IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 50 OF 2015

BETWEEN

NATIONAL SOCIAL SECURITY FUND

BOARD OF TRUSTEES…….....……APPELLANT

AND

SIFA INTERNATIONAL LIMITED …….…….....… RESPONDENT

(Being an appeal against the decision of the Environment and Land Court of Kenya at Mombasa (Mukunya, J.) dated 27th March, 2015

in

E.L.C. C. Suit No. 263 of 2006

****

JUDGMENT OF THE COURT

The relationship of the parties to this appeal as landlord and tenant began when **National Social Security Fund** "*the appellant*" and **Sifa International Ltd** "*the respondent*" entered into a lease agreement dated 1st February 2004. The lease was in respect of 6 parcels of land known as **sub-division Nos. 982, 2535, 2537, 2538, 2539** and **2540** all in **Section Number 1 (Mainland North)** situate within the Mombasa County, owned by the appellant and hereinafter referred to as "*the suit premises*." The lease was for a term of **five years and one month**. Clause 2 (a) of the lease stipulated that monthly rent of Kshs.120,000/- was payable to the appellant '*for the first 24 months of the term created and thereafter monthly rent was to be increased by 15% after every two years for the remainder of the term.*' The clause further stipulated that rent payable for the 3rd and 4th year was to be Kshs.138,000/- while the rent for the remainder of the term was to be Kshs.158,700/-.

Of particular relevance to this appeal is clauses 2 (c) and (d) of the lease which stipulated that in the event that the appellant was to sell the suit premises, the respondent was to have the first option to purchase and in the event that the appellant did not sell the demised properties within the lease term, the lease was to be **'***renewable at the prevailing market rent for a further term of six years subject to a written notice of desire to renew by the lessee to the lessor three (3) months prior to the expiry of the said term.*' Clause 2 (d) provided for the termination of the lease by either party giving the other six months prior notice of its

intention to terminate or paying in lieu a sum equivalent to six months' rent for the prevailing period and/or term of the lease. The proviso to that clause further provided that all disputes were to be first referred to an arbitrator appointed mutually by both parties and in case none could be so appointed, the chairman of the Kenya Institute of Arbitrators was to appoint one.

It is on the basis of that lease that the respondent took possession of the suit premises and turned what it termed as dilapidated structures it had found on the premises into a successful venture of a hotel and tourist resort through renovation and rehabilitation that it alleged cost it more than Kshs.30 million. It would appear that the tenant-landlord relationship between the parties was cordial until sometime in early March 2006 when the appellant advertised the suit premises for sale in a local daily. The appellant had prior to that requested the respondent to be let into the suit premises for purposes of valuation which it alleged then was for establishing the value of its assets. Following the advertisement, the respondent wrote to the appellant a letter dated 13th March 2006 reminding it that it had the first option of purchase as per the lease agreement, which it wished to exercise especially in regard to plot 982. The respondent therefore requested that it be furnished with the price of each unit, copies of title and the deed plan to enable it to conduct due diligence and possibly make an offer.

The appellant did not revert to the respondent with the requested details but instead wrote a letter dated 3rd November 2006 to the respondent giving the respondent a 14 day notice within which to exercise its option to purchase, failing which the offer would lapse. The respondent responded vide its letter dated 16th November 2006 in which it reiterated its desire to exercise the option to purchase and also its wish to be furnished with the documents it had requested earlier. The respondent followed that letter to the appellant with yet another letter dated 20th November 2006 in which it expressed concern about the number of prospective purchasers streaming into the suit properties for viewing purposes. According to the respondent, that signaled the appellant's intention of disposing the suit premises to third parties despite the lease agreement. In that letter, the respondent introduced the angle of being a protected tenant pursuant to the provisions of the **Landlord and Tenant (Shops, Hotels & Catering Establishments) Act** *"the Act"* and further declared that a dispute had arisen in regard to the lease agreement and therefore the need to commence arbitral proceedings.

Shortly thereafter however, the respondent instituted this suit vide an undated Plaint filed in court on 21st November, 2006. This Plaint was subsequently amended by an order of the court. The respondent's case was that it was apprehensive of the appellant terminating the lease agreement, evicting it and selling the suit premises to third parties thereby causing it to suffer irreparable loss and damage in view of the investments it had committed in the suit premises. The respondent also alleged that the appellant had interrupted its peaceful and quiet enjoyment of the suit premises due to the advertisement which had caused prospective buyers to stream in to the suit premises for viewing purposes thereby causing anxiety among its employees. The respondent maintained it was a protected tenant and it intended to file a reference in the Business Premises Rent Tribunal for determination. The respondent also declared a formal dispute as provided for in the lease agreement and averred that it had proposed names of arbitrators. It therefore prayed that the dispute be referred to arbitration as per the lease agreement; that it be declared a protected tenant under the provisions of the Act; that since it had the first option to purchase it was entitled to specific performance; a permanent injunction restraining the appellants from offering for sale, selling, transferring or alienating in any manner the suit premises or in any way interfering with the peaceful and quiet enjoyment and possession of the same pending the hearing and determination of the arbitration. In addition to the foregoing the respondent sought Kshs.34,146,005/- as costs for re-installing the demolished structures and Kshs.67,272,339/- for loss of business and profits for the period 8th August, 2007 to 30th December, 2010 all totaling Kshs.101,421,344/- as special damages.

Contemporaneous with the filing of the initial plaint, the respondent had also filed an application dated 20th November 2006 praying that a temporary injunction against the appellant restraining it from offering for sale, advertising, selling, transferring or in any manner alienating the suit premises to any third party and from evicting the respondent therefrom; or in any manner interfering with its quiet enjoyment pending the hearing and determination of the application and that the dispute be referred to arbitration. Alternatively, that the making of entries in the register be forbidden pending the hearing and

determination of the suit. The orders prayed for and in particular the interim injunction was initially granted to the respondent *ex-parte* on 21st November 2006, and was thereafter extended (*inter partes*) several times until the hearing of the application *inter partes*.

However, while the interim orders were still in force the respondent filed an application on 21st February, 2007 alleging breach of the same by the appellant and praying that the appellant's property be attached and its managing trustee be committed to civil jail for disobedience of the court orders. That application was followed by yet another filed by the respondent dated 29th February 2008 that sought consolidation of the two applications, the arrest and committal to civil jail of the appellant's managing trustee, Rachel Lumbasyo, corporation secretary, Said Chitembwe as well as the managing director of Kajos Enterprises. The latter had been contracted by the appellant to pull down the respondent's structures on the suit premises. The result was a ruling delivered by **Sergon, J.** on 19th May 2008 where the first two were found guilty of contempt of court and each was fined Kshs.300,000/- or in default 3 months imprisonment.

The appellant was of course opposed to the claim by the respondent and in its amended defence dated 8th November 2011 denied all the averments contained therein. In particular it denied that the respondent had invested in excess of Kshs.30 million in the suit premises; that it was in breach of the lease agreement or that it had plans to sell the suit premises contrary to the terms of the lease; that it had in any way infringed on the respondent's right to peaceful and quiet enjoyment of the suit premises; that the respondent was a protected tenant under the Act; that any dispute had arisen to warrant a reference to arbitration as provided for in the lease; that it had advertised the suit premises for sale; and that the respondent had been occasioned any financial loss or damage.

The appellant reiterated that it had express or implied authority to demolish any illegal, unwanted or dilapidated structures on its suit premises to ensure safety of the users. It also averred that in any case, the respondent was the author of its own misfortune as it had built illegal structures without its consent and/or permission which amounted to material alteration of the suit premises and was thus in breach of the lease agreement. Though the appellant alleged that the respondent had continued to carry on business in the suit premises without paying rent, there was no counter-claim to that effect. In particular also, the appellant denied that the respondent had suffered loss and damage amounting to Kshs.101,421,344/- and put the respondent to strict proof thereof.

It is the averments as contained in the pleadings and the evidence led by the respective parties in support thereof that were considered by **Mukunya, J**, who in a reserved judgment dated 27th March 2015 decreed that the respondent do pay the appellant Kshs.16,508,200/- as the rent for the period of the lease; and on the other hand, the appellant do pay the respondent Kshs.16 million as cost of the destroyed structures and Kshs.500,000/- compensation for loss of business over the period the structures were demolished; that any rent remaining unpaid was to be deducted from the Kshs.16,508,200/- aforesaid and the balance was to be paid to the respondent as full compensation of the destroyed structures. The respondent was nonetheless ordered to vacate the suit premises by 31st March 2015.

