IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: SICHALE, J. MOHAMMED & KANTAI JJ.A)

CIVIL APPEAL NO. 165 OF 2016

BETWEEN

KENYA COMMERCIAL BANK LIMITED.....APPELLANT

VERSUS

PICKWELL PROPERTIES LIMITED.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya

at Nairobi, (Ogola, J.) dated 20th March, 2013

in

H.C.C. C. NO. 544 OF 2011)

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JUDGMENT OF J. MOHAMMED, JA.

Background

1. This is an appeal by KENYA COMMERCIAL BANK LIMITED (the appellant who was the respondent in the High Court) against PICKWELL PROPERTIES LIMITED (the respondent who was the plaintiff in the High Court). The appellant was aggrieved by the judgment of the High Court, (Ogola,J) which found in favour of the respondent and determined that the appellant had breached various terms of the tenancy agreement between the parties.

2. The brief background of the appeal as can be gleaned from the plaint is that by a letter of offer dated 29th November, 1993 (the tenancy agreement), the respondent who is the registered proprietor of Shankardass House offered to lease to the appellant premises situated on the ground and mezzanine floors (the suit premises) for a term of 12 years commencing on 15th December, 1993 and expiring on 14th December, 2005 and the appellant accepted the offer.

3. The salient terms of the tenancy agreement were: that rent was payable six months in advance; the respondent, as landlord was entitled to levy distress for the recovery of any rent outstanding for seven (7) days from the date of payment; that any rent outstanding fourteen (14) days from the date of payment would incur interest at the appellant's prevailing bank lending rates or 21% per annum, whichever was the greater; that the appellant would pay a security deposit for the due performance and observance of its obligations under the lease; and that the appellant undertook to redecorate and restore the suit premises to their original layout, state and condition as at the commencement of the tenancy during the final year of the term of the lease.

4. The respondent filed suit in the High Court on 1st December, 2011, by way of plaint on the grounds inter alia that the appellant vide a letter dated 29th June, 2005 notified the respondent that it would not renew its tenancy in respect of the suit premises upon the expiry of the term of the tenancy agreement on 14th December, 2005.

5. In the said plaint, the respondent claimed that: the appellant did not pay the agreed rental payments and interest as agreed between the parties; that the appellant did not vacate the suit premises upon the expiry of its tenancy on 14th December, 2005 and remained in possession of the suit premises until 31st October, 2006 when it removed the last of its trade fixtures and equipment which included two (2) bank safes each weighing in excess of 300 Kilograms; and that in the circumstances, the appellant gave vacant possession of the suit premises to the

respondent on 31st October, 2006 and was therefore liable to pay rent for the period it occupied the said premises from 15th December, 2005 until 31st October, 2006 when it vacated the suit premises; and that arising from the appellant's delayed payment of rent for the latter half of 2005, interest became due and payable on the delayed payments.

6. It was the respondent's further claim that the appellant failed to redecorate and restore the suit premises to the original state and condition in breach of the terms of the tenancy agreement; that while the appellant offered to pay the respondent Kshs 13,500,000 in lieu of its obligation to redecorate and restore the suit premises, it paid Kshs 9,578.200 and deducted the sum of Kshs 3,921,800 which amount it claimed to have paid to the previous tenant when it took up the suit premises.

7. The respondent prayed for judgment against the appellant for interest on delayed rent for the period 1st July 2005 to 30th November 2011; rent for the period 1st January 2006 to 31st October 2006 and interest thereon at 21% per annum from 1st January 2006 to 30th November 2011; interest on unpaid rent until payment in full; Kshs 3,921,800 being the amount deducted from the amount paid for restoration of the suit premises, interest thereon and costs.

8. In response, the appellant filed a defence, set off and counterclaim dated 25th January, 2012 claiming that it did not accept the terms of the letter of offer dated 29th November, 1993 in writing or at all; that no agreement was executed between the parties in terms of the mandatory requirements of Section 3(3) of the Law of Contract Act; and that in the circumstances it remained at all material times a month to month tenant liable to pay monthly rent. In the absence of a tenancy agreement between the parties, the appellant denied any obligation to pay interest at 21% per annum as claimed by the respondent in respect of delayed rental payments.

9. The appellant further claimed that it had vacated the suit premises prior to the termination date save that it had not removed two safes from the suit premises; and that in the circumstances, it was not liable to pay rent for the suit premises for the period between 14th December, 2005 and 31st October, 2006. It was the appellant's further claim that its failure to remove two safes from the suit premises on 14th December, 2005 was not a reasonable excuse for the respondent to refuse to take back possession of the suit premises.

10. The appellant further contended that following the respondent's refusal to take back the suit premises and in a bid to amicably resolve the dispute, the parties entered into negotiations on a without prejudice basis in respect of the amount payable by the appellant for the restoration of the suit premises to its original order and condition. The negotiations resulted in the payment of Kshs 9,578,200 by the appellant to the respondent for the restoration of the suit premises.

11. In its set off and counterclaim, the appellant claimed from the respondent: a refund or set off of the sum of Kshs. 12,766,223.40 which it had paid to the respondent as a security deposit for the due performance of its obligations under the lease; and a refund or set off of the sum of Kshs 9,578,200 which it had paid to the respondent for the restoration of the suit premises and which the respondent leased to other tenants without carrying out restoration works on the suit premises; that this resulted in the unjust enrichment of the respondent as it did not utilize the funds to carry out any restoration works on the suit premises.

12. The respondent filed a Reply to Defence and Defence to Counterclaim on 9th February, 2012 in which it reiterated its claim as set out in the plaint save for the averment that Section 3(3) of the Law of Contract Act did not apply in the matter since Section 3 (7) of the Law of Contract Act provided that the provisions of Section 3(3) of the Law of Contract Act were not applicable to any agreement or contract made or entered into before the commencement of Section 3(7) of the Law of Contract Act.

13. Upon hearing the suit, the learned Judge concluded that there existed a tenancy agreement between the parties as the appellant subjected itself to the terms and conditions in the letter of offer dated 29th November, 1993; that in further support of this finding, the appellant remained in possession of the suit premises paid, and gave the respondent six months' notice of its intention not to renew the tenancy; and that it could be construed from the conduct of the parties that their intention was to enter into a tenancy agreement and that the letter dated 29th November, 1993 operated as a tenancy agreement.

14. The learned Judge further found that the appellant vacated the suit premises on 31st October, 2006 when it removed the last of its fixtures and equipment; and that in the circumstances, the respondent was entitled to payment of rent for the period of January, 2006 to October, 2006 and interest thereon; that the appellant was not entitled to a refund of the security deposit of Kshs. 12,766,223.40 until it had fully discharged its tenancy obligations; that the failure by the respondent to utilize the amount paid by the appellant in the sum of Kshs. 9,578,200 to restore the suit premises to their original state and condition did not amount to unjust enrichment; and that the respondent was entitled to payment of Kshs. 3,921,800 being the unpaid balance of the amount agreed by the parties for the restoration of the suit premises to their original state and condition.

15. The learned Judge entered judgment for the respondent as follows:

"a) Interest on delayed rent for the period 1 July, 2005 to 30th December, 2005;

b) Rent for the period 1st July, 2006 to 31st October 2006 at Kshs. 32,113,291/-;

c) Interest on delayed rent for (b) at 21% per annum from January 2006 until filing of the suit;

d) Amount deducted from reinstatement sum at Kshs. 3,921,800/-;

e) Interest on a, b, c and d above at Court rates until payment in full;

f) costs of this suit."

16. Aggrieved by that decision, the appellant preferred this appeal on the grounds that the learned Judge erred in law and in fact in: finding that the appellant was liable to pay rent for the period 1st January 2006 to October 2006; finding that the appellant was liable to pay interest at 21% per annum for rent for the period 1st January 2006 to October 2006; finding that the claim was not time and statute barred; in refusing to allow a refund, or set off of the security deposit of Kshs. 12,766,223.40; in rejecting the appellant's counterclaim for Kshs. 9,578,200; and in awarding the respondent Kshs. 3,921,800.

17. The appellant sought orders that: the appeal be allowed and that the impugned judgment be set aside and substituted with an order dismissing the respondent's suit; that the respondent pays the appellant's costs of this appeal and in the High Court; and any further or other order that this Court may deem fit and just to grant.

18. The respondent filed a Cross Appeal on 5th June, 2017 on grounds that the learned Judge erred: in awarding interest on one period of delayed rent and not on the other; and did so capriciously, and without giving any reasons for so doing, despite finding that the appellant had agreed to pay interest at the rate of 21% per annum on delayed rent; in failing to apply the said contractual rate of 21% per annum from the time the rent had become due until payment in full; in applying interest at court rates after the date of judgment, and not the agreed contractual rate, despite holding that the contractual rate was the applicable rate for any delayed rental payments; in failing to appreciate that the learned Judge's failure to award interest at the rate contractually agreed resulted in the unjust enrichment of the appellant; in holding that the sum of Kshs. 3,921,800 had been deducted from the deposit, even after he had made a finding of fact that it had been wrongly deducted from an amount which the appellant had agreed to pay in lieu of its contractual obligation to redecorate and repair the suit premises to their original layout state and condition; and in failing to award interest on the sum of Kshs. 3,921,800 from the date of its wrongful deduction.

19. The respondent sought orders that the decree be varied and judgment be entered for the respondent as prayed for in the plaint; and that the respondent be awarded costs of the appeal and of the cross appeal.

Submissions by Counsel

20. At the plenary hearing, Mr. D. K. Musyoka, learned counsel for the appellant orally highlighted the appellant's written submissions and elected to abandon the grounds relating to the validity of the tenancy agreement. On the question whether the appellant was liable to pay rent for the period after termination of the tenancy, counsel submitted that the appellant's notice to renew the tenancy expired on 14th December, 2005; that the appellant vacated the suit premises before 14th December, 2005; that the respondent refused to take back the suit premises after the termination of the tenancy and after the appellant had vacated the suit premises; that the appellant was therefore not liable to pay rent for the period after it had vacated the suit premises; that the appellant was not in possession of the suit premises in October, 2006 when it removed its fixtures and fittings as the parties were negotiating on the restoration of the premises in compliance with the tenancy agreement.

21. Counsel faulted the learned Judge for failing to find that the remedy for breach of the terms of the tenancy agreement lay in damages and not in the respondent's refusal to take possession of the suit premises and claim rent for the extended term; that the respondent's claim that it could not take possession of the suit premises before the appellant restored the suit premises to the original state and condition was therefore unlawful and unreasonable; and that the respondent had a duty to mitigate the damages which it claimed to have suffered

22. Counsel faulted the learned Judge for finding that the appellant was liable to pay interest at 21% per annum on delayed payment of rent. Counsel submitted that there was documentary evidence indicating that the respondent resisted the termination of the tenancy without any justifiable cause as the appellant vacated the suit premises before 14th December, 2005; that no interest could accrue after termination of the tenancy agreement; and no claim can therefore be made for interest on an expired tenancy agreement.

23. As regards the respondent's claim for interest for the period between July 2005 to December, 2005, counsel submitted that the terms of the tenancy agreement provided that rent was payable every six months in advance; that the last six months of the term commenced on 1st July, 2005 when the rent for that period became due; that the respondent's claim which was filed on 1st December, 2011 was therefore time barred by dint of the provisions of Section 8 of the Limitation of Actions Act; and that the learned Judge therefore erred in finding that the claim for interest was not statute barred as the reference date of the date of the cause of action is the date in which the arrears became due and payable.

24. As regards whether the appellant was entitled to either a refund or set-off or counterclaim of the deposit of Kshs 12,766,223.40 and payment made on without prejudice basis of Kshs 9,578,200, counsel submitted that the learned Judge erred in holding that the appellant was not entitled to a refund or set off of the deposit; that the appellant had fulfilled its obligations under the tenancy agreement and was therefore entitled to a refund of the deposit or a set off; that in the circumstances, the learned Judge should have ordered the respondent to refund to the appellant the deposit of Kshs 12,766,223.40 and interest thereon at court rates.

25. On the respondent's Cross Appeal, counsel submitted that in accordance with the tenancy agreement, the interest rate of 21% per annum could only be applied in relation to delayed rent within the tenancy period; that the interest rate of 21% per annum was not applicable for claims arising after expiry of the tenancy and after the appellant had vacated the suit premises; that the amount of Kshs. 3,921,800 was not a rental payment and there was no agreement between the parties that the said amount would attract interest; and that the respondent's claim in this regard was not supported by any agreement or law. Counsel urged us to allow the appeal with costs and dismiss the cross appeal with costs.

26. Mr. Wandabwa, learned counsel for the respondent opposed the appeal and submitted that while the appellant gave notice to vacate the suit premises by 14th December, 2005 it remained in possession for another ten (10) months yet declined to pay rent for that period; that the learned Judge did not err in finding that the appellant removed its fixtures and equipment on 31st October, 2006 and was therefore in possession of the suit premises until that date and was liable to pay rent and interest thereon in compliance with the tenancy agreement; that

the learned Judge found that while there was evidence that the respondent had initially resisted the termination of the tenancy by the appellant, there was no evidence that it had refused to take back the premises as alleged by the appellant; that the learned Judge found that the intention of the parties was to enter into a tenancy arrangement and the letter of 29th November, 1993 operated as a tenancy agreement and the parties were therefore bound by the terms and conditions contained therein, including the provision for interest at the rate of 21% per annum on delayed rent.

27. As regards the appellant's claim that the suit was barred for limitation as the appellant's failure to pay rent on time occurred on 1st July, 2005 while the suit was filed on 1st December, 2011, counsel submitted that the learned Judge found as a fact that the unpaid rent was eventually paid in 2006 and the claim could therefore not be defeated by limitation.

28. On the appellant's claim for repayment of the security deposit of Kshs 12,766,223/40, counsel submitted that the learned Judge did not err when he held that the appellant's claim was premature as per the terms of the tenancy, this amount was payable once the appellant fulfilled all its tenancy obligations to the respondent.

29. As regards the appellant's claim that it was entitled to deduct Kshs 3,921,800 from the amount due to the respondent for restoration of the suit premises as it had paid this sum to a third party that had previously occupied the suit premises for its fixtures, counsel submitted that the learned Judge did not err when he found that this was a transaction to which the respondent was a stranger and there was therefore no justification for the appellant to deduct the same. Counsel further submitted that the learned Judge did not err when he found no merit in the appellant's claim that as the sum paid by the appellant to the respondent for restoration of the suit premises was not utilized by the respondent, the same resulted in an unjust enrichment and should be refunded.

30. On the respondent's Cross Appeal, counsel submitted that the learned Judge erred in failing to award the contractually agreed rate of interest to the claims of rent paid late and unpaid rent; that the learned Judge had no discretion in the matter and was obliged to enforce the agreed rate of 21% per annum, unless it was shown that the agreed rate was illegal, unconscionable or fraudulent. Counsel further submitted that the learned Judge erred in awarding interest on Kshs 3,921,800 deducted from the amount paid for restoration of the suit premises from the date of judgment at court rates and awarded no interest for the seven years from default in 2006 until delivery of the impugned judgment in 2013.

Counsel urged the Court to dismiss the appeal with costs and allow the cross appeal with costs.

Determination

31. I have considered the grounds of appeal, the submissions, the authorities cited and the law. This Court's duty as the first appellate court was considered and is set out in the case of Selle and Another v. Motor Boat Company Ltd and Others, [1968] 1 EA 123 as follows:-

> **"An appeal to this court from a trial by the High Court is by way of retrial 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 witnesses and should make due allowance in this 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 (Abdul Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."**

32. I have distilled six (6) germane issues for determination:

> **a) Whether the letter of 29th November, 1993 gave rise to an enforceable agreement to lease between the appellant and the respondent?**
>
> **b) Whether the appellant's claim was statute barred?**
>
> **c) Whether the appellant was liable for the payment of rent for the period after the termination of the tenancy from January, 2006 to October, 2006?**
>
> **d) Whether the appellant was entitled to a refund or set off or counter claim of the deposit of Kshs 12,766,223.40?**
>
> **e) Whether the appellant was entitled to a refund or set-off or counter claim for the payment made on without prejudice basis of Kshs 9,578,200**
>
> **f) Whether the respondent's Cross-Appeal has merit?**

33. On the question of whether the letter of 29th November, 1993 gave rise to an enforceable agreement between the parties, the learned Judge concluded that the said letter constituted a tenancy agreement between the parties. From the record, the appellant remained in possession of the suit premises; was paying rent in accordance with the terms of the letter of 29th November, 1993 and gave notice to terminate its tenancy.

34. In Mega Garment Limited vs Mistry Jadva Parbat & Co. (Epz) Limited [2016] eKLR this Court stated as follows:

> "The time-honoured decision of this Court in Bachelor's Bakery Ltd v Westlands Securities Ltd (1982) KLR 366 which has been followed in a long line of subsequent decisions elucidates the status of an unregistered lease. It reiterates and confirms the firmly settled law, first, that a lease for immovable property for a term exceeding one year can only be made by a registered instrument; that a document merely creating a right to obtain another document, like the one in this dispute, does not require to be registered to be enforceable; that such an agreement is valid inter partes even in the absence of registration, but gives no protection against the rights of third parties. That exposition of the law hold true in this case."

It is notable that the appellant vide a letter dated 29th June, 2005 gave the respondent notice that it would not renew the tenancy upon expiry on 14th December, 2005. From the record, the appellant's advocates forwarded cheques in respect of rent to the respondent's advocates.

Applying the above principles to the circumstances of this case, I find that by virtue of the existence of the agreement to lease in the terms of the letter of 29th November, 1993, a valid, binding and enforceable agreement came into existence as between the parties.

35. On the appellant's claim that the suit was barred by limitation in view of the fact that the breach to pay rent on time, had occurred on 1st July, 2005, while the plaint had not been filed until 1 December, 2011, the respondent was barred by time. Section 23(3) of the Limitation of Actions Act provides that:-

> **"(3) Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefore acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment:**
>
> **Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but a payment of interest is treated as a payment in respect of the principal debt."[Emphasis supplied].**

36. In interpreting the above provision, this Court, in the case of Shire v. Thabiti Finance [2000] LLR 1455 (CAK), observed as follows:-

> **"[These words] leave no doubt that the legislature intended that any acknowledgement or part-payment not only extends the limitation period but also revives an otherwise statute-barred action falling within that provision."**

37. Further, this Court, when dealing with the issue of limitation in the case of Afrofreight Forwarders Limited V African Linear Agencies, Civil Appeal No.25 of 2007, relying on the above provision found that the suit was not time barred as the date of acknowledgment of indebtedness by the debtor was within the limitation period of 6 years.

38. It is evident from the record that the appellant failed to pay the rent for the period 1st July, 2005 to 31st December, 2005 when it first became due. However, the appellant made the payment in March, 2006, and the cause of action therefore arose in 2006 and the limitation period would have lapsed in 2012. I therefore find that the learned Judge did not err in his finding that the claim for interest for the period 1st July, 2005 to 31st December, 2005 was due and payable and was not statute barred.

39. On the question whether the appellant was liable to pay rent for the period after termination of the tenancy, it is not in dispute that the appellant removed all its fixtures including two safes from the suit premises on 31st October, 2006, the date when the respondent claims that the appellant handed it possession of the suit premises. It is therefore imperative to determine when the appellant handed possession to the respondent; and consequently, whether the appellant was liable for payment of rent, interest or any other amounts to the respondent in compliance with the terms of the tenancy agreement between the date it handed over the keys to the suit premises on 31st July, 2006 and the date when it removed all its fixtures and equipment on 31st October, 2006.

40. In WJ Blakeman Ltd V Associated Hotel Management Services Ltd [1985] eKLR Madan, JA (as he then was) stated as follows:

> **"Possession' is a teasing topic whenever it arises. It does not hold one straight-forward meaning, it has various meanings different in different situations so that the ownership of property cannot be affixed with unencumbered ease.**
>
> **'Possession' is a word that, perhaps like a great many words, is incapable of an entirely precise and satisfactory definition, Stable J in Bank View Mill Ltd and Others v Nelson Corporation and Feyer & Co (Nelson) Ltd (1942) 2 All ER 476 at p 486 (E&F). The term 'possession' is always giving rise to trouble. Viscount Jowitt said in United States of America and Republic of France v Dolfus Mieg et Compagnie, SA & Bank of England (1952) 1 All ER 572 "The person having the right to immediate possession is, however, frequently referred in English law as being the "possessor" – in truth, the English law has never worked out a completely logical and exhaustive definition of "possession" ". "For my part I approach this case on the basis that the meaning of possession depends on the context in which it is used", per Lord Parker CJ in Towers & Co Ltd v Gray (1961) 2 All ER 68 at p 71."**

41. Halsbury's Laws of England 4th Edition at Paragraph 1111 states as follows regarding possession:

> **""Possession" may mean legal possession: that possession which is recognized and protected as such by law. The elements normally characteristic of legal possession are an intention of possessing together with that amount of occupation or control of the entire subject matter of which it is practically capable and which is sufficient for practical purposes to exclude strangers from interfering…"**

42. Words and Phrases Legally Defined, Vo. 4 p 151 states as follows:

> **"Possession" is a word of ambiguous meaning, and its legal senses do not coincide with the popular sense…The word "possession" is sometimes used inaccurately with the right to possession. This right to possess is a normal incident of ownership; but an owner's right to possess may be temporarily suspended, for example, he has bailed the goods to a bailee for a term; and, conversely, the right to possess may exist temporarily in one who is not the owner, for example, a bailee."**

43. In the circumstances of this case, I find that the appellant was in actual possession of the suit premises until 31st October, 2006 when it removed the last of its fixtures and fittings from the suit premises. In accordance with the terms of the tenancy agreement, the appellant was liable to pay rent until the time that it handed possession to the respondent together with interest thereon. The learned Judge did not therefore err when he found that the appellant was liable for payment of rent until 31st October, 2006 and interest thereon as per the tenancy agreement.

44. On the question whether the appellant was liable to pay interest at 21% for the rent found to be payable for the late payment, the record shows that while the appellant issued notice to terminate the tenancy on 14th December, 2005, it handed over the keys of the suit premises to the respondent in July, 2006 and that the appellant handed over vacant possession to the respondent in October, 2006 when it removed the last of its fixtures (two bank safes). I find that the learned Judge did not err in his finding and I therefore find no merit in this ground of appeal.

45. On the question whether the appellant was entitled to either a refund or set off or counter claim of the deposit of Kshs 12,766,223.40, I note from the record that it was a term of the tenancy agreement that the security deposit of Kshs. 12,766,223.40 was to be refunded to the appellant at the end of the tenancy. However, it was a further term of the tenancy agreement that the respondent was entitled to apply the deposit or any part thereof towards the discharge of the appellant's tenancy obligations. I therefore find that the learned Judge did not err in finding that in accordance with the terms of the tenancy agreement, the respondent was entitled to retain the security deposit until the appellant had fully discharged its tenancy obligations as per the tenancy agreement.

46. As regards whether the learned Judge erred in rejecting the appellant's counterclaim for Kshs. 9,578,200 and in awarding the respondent Kshs. 3,921,800 on the premise that the parties had agreed on the restoration cost of Kshs. 13,500,000, it was the appellant's claim that it was entitled to deduct this sum as it had paid the same to the previous tenant for items it had purchased from the said tenant upon taking possession of the suit premises. The learned Judge found, correctly in my view, that as the respondent was not a party to this transaction and received no benefit from it, the appellant was not justified in deducting the said amount.

47. I now turn to the Cross-Appeal which raises several issues regarding the award of interest. I appreciate that an award of interest is an exercise of the learned Judge's discretion under

Section 26 of Civil Procedure Act which provides as follows:-

> **"(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.**
>
> **(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum."**

48. This power is to be exercised cautiously, judicially and in the interest of justice. In Abok James Odera T/A A. J. Odera & Associates v. John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR this Court observed that:-

> **"…it is now trite that the exercise of the judicial discretion donated by this section 26(1) above is not absolute. It has to be exercised judiciously, not with caprice or whim but with reason."**

49. Where parties have agreed on a rate of interest, the court has no discretion in the matter. In the case of Ajay Indravadan Shah v. Guilders International Bank Ltd [2002] 1 E.A. 269, this Court, interpreting the above provision, observed thus:-

> **"This section, in our understanding, confers upon the Court the discretion to award and fix the rate of interest to cover three stages, namely:**
>
> **(1) The period before the suit is filed;**
>
> **(2) The period from the date the suit is filed to the date when the Court gives its judgement, and**
>
> **(3) From the date of judgement to the date of payment of the sum adjudged due or such earlier date as the Court may, in its discretion, fix.**
>
> **We further understand these provisions to be applicable only where the parties to a dispute have not, by their agreement,**

fixed the rate of interest payable. If by their agreement the parties have fixed the rate of interest payable, then the Court has no discretion in the matter and must enforce the agreed rate unless it be shown in the usual way either that the agreed rate is illegal or unconscionable, or fraudulent."

50. This court in Mbogo & Another V Shah [1968] EA 93 set down the principles that guide this Court before interfering with a learned Judge's exercise of discretion:

"An appellate court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which he should have taken into consideration and in doing so arrived at a wrong conclusion…"

51. Regarding award of interest, I have first considered the issue of whether the learned Judge erred in failing to award the contractually agreed rate of interest to the claims of rent paid late and the unpaid rent paid. In this regard, I find that the tenancy agreement expressly provided a rate of interest and its applicability from the date of default until payment. I therefore find that the learned Judge erred in failing to award the rate of interest of 21% per annum to the rent for the period 1st July, 2005 to 30th December, 2005 as it was one of the agreed terms of the tenancy agreement between the parties.

52. From the record, it is undisputed that the rent for the period was delayed and was paid on 12th May, 2006. Further, it is clear that the parties had, in the tenancy agreement, agreed on 21% per annum as the rate of interest on late payment of rent. Thus, in my view, the respondent was entitled to compensation for the delayed payment of rent for the period 1st July, 2005 to 30th December, 2005 from the due date, 1st July, 2005 to the date of actual payment, 12th May, 2006.

53. It was the respondent's contention that the learned Judge erred in awarding interest on Kshs. 3,921,800 from the date of judgment at court rates and not for the seven years from default in 2006 until the delivery date of the judgment in 2013. In this respect, the learned Judge's finding was that there was no basis for the respondent to demand interest at 21% per annum for the said amount as this amount was never rent in the first place, but a deposit which, ordinarily is not returnable with interest. The learned Judge therefore awarded the respondent interest on Kshs. 3,921,800 at court rates from the date of the judgment until payment in full.

54. From the record, the amount of Kshs 3,921,800 was a deduction from sum paid in lieu of the appellant's obligation to redecorate and restore the premises to the original state and condition in compliance with the tenancy agreement. The respondent was therefore entitled to interest on the unpaid amount from 28th August, 2006 when the appellant made the deduction at the agreed rate of 21% per annum for monies in default.

55. The upshot is that I find that the appeal has no merit and it is hereby dismissed with costs. I find that the cross appeal has merit and the same is allowed with costs.

Dated and delivered at Nairobi this 24th day of July, 2020.

J. MOHAMMED

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: SICHALE, J. MOHAMMED & KANTAI, JJ.A)

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JUDGMENT OF F. SICHALE, JA

I have had the benefit of reading the judgment of the Hon. Lady Justice Jamila Mohammed, J.A.in draft. I entirely concur with her findings and I have nothing useful to add. As the Hon. Mr. Justice Kantai, J.A. agrees, the final orders of the Court shall be as proposed by the Hon. Lady Justice Jamila Mohammed J.A.

Dated and delivered at Nairobi this 24th of July, 2020.

F. SICHALE

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JUDGE OF APPEAL

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: SICHALE, J. MOHAMMED & KANTAI, JJ.A.)

CIVIL APPEAL NO. 165 OF 2016

BETWEEN

KENYA COMMERCIAL BANK LIMITED.....APPELLANT

AND

PICKWELL PROPERTIES LIMITED.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya

at Nairobi (Ogola, J.) dated 20th March, 2013

in

H.C.C.C. No. 544 of 2011)

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JUDGMENT OF KANTAI, JA

I have had the advantage of reading in draft the Judgment of my learned Sister J. Mohammed, JA and I need not repeat the facts of the case in detail as they are well captured in the said draft.

By a letter of offer dated 29th November, 1993 the respondent offered to the appellant premises at its Shankardass House in Nairobi at an agreed rental for a period of 12 years from 15th December, 1993. Among the terms set out in the said letter of offer were that rent was payable six months in advance; any rent due and owing after the 14th due date would incur interest at the then prevailing (appellant's) bank lending rates or 21% per annum whichever was greater; the appellant would pay a deposit equal to 6 months' rent to be increased as per reviewed rents and service charges at 2 year intervals which would be held by the respondent interest free until expiry or determination of the lease; and the appellant was to enter into a formal lease with the respondent. It is common ground that the parties did not enter into a formal lease agreement as had been envisaged in the letter of offer but the appellant took possession of the premises and occupied it as envisaged in the letter of offer. Nothing much turns on the issue of a formal lease not been entered into or registered. This Court held in the case of Mumias Sugar company Limited v Freight Forwarders (K) Limited [2005] eKLR where a formal contract was not entered by the parties:

> **"We have carefully studied the correspondence between the parties adduced in evidence and have come to the conclusion that it is sufficient to prove the existence of a binding contract between the parties to enter into a sub-lease in the terms of the draft sub-lease, amended as agreed in the correspondence."**

Similarly, in the case of Kenya Knitting & Weaving Mills Limited v Kenya Power & Lighting Company Limited [2016] eKLR this Court stated:

> **"…. an agreement such as this one under consideration is valid interpartes even in the absence of registration although it gives no protection against third parties."**

By a letter dated 29th June, 2005 the appellant notified the respondent that it would not renew the tenancy upon its expiry on 14th December, 2005. The appellant vacated the premises but did not remove two bank safes said each to weigh in excess of 300 kilograms and the safes were only removed on 31st October, 2005.

In the suit before the High Court the respondent prayed for interest on delayed rents; rent for the period 1st January, 2006 to 31st October, 2006 and interest thereof; an amount deducted by the appellant after vacating the premises and interest on the same.

The appellant filed a defence, set-off and counter-claim where it prayed for a sum of Ksh.22,344,423.40 said to be a sum to be refunded to the appellant by the respondent and interest on the same or in the alternative, a sum of Ksh.9,578,200 said to be due from the respondent to the appellant.

Ogola, J. heard the case and in a Judgment delivered on 20th March, 2013 the learned Judge found for the respondent in respect of interest on delayed rent for the period 1st July, 2005 to 30th December, 2005; rent for the period 1st January, 2006 to 31st October, 2006 and interest therein at 21% per annum from January 2006 until filing of the suit. The Judge also found that the appellant was not entitled to deduct the sum it had deducted upon vacating the premises and he awarded interest on that sum to the respondent.

I have gone through the whole record and the submissions made before us. There is no dispute that the appellant took possession of the premises and occupied the same for the period stated. Upon giving notice to vacate, the appellant vacated the premises but did not remove two very heavy safes which were left in the premises until they were removed on 31st October, 2005. The effect was that the appellant was in actual possession of the premises until 31st October, 2005 when it removed its safes from the premises.

Rate of interest applicable for delayed rent was stated in the letter of offer as 21% per annum or the appellant's lending rates; whichever was greater. The parties thus agreed on the rate of interest applicable.

I agree with my learned Sister that the appeal should be dismissed and the cross-appeal allowed.

Dated and delivered at Nairobi this 24th day of July, 2020.

S. ole KANTAI

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JUDGE OF APPEAL