IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: ASIKE-MAKHANDIA, KIAGE & SICHALE, JJ.A]

CIVIL APPEAL NO. 90 OF 2017

BETWEEN

GUARDIAN BANK LIMITED..APPELLANT

AND

BOOK POINT LIMITED..1ST RESPONDENT

GUILDERS INTERNATIONAL BANK LIMITED....2ND RESPONDENT

(An appeal against the Judgment of the High Court (Sergon, J) dated 3rd March, 2017 **In Nairobi Civil Appeal No. 1807 Of 2002)**

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JUDGMENT OF THE COURT

The appellant, **Guardian Bank Limited** filed an appeal against the decision of **Sergon, J** dated **3rd March, 2017**. The ruling the subject of this appeal ensued from an application dated **17th January, 2012**, brought by the appellant under order XXI of the Civil Procedure Rules (CPR) against the 1st respondent seeking to set aside the Notice to Show Cause why execution should not issue dated **11th January, 2012** and filed by the 1st respondent for recovery of a sum of Kshs 178,514,179.00 from the appellant and the 2nd respondent. In that ruling, **Sergon, J** held thus:

> **"In my view, the contention arises from order 2 which demanded payment of rent, service charge, interest and other outgoings as and when they fall due from 1*st* September, 2001 until the expiration of the lease. The bone of contention of the sum of Kshs 178,514,179.00 seem to arise from this order in particular. The 2nd defendant claims that it has settled the claim having paid Kshs 14,573,311.50 plus the taxed costs. The plaintiff on the other hand acknowledges payment as deposited in court but argues that there is still an outstanding amount of money by virtue of order 2 which amount is to the tune of Kshs 178,514,179.00. ……**
>
> ***The 2nd*** **defendant according to the above order is required to pay rent dues from 1*st September, 2001 until 28th* February, 2006 when the lease expires, which rent according to my calculations amounts to Kshs 35,351,232.00 while the service charge amounts to Kshs 4,949,166.00. The interest on the other hand would be 30% per annum as was payable at the time (30% on Kshs 35,351,232 + 9,949,166.00) = 12,090,11.94. It emerges therefore that there are additional sums of money that are payable to the plaintiff by the 1*st and 2nd defendant. According to my calculations, the total sum payable is Kshs 57,390517.4 without calculating other outgoings.***
>
> ***I am of the view that the 2nd*** **defendant should instead have challenged the plaintiff to explain how it arrived at the figure of Kshs 178,514,179.00. It is however as I stated earlier obvious that the decretal sum of Kshs 14,573,311.50 was not the only money payable under the decree. The only question is how much more is payable as per order 2 of the amended decree"**

It is the above ruling that provoked the instant appeal, the genesis of which is a claim filed in at the High Court of Kenya at Nairobi by **Book Point Limited** (the then plaintiff, now the 1st respondent herein) against **Guilders International Bank Limited** (the then 1st defendant and now the 2nd respondent herein) in which, by virtue of a lease dated **1st April, 1996**, the 1st respondent demised to the 2nd respondent all that ground and Mezzanine floors of the building being and erected on L.R. 209/12086, Moi Avenue known as **Guilders Centre** "*the suit premises*" for a term of ten years from **1st March, 1996** at rents and conditions stated in the said lease. Also, by a deed of variation dated **12th October, 1999,** the duo agreed on rents to be paid effective **1st June, 1999** upto **28th February, 2006** as follows:

i. Monthly rent of Kshs 500,000.00 was payable effective from **1st June, 1999 to 31st May, 2001,**

ii. Monthly rent of Kshs 580,000.00 was payable effective from **1st June, 2001 to 31st May, 2003,**

iii. Monthly rent of Kshs 672,800.00 was payable effective from **1st June, 2003 to 31st May, 2005** and

iv. Monthly rent of Kshs 780,448.00 was payable effective from **1st June, 2005 to 28th February, 2006.**

It was agreed further that the said rents were to be paid by the 2nd respondent without deductions whatsoever quarterly in advance in the manner specified in the lease.