Dissatisfied with those findings the appellant has proffered this appeal premised on nine grounds which may be summarized as follows; that the learned trial Judge erred in law and in fact in:-

i. awarding the respondent a sum of Kshs.16 million as special damages as the costs of the demolished structures when there was no evidential proof to support such an award;

ii. awarding the respondent a sum of Kshs.16 million when the same had not been strictly proved by the respondent as required by law;

iii. awarding the respondent damages arising from demolition of illegal structures erected on its properties in contravention of the lease agreement, the Physical Planning Act and the Local Government (Adoptive By laws) Building by Laws Orders of 1968;

iv. failing to find that the respondent's claim offended the principle of *ex turpi causa non oritur action;*

v. purporting to compute the rent payable by the appellant when the same was provided for under the lease agreement and was not an issue in dispute before court;

vi. purporting to limit the rent payable for the two terms at Kshs.16,508,200/- when the rent due as per the lease for two terms was Kshs.22,314,584/-

vii. granting orders of stay of execution in respect of the respondent's vacation or eviction of the suit premises when the lease had lapsed;

viii. failing to consider the evidence adduced by the appellant on the illegality of the demolished structures; and,

ix. awarding the respondent damages having found that there was no evidence adduced by the respondent to support the claim of loss of income.

The appellant then prayed that the appeal be allowed with costs; that the judgment and decree be reversed and or set side and in substitution thereof an order dismissing the suit with costs be made; that the order limiting the rent payable by the respondent to the appellant for two terms to Kshs.16,508,200/- be set aside and substituted with an order directing the respondent to pay rent for the two terms amounting to Kshs.22,314,584/- in terms of the lease agreement; and that the respondent pays mesne profits upto when it shall vacate the suit premises and costs.

The respondent was equally dissatisfied with the findings of the learned Judge and to that end filed a Notice of Cross-Appeal also citing eight main grounds that can be summarized as follows; that the learned trial Judge erred in failing to find that:- firstly, the appellant had breached the lease agreement with the respondent; secondly, the appellant had not afforded the respondent the first option to purchase; thirdly, the letter of offer dated 19th December, 2016 was made in bad faith; fourthly, failed to make a proper determination of damages occasioned to the respondent; fifthly, the estimated value of Kshs.34,000,000/- was fairly accurate; sixthly, it did not owe the appellant the sum of Kshs.16, 508,200/- as unpaid rent since the lease period had stopped running from the date the structures were demolished; seventhly, the estimated value of Kshs.34 million was fairly accurate having already noted the substantive nature of the buildings on site; and, eighthly, the respondent had made proper offer for the plots by 13th March 2006 and again expressly on 16th November, 2006 and that the offer of 20th December 2006 was superfluous and unnecessary.

The parties subsequently filed their respective written submissions. Highlighting the submissions, **Mr. Ochwa**, learned counsel for the appellant, submitted that the relationship between the parties was governed by a lease of five years, which he alleged had lapsed by effluxion of time. However, Counsel submitted that the respondent was still in occupation of the premises by virtue of an injunction issued by the High Court pending the hearing and determination of this appeal. Counsel claimed that from March 2015 to date, the respondent had not paid rent and further that rent for the last term of the tenancy was never paid. Counsel relied on the case of **Securicor Courier (K.) v Benson David Onyango & Another [2008] eKLR,** for his submission that the parties were bound by the terms of the lease and the court should not re-write the contract for them as the High Court purported to do. Counsel faulted the Judge's award of Kshs.16 million as special damages to the respondent without any evidence at all. According to counsel, the prayer for special damages, as per the plaint, was for Kshs.101, 421, 344/= and the particulars thereof had been given. Counsel submitted that it was trite law that special damages must be pleaded and specifically proved. Counsel argued that in the judgment the High Court found that the claim for special damages was not proved, and declined to make an award to the respondent. However, the Judge went ahead to make certain awards in the absence of proof. Counsel argued that the respondent's claim for special damages should have been dismissed in its entirety especially because **PW3**, the respondent's director, whose evidence the Judge relied on to award the special damages had testified that she was a stranger to the dealings and left it to her accountant to shed light on the claim for special

damages. That accountant never testified. Accordingly, though special damages were pleaded, they were not specifically proved as required. In any event according to counsel, the documents relied upon were not in the name of the respondent. Mr. Ochwa also alleged that the learned Judge erred in awarding damages for demolished structures that were illegal to begin with. Counsel relied on the case of **Standard Chartered Bank Kenya Ltd v Intercom Services Ltd & 4 Others [2004] eKLR** to buttress that submission.

Counsel further submitted that the Judge erred in awarding the respondent Kshs.16, 508, 200/- as outstanding rent as it was a term of the lease that rent escalates by 15% every two years. Counsel alleged that the Judge did not apply or adopt that escalation clause. The appellant further claimed that the rent arrears as at 31st March, 2015, when it deemed the lease to have lapsed, was Kshs.22, 555, 764.22/-. Counsel went ahead to submit that for the entire term of 6 years, no rent had been paid. He concluded his submissions by arguing that the High Court erred in granting stay of execution which in effect was to prolong the tenancy.

Mr. Ligunya, learned counsel for the respondent submitted that this appeal raised two key concerns; first the Kshs.16 million awarded to the respondent and secondly the rent analysis by the High Court. Counsel submitted that the Kshs.16 million was correctly awarded to the respondent as there was evidence to support it. He explained that there was no doubt that the respondent ran business on the suit premises. The award of Kshs.16 million to the respondent was, according to him, not outlandish. On the issue that the learned Judge should not have awarded damages for demolished illegal structures, counsel submitted that there was a valid court order in force forbidding the appellant from demolishing the structures. Nevertheless the appellant went ahead to demolish the structures resulting in contempt proceedings where the appellant's managing trustee and its secretary were found guilty and fined accordingly. The Judge was therefore right in awarding the damages according to counsel. On the issue of rent due, Mr. Ligunya submitted that the appellant's amended defence did not raise a counter-claim for the rent due and relied on the authority of **Ole Nganai v Arap Bor [1982] eKLR** in support of his argument that a party cannot be granted a prayer it has not sought or prayed for.

On the cross-appeal, Mr. Ligunya submitted globally that according to the lease, the respondent had the first option to purchase the suit premises if the appellant sought to sell. He argued that the respondent too had sought arbitration proceedings. Therefore, the Judge's finding that there was no such issue before him was wrong. Counsel submitted that the appellant had advertised the suit premises for sale without having first accorded the respondent the option to purchase and it was indeed the respondent who drew the appellant's attention to the relevant clause by a letter. Mr. Ligunya submitted that it behooved the appellant to make the offer which it failed to do. He alleged that the appellant wrote to the respondent 9 months after having advertised the suit premises for sale, giving it a mere 14 days within which to exercise the option to purchase if it wished to do so. Even after that, counsel stated that the respondent replied to that letter stating that it wished to purchase the suit premises and in effect requested for relevant documents to enable it consider making an offer but there was no response by the appellant. Subsequently, the respondent wrote to the appellant declaring a dispute for purposes of arbitration. Counsel therefore concluded that there was enough material before the learned Judge to enable him hold that there was a case for arbitration as the offer letter was superfluous and was of no effect, time having ceased to be of the essence after the demolition of the structures. According to counsel, it could not be argued that appellant gave the respondent the first option to purchase the suit premises.

In reply, Mr. Ochwa submitted that on arbitration, it was infact the respondent who begun the court proceedings and could therefore not turn around and now claim that they were in the wrong forum. Counsel submitted further that the respondent having elected to do so, it could not blame it on the appellant. Further, that the respondent could not derive any benefit from the lease as it had already lapsed. In reply to the respondents submissions that time in regard to the lease duration had ceased to be of the essence since demolition, counsel was of the contrary view that time was of the essence as there had been no prayer by the respondent to stop the running of time and an order of injunction does not stop the running of time. Counsel further stated that the issue of time not being of the essence was being raised for the first time before this Court. Counsel argued court that the respondent was still in occupation of the premises and the appellant had the right to distress for rent due were it not for the injunction order in

force. Mr. Ochwa reiterated that the issue of rent was not a new issue as it had been raised in the defence and that if the respondent had paid any rent, the onus was on them to say how much. According to counsel, the respondent had conceded it had not paid rent.

Being a first appeal our primary role is to proceed by way of a rehearing through analysis and re-evaluation of the evidence recorded by the trial court so as to draw our own independent conclusion but bearing in mind that we did not see or hear the witnesses testify. See **Kenya Ports Authority v. Kuston (Kenya) Ltd [2009] 2 EA 212**.

In our view, having considered the pleadings, the evidence in support thereof, the judgment of the High Court, the grounds of appeal and the cross-appeal, the rival written and oral submissions and the law, the broad issues arising for determination in this appeal are:-

(i) Whether the award of Kshs.16,000,000/- to the respondent as special damages on account of demolished structures; and Kshs.500,000/- for loss of business was proper.

(ii) Whether the issue of unpaid rent or rent owing was an issue before the Judge that fell for determination;

(iii) Fate of the cross-appeal with particular regard

- breach of the contract

- value of demolished structures

- 16 million unpaid rent

On the issue as to whether the Judge misdirected himself in law by awarding Kshs.16 million to the respondent as costs for the demolished structures, we take this view. The appellant has challenged that award to the respondent on the basis that there was no proof to support it. To determine exactly the nature of that award, it is prudent to revisit how the learned Judge arrived at the figure. The Judge observed as follows:-

> "**What the court can do now is award the value of the demolished structures. Under the circumstances, doing the very best I can do in the circumstances and from the amount claimed and the concessions given by the plaintiffs architect, I will award the plaintiffs Kshs.16 million as the cost of the structures demolished by the defendant…..**"

The Judge therefore meant to compensate the respondent for the demolished structures. In so far as the Judge wanted to compensate the plaintiff for a quantifiable monetary loss based on the value of the demolished structures, then the nature of the award was special damages and it was pleaded as such.

It has been stated time without number that special damages must not only be pleaded, they must be specifically or strictly proved. This Court in the case of **William Kiplangat Maritim & Another v Benson Omwenga, Civil Appeal No. 180 of 1993 (Nairobi)** cited with approval its decision in **Coast Bus Service Ltd v Murunga Danyi & 2 Others, Civil Appeal No. 192 of 1992** (UR) and stated as follows:-

> "**We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the plaint as was done in this case, that the particulars of special damages were to be supplied at the time of trial. If at the time of filing suit, the particulars of special damages were not known, then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of the special damages are pleaded in the plaint that a claimant will be allowed to proceed to** strict proof of those particulars**…**" (our emphasis)

So does the record reflect this requisite proof that led the Judge to award the amount to the respondent? With tremendous respect to the Judge, the answer is no. There was no proof. The court even found so when it remarked as follows in its judgment:-

> "**I now turn to the plaintiff's claim of Kshs.34, 146,005.00 as costs of the demolished structures and Kshs.67, 272, 339 claimed as loss of business from 8th August 2007 to 30th December 2010. The plaintiff in support of its claim produced to court an estimated cost of construction of the demolished structures in pages 108 to 110 in its bundle of documents all totaling Ksh.34, 146,005 when the plaintiff's director M/S Lenah Koinange was cross-examined on this day by Mr. Ochwa, learned counsel for the defendant, she said that she had no supporting documents. That there was no quotation that there was no supporting documents. That she had no receipts from a quantity surveyor further that she had brought no receipts from an architect or a quanity surveyor**." (sic)

We may also add that the witness was emphatic that she was a stranger to the claims and left it to the accountant to avail the documentation in support of the claim. That accountant was never availed to testify. What the Judge relied on then must have been the testimony of the quantity surveyor, one **Francis Kariuki Kiiru** who the court referred to in its judgment as the '*plaintiff's architect*'. Mr. Kariuki however testified and admitted that the special damages claimed by the respondent were estimates based on his observation of the suit premises before and after demolition. To come up with the estimates he had used a sketch of what the demolished structures looked like. He also testified that there was no actual construction receipts of the expenditure incurred and that the estimated costs of Kshs.35 million could go '*much lower'*. That is what the court in its judgment referred to as '*concessions'*. The learned Judge went ahead to hold that the demolished structures must have been of some value and observed that the appellants had not disputed that the structures were of some value. The trial Judge also considered some photographs which according to the Judge showed that the demolished structures were quite of some considerable value. However, as special damages are not discretionary, the approach adopted by the Judge in determining whether or not to award the special damages claimed was clearly wrong. Special damages, we repeat can only be awarded when they have been properly pleaded and strictly proved. There is no middle ground. It is either they are strictly proved or not. In this case, there was no such proof and therefore the Judge erred in granting them. That award therefore had no legal basis and must be rejected.

In the same breath, the learned Judge awarded the respondent Kshs.500,000/- as compensation for loss of business for the period between 8th August 2008 and 30th December 2010, being the period which the structures remained destroyed. In its Amended Plaint the respondent had sought for Kshs. 67,275,339/= as special damages but in arriving at the award of Kshs. 500,000/= the learned Judge delivered himself as below:-

> ……"**After analysis of the evidence of the plaintiff in regard to Kshs.67,275,339.00 and the evidence adduced by its witnesses, and having regard to the rebuttal by the defendant, I am not satisfied that the plaintiff has proved its claim of Kshs.67,275,339.00 loss of projected business and profit for the period 8th August 2007 to 30th December 2010. No documents were availed to the court in that regard at all. I am therefore unable to award that figure to the plaintiff.** However and although there was no proof of loss for Kshs.67,275,339, I take judicial notice, that their business premises herein was destroyed, in the manner the business herein was destroyed, there surely should be some loss**. The loss maybe for 1 year 4 months as claimed, it may be for a lesser period. The demolished buildings were not reconstructed at all. There was no evidence that the business closed completely. To make a makuti beach bar may not have been such a herculean task to take 16 months. However, and being fair to the plaintiff there must have been some loss. I assess that loss to be Kshs.500,000.00 only. I will therefore grant Kshs.500,000.00 loss of business from 8th August 2007 to 30th December 2010**." (sic) [Emphasis added]

It's clear from the above passage that the learned Judge arrived at the award of loss of business, as special damages, after taking judicial notice that loss of some sort must have occurred when the appellant

allegedly destroyed the structures it considered illegal on the suit premises. The award of loss of business must however fail as it cannot stand in law. Pleaded by the respondent as special damages, the respondent needed to adduce evidence during the trial to lay irrefutable basis for any award or claim to the special damages. Without that evidence or basis, as the High Court had indeed found, then the award of Kshs.500,000/= fails. There was evidence led by the appellant that the Value Added Tax (VAT) paid by the respondent to Kenya Revenue Authority could not authenticate its claim for Kshs.67,275,339/= as loss of business for the period the structures remained destroyed. **Abdul Bahga** (DW2), an accountant by profession, testified that he received instructions from the appellant to compute or authenticate the respondent's cash flow or financial projections based on the respondent's VAT and tax returns. He testified that between 2002 to 2009 and 2009 to 2011 the respondent declared no income and hence remitted no tax as there was none payable. In the year 2008, the respondent paid tax of Kshs.7,600/= only. The witness came to a conclusion that the analysis of tax returns to KRA by the respondent could not support the cash flow projections claimed by the respondent as loss of business. His evidence remained uncontroverted. Therefore, the claim of Kshs.67,275,339/= as special damages was not proved and must fail in *toto.* There was no basis to award the Kshs.500,000/= as there can be no middle ground. Furthermore, this Court is also alive to **Section 59** of the Evidence Act which is in terms that:-

> **"No fact of which the court shall take judicial notice need be proved."**

Sure some loss must have occurred to the respondent when the structures were destroyed, sure some loss of business must have occurred but with respect to the learned Judge, however this is not an instance where a court could invoke or apply the doctrine of judicial notice. Infact **Section 60** of the above quoted Act gives instances where the court can invoke or apply the doctrine of judicial notice and the award of Kshs.500,000/= as special damages in the present suit would not fall under the said instances by any stretch of imagination. Awarding loss of business on the basis of judicial notice was a misapprehension of the law by the learned Judge which this Court is bound to correct.

On the question of whether unpaid or rent owing was a question before the learned Judge of the High Court and therefore fell for determination, the appellant's amended defence dated 8th November 2011, raised no counter-claim in that regard or at all. The lease agreement was clear as to the rent payable. However, in its amended list of issues dated 17th February 2011, the appellant raised the issue whether the respondent had been paying rent. The respondent's director also testified and conceded that at some point during the lease term, the appellant had refused to accept rent and that it had been remitting the rent to a separate account since then. The respondent however stated that it had always been ready and willing to pay rent. The actual amount payable as rent was never in dispute though and in the absence of an invitation by the parties through their pleadings for the Judge to determine the rent due or payable then the work of the learned Judge should have been only to determine whether the respondent had been paying rent and as the respondent had admitted that it had not, the Judge should have ordered that it be paid or be transferred to the appellant. In our view, it was not the business of the court to wade into the computation of how much rent was actually payable especially since in the calculation of the rent payable, the appellant alleges that the High Court failed to factor in the escalation clause of 15% increase after the first two years for the remainder of the term as provided for in the lease. This Court has in **Vyas Industries v Diocese of Meru (1982) KLR 114** held that a court may base its decision on an unpleaded issue if during the course of the trial the issue has been left for the decision of the court. In the same spirit, it was held in **Odd Jobs v Mubia (1970) EALR 476** that where an unpleaded issue is presented before court and the opposing party even cross examines a witness or participates in the arguments in respect of the said issue, the opposing party cannot later on object to the court's deliberation over the said issue. Although not pleaded, the parties herein made the issue of rent alive during the trial and so the learned Judge of the superior court was bound to determine the issue. However, the learned Judge failed in not factoring in the escalation clause provided for in the lease.

The respondent has through its cross appeal faulted the courts failure to hold that there was a breach of lease between the parties. It is not in dispute that there was a valid lease agreement between the parties which was legally binding and enforceable against each party. The lease contained a clause that stipulated that incase the appellant wished to sell the suit premises, the respondent would be granted the first option to purchase. However, the respondent alleges that it came to know of the appellant's intention to sell the

suit premises through an advertisement in a local daily inviting prospective buyers to make bids for properties owned by the appellants including the suit premises. It therefore alleged that there was breach of the lease as it was not accorded that opportunity. However, the first option to purchase clause was silent as to when exactly the option was to be given to the respondent. The learned Judge was of the view that since the appellant had the right to sell the property, it meant that by implication and extension, that it also had the right to advertise the property for sale. The only condition was that the appellant was to give the first option to purchase to the respondent. However, was the option to be given after the appellant had received the bids after advertisement or was it to be given before any such advertisement? The mere fact that there was an advertisement by the appellant inviting bids from prospective buyers could not be taken as not granting the first option to purchase to the respondent and therefore infer breach of the lease. This is especially since no sale materialized without the appellant having accorded the respondent the option to purchase or at all. Perhaps if the appellant had advertised the suit properties for sale and then gone ahead to sell the properties to a third party without first according the respondent that first option to purchase then there would have been breach of the lease. However, this is not the case and therefore this ground fails.

The respondent has also claimed that there was breach of the lease since upon expiry of the first term, it requested for renewal of the lease but the same was denied by the appellant. The record indeed shows that the respondent requested the appellant for a renewal of the lease when the first term lapse was imminent or approaching, vide its letter dated 22nd October 2008. However, the appellant through its letter dated 4th February 2009 stated that it was not going to renew the lease when it expired on 28th February 2009. Be that as it may, the circumstances regarding this suit is that the respondent went ahead to occupy the suit premises for a second term and infact is still in possession of the suit premises. Although there was refusal to renew the lease, the respondent was still in possession of the suit premises for a second term. Indeed as submitted by the appellant, its refusal to renew the lease could only have become an issue in this suit if it had taken steps to evict the respondent from the suit premises. The respondent has not disputed that it is in possession of the suit premises even well after the lapse of the two terms envisaged by the lease. It has also not refuted the fact that any rent payable for the second term of the lease is calculated according to the rent agreed as payable for the second term by the lease. The respondent cannot argue that there was non-renewal of the lease when it has been in possession of the suit premises for the full term of the lease as agreed on and acknowledged that rent due is per the lease agreement. The issue of renewal at this juncture is therefore moot.

In our view and in the circumstances, the appeal succeeds in that the special damages being Kshs. 16,000,000/= for the demolished structures and Kshs.500,000/= as loss of business awarded to the respondent were never proved and are hereby set aside. Any rent owing or due to the appellant should be computed by the Deputy Registrar, giving due regard to the escalation clauses in the lease, and then paid or transferred to the appellant. The cross appeal fails in its entirety and the same is dismissed. This being the outcome, we direct that each party bears its own costs both in this Court and the High Court.

Made and dated at Mombasa this 27th day of May, 2016.

ASIKE-MAKHANDIA

…….

JUDGE OF APPEAL

W. OUKO

…….

JUDGE OF APPEAL

K. M'INOTI

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR