 1<sup>st</sup> January 1914 during the said term annual rent of 2790/- clear of all deductions payable in advance on 1<sup>st</sup> January in every year, the first of such yearly payment to be made on 1<sup>st</sup> January 1914 and the lessees do hereby covenant with the landlord that they the lessees during the said term will pay yearly rent hereinbefore reserved in advance on the days and in the manner aforesaid and will pay all rates and taxes or charges in the nature of land tax or other outgoings now payable or hereinafter to become payable in respect of the said premises or

...thereof and will at the expiration or sooner determination of the said lease yield all the said buildings and structures which may be standing upon or fixed to the said land without payment of any compensation in respect of any such buildings or fixtures by the landlord and it is hereby agreed that should the lessees so desire they may at the expiration of the said term call upon the landlord to give them a renewal of the lease for a further period of 99 years on the same terms as above and the landlord shall there upon give to the lessees such renewal.”



53. The above Clause contains two phrases around which its construction is to be made. First, there is the introduction to the option: “should the lessees so desire they may at the expiry of the said term call upon the landlord to give them a renewal of this demise for a further period of ninety nine years on the same terms as above appearing”. Second, is the operative direction: “and that that landlord shall thereupon give to the lessee such renewal”.
54. All that the appellant was required to do to trigger the option was to call on the landlord to renew the lease at the expiry of the term of the indenture. It is common ground that on 8<sup>th</sup> June 2011, the appellant wrote to the 1<sup>st</sup> respondent notifying them of its intention to renew the lease. This was well before the lease expired on 31<sup>st</sup> December 2012. The appellant exercised the option within time.
55. The 1<sup>st</sup> respondent contended that they did not recognize the appellant for reason that he entered the premises in 1977 without the written consent from the administrator of the Estate. We have already dealt with this aspect of the 1<sup>st</sup> respondent’s complaint, and found that even though no consent was obtained from the administrator of the deceased estate before the assignment of the leases to the appellant, that did not invalidate or vitiate the leases. By the time the appellant was applying for renewal of the lease, he had been in occupation of the suit premises for 34 years. As we stated earlier, there is no evidence on record that the 1<sup>st</sup> respondent objected to the appellant’s occupation of the premises.

**Whether the appellant paid ground rent and whether rent was an extraneous matter to the renewal of lease.**

56. As to the issue of rent, there are two sides to this issue. The first one is the issue whether the appellant paid rent as prescribed by the Indenture of 1914. Regarding this issue the evidence adduced by Masud Mohamed Ali Rana, the appellant’s first witness was very clear that rent was not paid in compliance to the terms under the Indenture. His evidence is clear he had no proof of any payment of rent between 1978 to 1994; that in 1995 the appellant paid to Malindi School Trust the sum of Kshs. 104, 000/=, and on the 30<sup>th</sup> November 2010 it paid Kshs. 95, 000/= to Pandya & Talati Co. Advocates. The witness said that he could not tell what the two payments were meant for. The appellant’s case was that on advice from Pandya & Talati Co. Advocates the appellant drew a cheque for Kshs.284,560/- dated 11<sup>th</sup> May 2011 for the payment of the full rent for period between 1977 to 2011, but that the cheque for the said payment was rejected.
57. The evidence of Soud for the 1<sup>st</sup> respondent was that his father wrote to Pandya advocates the letter informing them to cease acting for the estate of the deceased and directing that they surrender to the newly appointed advocates, Hassan Abdi & Co advocates records and monies of the estate. The letter to Pandya is dated 29<sup>th</sup> April, 2011. He testified that the request for surrender of accounts and monies for recovered rents are still outstanding. He stated that the newly appointed advocates were instructed to decline to receive the cheque of payment of rent from Pandya for reason the payment was in breach of the 1914 Indenture which provided that payment of ground rent should be made at the beginning of each year. He further testified that no ground rent was ever been paid at any time by the appellant.
58. Mr. Khagram’s submissions was that the appellant adduced evidence to demonstrate that it made payment for ground rent to the 1<sup>st</sup> respondent. There is evidence to support this position. The evidence of the appellant’s witness, Masud was that on the 30<sup>th</sup> November 2010 it paid Kshs. 95, 000/= to Pandya. Secondly, the letter at page 288 of the record of appeal, Vol. 1 is a letter from Pandya advocate dated 12<sup>th</sup> May 2011 to Hassan Abdi advocates who took over from him as afore stated. He acknowledges Hassan’s letter to him. His letter to Hassan enclosed a cheque and explained in part

“We acknowledge receipt of your letter dated 29<sup>th</sup> April 2011.



We are preparing our fee note for professional services rendered to Salim Soud Ali pertaining to the estate of the Ali Bin Salim El Busaidy, deceased.

We enclose herewith a cheque for Kshs. 284,560/= being ground rent at the rate of Kshs. 2,790/= x 3- Kshs. 8,370/= per annum for the three plots for 34 years from 1<sup>st</sup> January 1977 to 31<sup>st</sup> December 2011 owed by the current registered lessee Koira Ltd It had purchased the leasehold interest of the plots in August 1977. It will pay regularly future rent as and when due to the legal representative of the deceased lessor...”

59. We find that there is clear evidence from the appellant’s witness that money was paid to the 1<sup>st</sup> respondent’s advocate in 2010, and even though the witness did not commit himself as to the purpose of that payment, especially being the 1<sup>st</sup> respondent’s advocate, the money must have been towards payment of rent. The letter from Pandya dated 12<sup>th</sup> May 2011 is a demonstration that the appellant made an attempt to pay rent on 31<sup>st</sup> December 2011, which payment was rejected. Given this evidence, we cannot say that the appellant did not pay a single cent towards rent to the 1<sup>st</sup> respondent as was claimed.
60. The appellant was in occupation of the suit properties for 34 years and the 1<sup>st</sup> respondent was aware of this. The 1<sup>st</sup> respondent did not adduce any evidence to demonstrate that it ever issued a rent demand note, or to show it demanded payment of rent from the appellant. The Indenture contained very specific provisions regarding the 1<sup>st</sup> respondent’s rights where rent was not paid and what actions it could take. We shall deal more with this aspect later on in this judgment.
61. The second aspect of rent, and most important is whether the payment or otherwise of rent was an extraneous matter to the renewal of the lease. Mr. Khagram’s submission was that the renewal of the lease had nothing to do with the payment or otherwise of the rent. Counsel relied on the case of *Hunt vs. Spencer* [1867] 13 GR 225 [CA], for the proposition that where the option to renew was not dependent on the performance of a covenant by a party in question, the court should consider that the general rule was against enforcing part of a contract where the other part was from its very nature incapable of being specifically enforced. It also relied on *Rafferty vs. Schofield* [1897] for the proposition that where it was not a condition precedent to the exercise of the option to renew that the lessee should not have defaulted, the option was well exercised and a binding contract created between the parties. Cited was the case of *Birchmont Furniture Ltd vs. Loewen* [1977 3 WWR 651], a case where the lease agreement had both an option to renew and an option to purchase. The court affirmed the principle that the language of the option clause, is material and of particular relevance to the case, whether it is expressed to be subject to or conditional upon performance by the lessee or tenant of covenants or terms.
62. On these principles, Mr. Sagana in his submissions seemed to agree. Counsel cited Ontario Court of Appeal case, *Coventry vs. Mclean* [1894] 21 OAR 176 which held that the terms of the exercise of option must be strictly construed and that all precedent conditions must be fulfilled before any contract binding upon the vendor can arise. Mr. Sagana relied on an Article by an Author, Mr. Steven L. Shavers [in Alberta Law Review [Vol. xxxiii, No. 1 1994]] titled *The Requirement To ‘Duly And Regularly’ Pay Rent As A Condition Precedent To Lease Renewal*. The author opined that renewal options are usually predicated on the satisfactory past performance of the tenants covenants. In that article the author examined Canadian cases, including the one counsel relied on of *Finch vs. Underwood* [1896] 45 LJ Ch. 522. The statement attributed to James Lord Justice, that the renewal agreement is a privilege to which the tenants were to be entitled on certain terms seems to us to be an obiter dictum. We were not able to verify the context as the authority was not provided. In any event, even if it was the holding of the Court, it is persuasive, not authoritative.



63. Mr. Sagana urged that payment of rent was a condition precedent to the renewal of the lease, which, he urged, was predicated upon the appellant's past performance. What Mr. Sagana has relied upon to argue that the appellant never paid rent as required under the Indenture was the evidence adduced by the appellant. Counsel urged that the appellant did not strictly observe the contract especially payment of rent and that as a consequence it had lost the right to the benefit of the clause on option to renew. It was Mr. Sagana's submission that because of the said default, the appellant's lease was extinguished and could not be renewed.
64. The learned ELC judge in her judgment made reference to an ELC decision in *Brand City Ltd vs. United Housing, supra*, where the Judge cited an Article, Common Law treatment of renewal rights in commercial agreements: A special look at franchises, distributorships and the duty of good faith by Adam Ship on the principle prerequisites to the enforcement of renewal right at Common law:
- i. a right to renew must be rooted in contract, either the primary or a collateral agreement,
  - ii. A renewal clause in any agreement must provide certainty as to essential terms that will govern the parties during the renewal term,
  - iii. A renewal clause and any conditions precedent expressed thereon must be properly exercised by the grantee in accordance with its terms subject to certain common law rules that avoid undue forfeiture of rights"
65. We have set out herein above the terms of the Indenture. In particular, we have set out verbatim what the parties covenanted on the option to renew. We agree that the terms of the contract upon which the option to renew are founded must be certain, concise, clear and unambiguous and must be strictly construed in accordance to the terms used by the parties.
66. The Indenture of 1914 is very clear that the option to renew the leases was not predicated upon the observance of any terms thereunder, or conditions precedent, including the one on payment of rent. The Indenture made specific provision of the rights of the lessor in case of default in payment of rent, which was re-entry into the suit premises, whereupon the lease would terminate. The step the lessor had to take before exercising its right of re-entry are well set out. In that regard, it provided as follows:
- "Provided always and these presents are upon this express condition that if the rent hereinafter reserved shall be due and unpaid for two calendar months after demand for such payment shall have been made in writing by the landlord or there shall be any breach of any other of the covenants by the lessees herein contained the landlord may re-enter upon the said premises and immediately thereupon the said term shall immediately determine and it is hereby agreed that it shall be sufficient for purposes of this proviso if such demand is sent to the lessees through the post addressed to them at Mombasa or if the same shall be posted in a conspicuous part of the said premises and the landlord doth hereby covenant with the lessees that the lessees performing all the covenants by them herein contained may quietly hold and enjoy the said premises during the said term without any interruption by the landlord, and that the lessees may assign..."
67. The administrator(s) of the deceased lessor's estate did not exercise the right of re-entry at any time during the life of the said leases, even though this right had accrued to them many times over. It is our view that failing to pay ground rent when due was irrelevant to the exercise of the option to renew the lease. Since there was no demand made, in the Court's view, failing to pay ground rent could have



been applicable where the 1<sup>st</sup> respondent was seeking re-entry before the expiry thereof, and not where renewal was being sought.

68. It is trite law that the role of the Court is not to redraw a contract for the parties. In *Damondar Jibabbhai & Co Ltd and another vs. Eustace Sisal Estates Ltd* [1967] EA 153, Sir Charles Newbold P stated that:-

“The function of courts is to enforce and give effect to the intention of the parties as expressed in their agreement. In the English Court of Appeal case above - *Globe Motors Inc & Others vs TRW Lucas Electric Steering Ltd & Others* (*supra*)

– Lord Justice Beatson stated as follows: -

'Absent statutory or common law restrictions, the general principle of the English law of contract is [that parties to a contract are free to determine for themselves what obligations they will accept]. The parties have the freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct.'

69. In *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR, the Court expressed itself as follows;

“... 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. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

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”.

70. We are in agreement with the ratio decidendi in the two cited cases of *Damondar Jibabbhai & Co Ltd and another vs. Eustace Sisal Estates Ltd* (*supra*) and *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* (*supra*). The parties were guided by the Indenture of 1914, whose terms were clear and unambiguous. It is not also lost on us that the 1<sup>st</sup> respondent has not raised any opposition to any of the terms of the Indenture, and in particular the one on the terms of the option to renew. We can therefore say that the terms of the Indenture are uncontested. The said agreement was in tandem with the RLA, which sets out the implied terms in the leases, on the part of the lessor and the lessee under Sections 53 and 54. For ease and convenience, we cite them hereunder.

71. The RLA, provides for implied terms in the lease on the part of the lessor as well as the lessee. Section 53 provides:

Agreements Implied in Lease on the part of the Lessor

“53. Save as otherwise expressly provided in the lease and subject to any written law governing agricultural tenancies, there shall be implied in every lease agreements by the lessor with the lessee binding the lessor –

(a) that, so long as the lessee pays the rent and observes and performs the agreements and conditions contained or implied in the lease and on his part



to be observed and performed, the lessee shall and may peaceably and quietly possess and enjoy the leased premises during the period of the lease without any lawful interruption from or by the lessor or any person rightfully claiming through him;,,,”

72. Section 54 provides:

Agreements Implied in Leases on the part of the Lessee

“54. Save as otherwise expressly provided in the lease and subject to any written law governing agricultural tenancies, there shall be implied in every lease agreements by the lessee with the lessor binding the lessee –

- a. to pay the rent reserved by the lease at the times and in the manner therein specified;
- b. to pay all rates, taxes and other outgoings which are at any time payable in respect of the leased premises during the continuance of the lease unless the same are payable exclusively by the lessor by virtue of any written law;...
- (h) not to transfer, charge, sublease or otherwise part with the possession of the leased premises or any part thereof without the previous written consent of the lessor, but such consent shall not be unreasonably withheld.”

[emphasis added]

73. Let us disabuse the parties on this notion. The issue in this case is not the adequacy or otherwise of consideration (See *Reliable Engineers Ltd vs. Mantrac Kenya*, (*supra*) nor is it one of relieving a party from a bad bargain, (See *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another*, (*supra*). The issue turns on what was the intention of the parties in their bargain? The agreement was that the lessee paid rent and all other payments to the government, and adheres to all the covenants under the Indenture. On the lessor’s part, his was to give the lessee quiet possession of the suit premises, with option to re-entry after following due process, in case of default.

74. There was also discussion regarding payment of rent and the currency of payment. Mr. Khagram insisted in his submissions that as far as rent was concerned, the same terms as specified in the Indenture were to apply and there was no room for negotiations. Mr. Sagana on his part urged that Rupees 2790 was too low when looked at in comparison with the value of the land and structures on it and the monthly rental income from the properties. He urged that that the rent specified of Rupees 2790 was against public interest, unconscionable, unfair, and inequitable.

75. We have considered all these arguments. Though the Indenture is unequivocal that renewal of the lease would be on “the same terms”, the issue remains, whether those terms can be applied in the same way as they were in 1914 especially since, the rent payable was set at Rupees 2790 per annum, which currency the parties agree is no longer legal tender in Kenya today. Secondly, the record shows that no rent over the lease period was paid by the appellant using that currency. Given the situation, it is apparent that parties should agree on practical and feasible renewal terms taking into account prevailing circumstances. But having said that, and we have repeatedly stated, it is not for the Court to come up with the renewal terms for the parties; that is an obligation that the parties alone will have to surmount.



## The Disposition

76. Our findings hereinabove answers the issue as to whether the 1<sup>st</sup> respondent bound under the terms of the Indenture dated 20th January 1914 to grant renewal of the Indenture for a further period of 99 years in the affirmative. The learned trial Judge was therefore wrong to find that renewal of the lease was not mandatory. As regards the terms of renewal of the lease. the Indenture of 1914 provided thus:

“and it is hereby agreed that should the lessees so desire they may at the expiration of the said term call upon the landlord to give them a renewal of the lease for a further period of 99 years on the same terms as above and the landlord shall there upon give to the lessees such renewal.”

77. The option under the Indenture therefore obligated the 1<sup>st</sup> respondent to renew the lease under the same terms as those specified in the 1914 Indenture. Since it is not the role of Courts to redraw a contract for the parties, see *Damondar Jibabbhai & Co Ltd and Another vs. Eustace Sisal Estates Ltd (supra)*, it becomes clear to us that the duty of the Court is to enforce the agreement of the parties. The Court has no jurisdiction to depart from what is agreed, as that would be tantamount to re-writing the contract for the parties. The appellant in this regard exercised his option to renew by communicating that fact to the 1<sup>st</sup> respondent and calling upon it to renew the lease long before the expiry. The 1<sup>st</sup> respondent was in turn obligated under the lease to grant the appellant a renewal under the terms of the 1914 Indenture.

78. It is notable that the remit of our duty therefore was to determine whether or not the lease was renewable, and if so, the terms of its renewal, and therefore the only order in the Appellant’s re-amended plaint dated 17<sup>th</sup> June 2017 that would be merited in the circumstances is that of specific performance of the indenture dated 20<sup>th</sup> January 1914 in so far as the option to renew the appellant’s interest in the suit properties for a further period of 99 years on the same terms contained in the indenture is concerned. However, given that the term of the indenture as regards the amount payable as rent is no longer applicable, the parties will need to agree on an equivalent term. We are also of the view that the consequent remedies sought in the re-amended Plaint to actualize the order of specific performance are beyond the remit of this Court for the reason that the dispute that was before us principally concerned the terms of a specific contract between the parties.

79. In the premises the Appellant’s appeal is found to be merited to the extent of the following orders:

1. The judgment of the ELC Court delivered by A. Omollo, J. on the 22nd March 2019 in ELC Civil Suit No. 288 of 2012 be and is hereby set aside.
2. Judgment be and is hereby entered in favour of the Appellant on the terms that the 1<sup>st</sup> Respondent be and is hereby compelled to renew the Appellant’s leasehold interest in the properties known as Title numbers Mombasa/Block XXI/151, 152 and 498 for a further period of 99 years, on the same terms contained in the Indenture dated 20<sup>th</sup> January 1914, save for the term as regards the amount payable as rent which has since been overtaken by events and the 1<sup>st</sup> Respondent and Appellant shall agree upon on the new rent payable.
3. The 1<sup>st</sup> Respondent will meet the Appellant’s costs of this appeal and of the suit before the ELC.

80. It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 14<sup>TH</sup> DAY OF APRIL 2023**



**A.K. MURGOR**

.....

**JUDGE OF APPEAL**

**P. NYAMWEYA**

.....

**JUDGE OF APPEAL**

**J. LESIIT**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