Notwithstanding the above undertakings, it was also agreed that a monthly service charge was to be paid by the 2nd respondent to the 1st respondent under the said lease quarterly in advance together with the rent but not as part of the rents as follows:

i. Monthly service charge of Kshs 70,000.00 was payable effective from **1st June, 1999 to 31st May, 2001**

ii. Monthly service charge of Kshs 81,200.00 was payable effective from **1st June, 2001 to 31st May, 2003,**

iii. Monthly service charge of Kshs 94,192.00 was payable effective from **1st June, 2003 to 31st May, 2005,** and

iv. Monthly service charge of Kshs 109,262.00 was payable effective from **1st June, 2005 to 28th February, 2006**.

Further it was agreed that the 2nd respondent was to pay to the 1st respondent on demand (in addition to the said rent and service charge) 10% of all ground rent, rates, taxes and other charges of every nature and kind which were (or in the future) to be assessed or imposed on the said premises and or on the property by the Government of Kenya or by any local authority. The lease also contained a further covenant by the 2nd respondent that it would pay on first demand without conditions all costs charges (including advocates costs and surveyors fees) incurred by the 1st respondent for the purpose of or incidental to the preparation and service of a notice requiring the 2nd respondent to remedy a breach of any of the 1st respondent's covenants and agreements contained in the said lease.

On **21st January, 2000**, the appellant wrote to the 1st respondent indicating that there had been a merger between itself and the 2nd respondent.

In the suit filed by the 1st respondent, it was claimed that the 2nd respondent and the appellant had not paid any rents, service charge, rates and taxes and outgoings as from **July, 2000** totaling to a sum of **Kshs 8,265,400.00** which was due and owing from them. It was also a term of the lease that 2nd respondent would pay interest on all overdue amounts calculated at the rate of 2% above the maximum bank lending rates of Trust Bank Limited from the date the amount became payable until payment in full. In the said claim therefore, the 1st respondent prayed for judgment against the 2nd respondent and the appellant for:

(i)	Rent and Service Charge and Rates/Land Rent		8,253,600.00
(ii)	Interest thereon		1,287,314.00
(iii)	Advocates costs		11,800.00
		Kshs.	**9,552,714.00**

The 2nd respondent filed a defence dated **1st August, 2000** in which it contended that although there existed a lease over the suit property between it and the 1st respondent, the same was terminated after negotiations of which the appellant had taken possession of the suit premises after agreeing with the 1st respondent. The 2nd respondent contended that the appellant had taken possession and occupation of the suit premises and had since conducted its activities therein with the consent and acquiescence of the 1st respondent on an arrangement that was exclusively between the 1st respondent and the appellant which the 2nd respondent was not privy to. It was argued that since the 1st respondent had induced the appellant into the relationship thus altering its position to the detriment of the 2nd respondent, the 1st respondent was estopped from laying the claims or any claim at all against the 2nd respondent. The 2nd respondent therefore denied any liability and also denied owing the 1st respondent any rents, service charges and interest thereon or being liable to pay any rates, taxes and outgoings as alleged in the plaint or at all and the court was thus asked to dismiss the suit with costs.

The appellant on the other hand filed its statement of defence on **24th July, 2001** in which it denied the 1st respondent's claim contending that the plaint did not disclose any reasonable cause of action against the appellant. The appellant also contended that there was no contract between the 1st and the 2nd respondent which was the basis of the suit in which it was consequently enjoined; that the appellant was a

stranger to the 1st respondent's claim as set out in the plaint; that it was not privy to the alleged lease between the 1st and the 2nd respondent dated **1st April, 1996** and the alleged deed of variation dated **12th October, 1999.** However, the appellant admitted being in occupation of part of the suit premises. It denied owing to the 1st respondent the rent and service charge of Kshs 8,265,400.00 and or the interest of Kshs 1,287,314.00 or any part or parts thereof as claimed or at all. The appellant contended that it took possession of the suit premises on the basis of a representation that a new lease would be negotiated afresh between the 1st respondent and the appellant, but which had not been agreed upon. The appellant claimed that it was a statutory tenant on the suit premises in terms of Section 106 of the Transfer of Property Act and that it had duly paid the reasonable amount of rent due to the 1st respondent until the 1st respondent unreasonably demanded non-contractual and unjustified amounts of rent from the appellant. The appellant denied being the assignee of the lease in respect of the suit premises and also denied owing the 1st respondent the rent and service charge of Kshs 8,265,400.00 and/or interest of Kshs 1,287,314.00 or any part or parts thereof in the absence of any valid assignment of the lease by the 2nd respondent to the appellant. It argued that the amount claimed by the 1st respondent was unreasonable, illegal and unconscionable in the circumstances. The appellant also denied the jurisdiction of the court on the basis that it was a statutory tenant and prayed that the 1st respondent's suit be dismissed with costs.

In the meantime, the 1st respondent filed an application by way of a Notice of Motion dated **23rd January**, **2003** urging the court to strike out the defences by the appellant and the 2nd respondent.

The application was heard by **Ransley, J**. who in a ruling delivered on **9th July, 2003** allowed the application. In the same ruling, the judge entered judgment against the 2nd respondent only and not against both the 2nd respondents and the appellant as pleaded in the plaint. He stated thus:

> **"In view of the fact that the 2*nd*** ***defendant is not liable under the lease to pay rent, I make no order against it for judgment. So far as its defense is concerned this cannot be sustained in law on the evidence. It has not shown that it is in possession of the suit premises nor indeed can the fact that it bought the shares of the 1st*** **defendant ipso factor either give it a right to possession nor give it possession of the suit premises. In the result I am of the view that the 2*nd*** **defendant cannot sustain the defence that it is a statutory tenant or by any other kind of tenant in the suit premises and strike out this defence as an abuse for the process of the court with costs to the plaintiff."**

Following that ruling, a decree was drawn and signed by the Deputy Registrar of the High Court on **2nd September, 2003** for a total of Kshs 14,573,311.50.

Thereafter, the 1st respondent filed a Notice of Motion dated **7th December, 2005** seeking a review of the orders made in the above ruling so as to enter judgment against the appellant (the 2nd defendant in the original suit) as prayed in the plaint together with costs. The application for review was brought under Order 44 rule 1(i) of the CPR which provides *inter alia*:

> **"1(i) Any person considering himself aggrieved:**
>
> > **a. By a decree or order from which an appeal is allowed, but which no appeal has been preferred; or**
> >
> > **b. By a decree or order from which no appeal is hereby allowed, And who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay".**

The application was based on several grounds together with annexed affidavits. The main ground was however, the discovery of new and important matter. The 1st respondent contended that it had ***"…discovered a new and important matter in the form of an Agreement for sale dated 13th*** **October, 1999 between the 1st defendant and the 2nd defendant which, despite due diligence on the plaintiff's part, was not within its knowledge at the time of the hearing. That the provisions of the said discovered agreement are such that had it been brought before the court during the hearing, it would most likely have altered the direction and result** ***of the court's ruling and /or judgment of Ransley, J. dated 9th July, 2003, …the 1st defendant was later to be purchased by the 2nd defendant under the discovered agreement of sale of business, an event not denied by either defendant. By a letter written to the plaintiff by the 2nd*** **defendant dated 21*****st January, 2000, the 2nd defendant informed the plaintiff that it had merged with the 1st defendant. It undertook to honour the terms of the lease between the plaintiff and the 1st defendant aforementioned. …the 2nd defendant who already had physically taken over possession of the lease premises as a result of the amalgamation or takeover, did fail to respond to the plaintiff's last letter. Apparently, neither the 1st nor the 2nd defendant was in the meantime paying the relevant rents under the lease. The material on the record however, show that the 1st defendant who was a bank, had ceased carrying on its banking and other business completely and had practically handed over the leased business premises to the 2nd defendant under the sale and transfer of business aforementioned....."***

To support its application, the 1st respondent explained to the court that after **Ransley, J**. struck out the defences and entered judgment on **9th July, 2003**, it discovered the existence of a Memorandum of Understanding (MOU) dated **13th October, 1999** between the 2nd respondent and the appellant; that it also discovered an Agreement of Sale of the Assets and Business of the 2nd respondent to the appellant dated **31st December, 1995** on **30th October, 2005**; that it became apparent that all the shares, assets and business of the 2nd respondent were purchased by the appellant and that both the MOU and the Agreement of Sale showed that the appellant took over the management of the business and assets of the 2nd respondent upon the execution of the MOU on **13th October, 1999** including the business and assets on the suit premises.

The application for review was heard by **Onyancha, J.** who in a ruling dated **8th February, 2010** found thus:

> **"It seems to me from the reading of the material before me, and I so find, that Ransley, J was denied evidence in the possession of the defendants which would definitely confirm not only a merger between them, but also express evidence of the taking over of the Lease Agreement and the undertaking to honour the same as if the 2*nd defendant were the 1st defendant. While it is not clear presently why particularly the 1st* defendant would be persuaded to enter into an apparent conspiracy to withhold that relevant evidence which might later work adversely to it, nevertheless, the act of refusing or neglecting to disclose the documents led to some injustice occurring. Not only did Ransley, J as a result conclude that the letter dated 21*st January, 2000 by the 2nd defendant to the plaintiff was a fraud, but also on the same basis concluded that the 2nd defendant was free to escape from paying lawful rent while unjustifiably and unfairly occupying the suit premises".***

The judge stated further that:

> **"In consideration of the evidence formerly on the record jointly with the new evidence in form of the MOU and the GSA aforesaid, this court reviews Ransely, (sic) J's court's judgment and decree and declares and includes, total liability against the 2nd defendant the Guardian Bank Limited, jointly and severally with the 1st defendant, the Guilders International Bank Limited. Costs of this application are to the plaintiff against the 2nd respondent/2nd defendant only".**

Following the above ruling an amended decree was filed on **9th September, 2010** where it was decreed that the 2nd defendant and the appellant were jointly and severally liable to pay to the 1st respondent the sum of Kshs 14,573,311.50. It was further decreed as follows:

> **"1…..**
>
> **2. That Rents, service charge, interest and other outgoings as *and when they fall due from 1st* September, 2001 until the expiration of the lease.**
>
> **3. That the 1*st and the 2nd defendant do jointly and severally pay to the plaintiff costs of the suit to be taxed and certified by the Taxing Master of the Court.***
>
> **4. That the 1*st and the 2nd* defendants' statement of defence be struck out *and,***
>
> **5. That the 2*nd* defendant do pay the plaintiff's costs of the application as well".**

Subsequent to the filing of the Amended Decree, the 1st respondent filed and served upon the appellant a Notice to Show Cause why execution should not issue for recovery of Kshs 178,514,179.00 being the balance/amount of decree together with interest, costs of execution and court collection fees.

It is the said Notice To Show Cause that provoked the appellant to file a Notice of Motion dated **17th January, 2012** under Order XX1, Rule 18, seeking stay of execution of the said Notice to Show Cause dated **11th January, 2012** on the basis that it was at variance with the Decree of the Court issued on **2nd September, 2003** and amended on **8th February, 2010**. The appellant stated further that the Notice to Show Cause was irregular and illegal; that the 1st respondent's advocate or the Deputy Registrar of the High Court had no jurisdiction, power or authority to embellish a High Court decree and supply further sums as was done in the case. It was argued for the appellant that the Notice to Show Cause was issued in excess of the jurisdiction and powers of the Deputy Registrar donated under Order 49 of the Civil Procedure Rules, 2010; that special damages must be specifically pleaded and specifically proved to the court; that the 1st respondent's claim for rents, service charge, interest and other outgoings as and when they fall due from **1st of September, 2001** until the expiration of the lease was never quantified and presented to the Court as required by law and that the same have not been specifically proved as by law required; that the amounts claimed was not part of the signed and sealed decree of the court; that the 1st respondent's new claim could not form part of the decree of the court since the court crystallized and tabulated the entire claim in the sum of Kshs 14,573,311.00 which was the sum under the decree; that a decree of the High Court does not permit a litigant to embellish the same *ex-post facto* with figures that have not been the subject matter of the court's determination; that the 1st respondent's claim did not contain a claim for additional interest from the date of judgment and that the court did not award any additional interest on the adjudged sums, no additional interest was claimed or awarded in the decree of the court and that the sum of Kshs 14,573,311.50 was paid in court on **15th October, 2010** in full and final settlement of the decretal sum as contained in the decree and finally, that the 1st respondent's Taxed Party and Party costs of Kshs 583,231.70 was paid on the 23rd **November, 2010** through a Bankers Cheque No. 044944. The application was supported by an affidavit of **Narayanmurthy Sabesan** sworn on **17th January, 2012** which merely reiterated and expounded on the above grounds.

To oppose the application the 1st respondent filed Grounds of Opposition dated **17th February, 2012** in which it stated that since the decree had been approved, signed and sealed with the seal of the court, it cannot be challenged; that the application had no merit in law and constituted an abuse of the process of the court; that the appellant had deliberately ignored and or failed to take into account monies properly due to the decree holder under item 2 of the decree which provided for rents, service charge, interest and other outgoings as and when they fell due from **1st September, 2001** until the expiration of the lease; that the appellant was wrong in maintaining that the monies due in respect of item 2 was "*special damages*" after covenanting with the decree holder in the lease to pay; and finally, that the appellant erred in disregarding the provisions of Section 26(2) of the Civil Procedure Act which allows a decree holder to charge interest at court rates from the date of the decree to the date of payment. In support of the above grounds, **Sudhir Shah** swore an affidavit dated **17th February, 2012.**

The application was heard by **Sergon, J**. In a ruling dated **3rd March, 2017, Sergon, J** found the application to be devoid of merit and accordingly dismissed it with costs to the 1st respondent.

Aggrieved by the ruling, the appellant moved to this Court by way of an appeal. In a Memorandum of Appeal dated **30th March, 2017**, it listed 18 grounds faulting the judge:- for failing to appreciate that the Constitution bestows judicial authority to the Courts and Tribunals established by law and not to private individuals; for upholding an illegal and unconstitutional act; for failing to determine issues in the appellant's Notice of Motion dated **17th January, 2012;** for denying the appellant a fair hearing of its application; for failing to find that the 1st respondent had no mandate to embellish, adjust or inflate the amended decree of the High Court and for failing to find that the 1st respondent had no right to take out the Notice to Show Cause which had an additional sum of Kshs 178,514,179.00 that was not the subject of a judgment or determination. The appellant further contended that the Deputy Registrar of the High Court had no jurisdiction to approve and sign the Notice to Show Cause dated **11th January, 2012** and that the judge having found that the decretal sum of Kshs 14,573,311.50 had been paid in full, erred in finding that there was a further sum of Kshs 57,390,517.40 payable to the 1st respondent, a matter which was not placed before him. The appellant also blamed the judge for adjusting the final amended decree through calculations to arrive at an erroneous sum of Kshs 57,390,517.40 in an effort to justify the sums of Kshs 178,514,179.00, an issue which was not before the judge; for failing to appreciate that the issue of recalculation had not been raised in its Notice of Motion dated **17th January, 2012;** for failing to set aside the Notice to Show Cause after finding that the 1st respondent needed to justify the sum of Kshs 178,514,179.00 in the Notice to Show Cause dated **11th January, 2012** and for holding that the sum of Kshs 14,573,311.50 was not the only money due and payable to the 1st respondent under the Amended Decree. The appellant also faulted the judge for condemning it to pay costs of the application to the 1st respondent. The appellant contended that in the circumstances, there was a perversion of justice. The appellant urged this Court to allow the appeal and in the process allow its Notice of Motion application dated **17th January, 2012** seeking to set aside the Notice to Show Cause, with costs.

When the application came up for virtual hearing before us, **Mr. Ochieng-Oduol**, learned counsel for the appellant, while adopting the appellant's written submissions dated **24th June, 2019** contended that the High Court erred in inflating the decree dated **8th December, 2010** by adding a sum of Kshs 178,514,179.00 that was not a subject of a judgment; that the 1st respondent did not have the power to embellish, adjust or inflate the decree; that the decree having been extracted, the additional figures introduced resulted to usurpation of judicial authority.

In highlighting the 1st respondent's submissions dated **28th March, 2019**, learned counsel, **Mr. A.B. Shah** pointed out that the decree issued on **2nd September, 2003** and the amended decree issued on **9th October, 2010**, had only one difference in that in the amended decree, both the appellant and the 2nd respondent were to jointly and severally pay the sum owed to the 1st respondent as opposed to the decree of **2nd September, 2003** wherein the judgment was to be enforced against the 2nd respondent to the exclusion of the appellant. Otherwise, both decree had the following orders:

"***Ordered to be paid in both decrees:***

(a) Rent and Service Charge and rates/land rent	**Kshs**	**8,253,600.00**		
(b) Interest upto 30.6.2001	**Kshs**	**1,287,314.00**		
(c) Advocates costs	**Kshs**	**11,800.00**		
			Kshs	**9,552,714.00**

d. Further interest from 1.7.2001 to 9.7.2003

on K.Shs 8,265,400/= @ 30% p.a. @]

K.Shs 6,793.50. per day x 739days]

] **Kshs. 5,020,396.50**

] **Kshs.14,573,311.50**

] **Kshs 14,573,311.50**

]

(e) Further interest from 10.07.2003 to]

28.02.2006 on K.Shs 8,265,400/-]

@ 30% p.a. @ K.Shs]

K.Shs 6,793/50 X 962 days]]

2003 - 173 days]

2004 - 365 days]

2005 - 365 days]

2006 - 59 days K.Shs 6,535,327.20

962 days K.Shs 21,108,638.70 "

He concluded that the said sums were due and owing for the use of the 1st respondent's premises for 5½ years.

In supporting the appeal, learned counsel, **Mr. Ouma**, holding brief for **Mr. Adipo,** learned counsel for the 2nd respondent in highlighting the submissions dated **18th February, 2020** and **28th February, 2020,** contended that the decree was not in conformity with the judgment; that Order 21 Rule 7 (1) provides that:

> **"The decree shall agree with the judgment"**; that the 1st respondent was granted prayers that were not sought in the plaint; that the prayer for rent, service charges, interest and outgoings for and when they fell due from **1st September, 2001** until the expiration of the lease were vague and unquantifiable; that the Notice to Show Cause dated **11th January, 2012** was unjustifiably embellished.

We have considered the record, the rival oral and written submissions, the authorities cited and the law.

In our view, the background facts leading to this appeal are largely uncontested. It is not contested that at the time the 1st respondent filed its plaint dated **28th June, 2001,** it sought the following orders:

"

a. Rent and Service Charge and Rates /Land Rent Kshs 8,253,600.00

b. Interest thereon ***Kshs 1,287,314.00***

c. Advocates costs ***Kshs 11,800.00***

Kshs 9,552,714.00

d. Further interest at the rates aforesaid from 1st ***July, 2001 on Shs. 8,265,400/= @ 30% per annum (@ 6,793.50 per day)***

e. Rents, service charges, interest and other outgoings as and when they fall due from 1st ***September, 2001 until expiration of the Lease.***

f. Costs with interest thereon".

It is also not contested that judgment in favour of the 1st respondent was entered on **9th July, 2003** by **Ransley, J** who struck out the defences of the appellant and the 2nd respondent. The ensuing decree dated **2nd September, 2003** was for Kshs 14,573,311.50 as well as:

"i. **Rents, service charge, interest and other outgoings as and when they fall due from the 1*st* of September, 2001 until the expiration of the lease,**

ii. The first defendant do pay the plaintiff costs of this suit to be taxed *and certified by the taxing officer of this Honourable Court,*

iii. The second defendants (sic) Statement of Defence be and is hereby struck out,

iv. The second defendant do pay the plaintiff costs of this suit to be taxed and certified by the taxing officer of this Honourable Court with costs."

It is further not contested that when the application for review came up before **Onyancha, J**. the only issue for consideration was whether the appellant together with the 2nd respondent should jointly and severally be held liable for the sums found due and owing to the 1st respondent. This application was allowed. **Onyancha, J**. rendered himself in the penultimate part as follows:

"In consideration of the evidence formerly on the record jointly with the new evidence in form of the MOU and the GSA aforesaid, this Court reviews Ransely (sic)J's court's judgment and decree and declares and includes, total joint liability against the 2*nd* *defendant the Guardian Bank Limited, jointly and severally with the 1st Defendant, the Guilders International Bank Limited".*

The crisp issue before us is whether the Notice to Show Cause dated **17th January, 2012**, was embellished when it demanded payment of Kshs 178,514,179.00. In the ruling delivered by **Sergon, J**, the subject of this appeal, the learned judge stated in part, "**According to my calculation, the total sum payable is *Kshs 57,390,517.4…"*** and that ***"…the decretal sum of Kshs 14,573,311.50 was not the only money payable under the decree".*** It is clear from the above statement that the judge undertook arithmetic calculations in order to arrive at the conclusion that the sum of Kshs 57,390,517.4 was payable. It is also true that in the 1st respondent's submissions dated **28th March, 2019**, calculations are tabulated therein showing how the sum of Kshs 178,514,179 was arrived at.

In this Court's decision of ***Justus Mutiga & 3 others vs. Law Society of Kenya & another [2018] eKLR,*** it was held:

"This Court has on several occasions pronounced that computation of monies awarded to parties as damages is a judicial function which cannot even be performed by the Registrar of the court. In Telkom Kenya Limited vs. John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) in Civil Appeal No. 60 of 2013, the Court was categorical that:

"Judicial function of assessment of damages is one the courts have long jealously guarded for it takes judicial wisdom, experience and consideration to arrive at an appropriate measure of damages".

In the **Justus Mutiga & 3 Others vs. Law Society of Kenya** (supra) the Court proceeded to state:

" Earlier on in the case of Kenya Revenue Authority vs. Menginya Salim Murgani [2010] eKLR, while addressing a similar issue, this Court expressed itself as follows:

"Both the award and level or quantum of damages is in our view judicial functions which the superior court cannot rightfully delegate …. A judgment must be complete and conclusive when pronounced and therefore it cannot be left to the Deputy Registrar to perfect it. Assessment of damages is not a ministerial act as envisaged by Order 48 (currently Order 49) of the Civil Procedure Rules and a direction to 'assess' or 'calculate' damages would be contrary to the requirements of Order 20 (currently 21) of the Civil Procedure Rules because it would be incomplete without assessment and will patiently be a nullity"

In the ***Justus Muthiga & 3 Others vs. Law Society of Kenya*** (supra), the Court concluded:

The above pronouncements from this Court would seem to suggest that any interference with the judgment of the court after pronouncements by anybody purporting to calculate the percentages of the awarded damages or to vary the judgment of the court would render the entire judgment a nullity. It is clear therefore that the schedule cannot be incorporated into any judgment without affecting the validity of the judgment, and in effect impugning the authority of the court. It would in our view be the best left for application in respect to settlement of claims before other dispute resolution forums. In view of the foregoing, we are satisfied the impugned schedule has no place in the Principal Act as the same cannot be applied to any judgment without rendering the same null and void. We therefore agree with the learned judge that Sections 3 (a) of the Insurance Motor Vehicle Third Party Risks (Amendment) Act, 2013 is null and void and so is section 6 which sought to introduce the impugned schedule".

In another decision of this Court, ***Capital Fish Kenya Limited vs. the Kenya Power & Lighting Company Limited [2016] eKLR,*** it was affirmed that not only should special damages be pleaded, but that they must be strictly proved. The plaint dated **28th June, 2018** filed by the 1st respondent did not have any specific pleadings for "**rents, service charges, interest and other outgoings as and when they fall due from 1*st September, 2001 until the expiration of the lease***". These needed to be specifically pleaded and not left for calculation by a Judge and/or Registrar. Further, the judgment entered by **Ransley, J.** was pursuant to an application for summary judgment under Order 36 Rules (1) which provides:

“ *1 (i)* **In all suits where a plaintiff seeks a judgment for:**

a. a liquidated demand with or without interest; or …”

The plaint filed by the 1st respondent apart from the figure of Kshs 9,552,714.00 was not a liquidated claim. The sums claimed were not proved and the Notice to Show Cause containing an addendum was not part of the judgment. Besides, Order 21 Rule 7 (1) of the CPR provides that: ***“The decree shall agree with the judgment”***.

In our view, the decree extracted and the subsequent Notice to Show Cause was not in consonance with the Ruling of **Ransley, J.** We further find that the figures introduced amounted to usurpation of judicial authority. It is also important to point out that what was before **Sergon, J** was an application to set aside the Notice to Show Cause dated **11th January, 2012**. In doing so, **Sergon, J** proceeded to recalculate the sums due to the 1st respondent, thus arriving at the sum of Kshs 57,390,417.40. The specific prayer before **Sergon, J**. was to set aside the Notice to Show Cause. With respect, we think it was not for the Judge to take it upon himself and undertake arithmetic calculations as contained in the addendum to the Notice to Show Cause. On our part, we are not aware of a practice where Notices to Show Cause are accompanied by addendums.

We believe we have said enough to show that this appeal is for allowing. Accordingly, we allow the appeal, set aside the orders of the High Court issued on **3rd March, 2016** and allow the appellant’s Notice of Motion dated **17th January, 2012**.

Costs of the appellant and the 2nd respondent shall be borne by the 1st respondent. It is so ordered.

Dated and Delivered at Nairobi this 18th day of December, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

……………………………………...

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR