



REPUBLIC OF KENYA



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Purity Njeri Kinyanjui t/a Pub Debrockers v ular (also known as Andy Singh Kulaw); Matindi (Interested Party) (Environment and Land Appeal E055 of 2022) [2023] KEELC 18400 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEELC 18400 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E055 OF 2022

JO MBOYA, J

MAY 31, 2023

BETWEEN

PURITY NJERI KINYANJUI T/A PUB DEBROCKERS APPELLANT

AND

INDERPAL SINGH KULAR (ALSO KNOWN AS ANDY SINGH KULAW) RESPONDENT

AND

ELIUD KARANJA MATINDI INTERESTED PARTY

JUDGMENT

Background and Introduction

1. The Appellant herein was a tenant in the premises otherwise known as L.R No. 209/2490/7, situate within Ngara Area in the City of Nairobi, belonging to the Respondent herein. For good measure, the issue as to whether or not there existed a tenancy relationship between the Appellant and the Respondent is not in dispute.
2. Further and in addition, it is common ground that on or about the 13th August 2021, the Respondent herein generated and issued a Notice to Terminate Tenancy, wherein same sought to terminate the Appellant's tenancy over and in respect of the demised premises with effect from the 1st November 2021.
3. Instructively, the Respondent raised and alluded to various grounds, inter-alia, default to pay rents in accordance with the tenancy agreement and accumulation of rent arrears in excess of Kes.1, 130, 000/= only as August 2021.



4. Inevitably, upon being served with the notice to terminate tenancy, the Appellant herein took out and filed a Reference and in respect of which same challenged the validity and propriety of the Respondent's Notice to terminate tenancy.
5. Arising from the filing of the Reference, the dispute between the Appellant and the Respondent was thus placed before the Business Premises Rent Tribunal for purposes of adjudication and determination. In this regard, the Reference was indeed heard culminating into a Judgment that was rendered on the 24th June 2022.
6. It is the said Judgment which has provoked the current Appeal vide Memorandum of Appeal dated the 13th July 2022 and in respect of which the Appellant has raised the following grounds of appeal;
 - i. That the Tribunal erred in law and in fact by dismissing the Tenant's reference and allowing the landlords notice to terminate the tenancy on the grounds of persistent in nonpayment of arrears of rents without taking into account the fact that the landlord and his agents had paralyzed the tenant's business operations and had not complied with the orders of the Tribunal issued in BPRT No. 105 and 174 of 2018-nairobi.
 - ii. The Tribunal erred in law and in fact in giving the tenant a period of 30 days to settle the arrears of rents and vacate the premises taking into account the current economic environment in the country.
 - iii. The tribunal erred in law in failing to appreciate that it is primarily a business court whose primary obligation is to protect tenants from exploitation and unlawful eviction.
 - iv. The tribunal erred in law and in fact in failing to take judicial notice of the fact that the substantial part of the arrears of rent were during the covid-19 pandemic which adversely affected the bar and restaurant industry.
 - v. The tribunal failed to take into account the Appellant comprehensive statement of account in respect of the history of the dispute between her and the Respondent and hence arrived at wrong findings on the issue of arrears of rents.
7. Following the taking of directions and confirmation that the Record of appeal was in order, the Advocates for the respective Parties agreed to canvass and dispose the appeal by way of written submissions. In this respect, the court ratified the agreement and thereafter directed that the written submissions be filed and exchanged within a set timeline.
8. Nevertheless, before the Honourable court could set down the matter for Judgment, one Eliud Karanja Matindi; filed an Application dated the 9th March 2023; and in respect of which same sought to be joined as an Interested Party in respect of the instant appeal. There being no objection to the admission of the named Eliud Karanja Matindi as an interested party, the Application dated 9th March 2023 was duly allowed.
9. Arising from the foregoing, Eliud Karanja Matindi was duly constituted and admitted as an Interested Party in respect of the instant appeal and same was similarly granted Leave to file and serve submissions in support of the appeal.



Submissions By The Parties

a. Appellant's Submissions

10. The Appellant herein filed written submissions dated 9th February 2023 and in respect of which Learned counsel for the Appellant raised, canvassed and highlighted four pertinent issues for consideration and eventual determination by the court.
11. Firstly, Learned counsel for the Appellant submitted that the learned vice chair person of the Tribunal erred in fact and in law in dismissing the Appellant's Reference and upholding the Notice to terminate the tenancy, which was taken out and issued by the Respondent.
12. In particular, Learned counsel for the Appellant submitted that it was incumbent upon the Learned vice chair person of the Tribunal to take into account and to consider the circumstances leading to the Appellants failure to timeously pay the rents in respect of the demised premises.
13. In this regard, Learned counsel submitted that the vice chair of the tribunal did not take into account the fact that it was the Respondent herein, who had contributed to and occasioned the Appellant to fall in substantial rent arrears as a result of the distress that was sanctioned by the Respondent.
14. It was the further submissions of Learned counsel for the Appellant that the Respondent herein unleashed an Auctioneer to levy Distress of Kes.1, 130, 000/= only which was claimed to be in arrears as at August 2021; and that following the levying of distress, the Appellant's Business went down and hence culminated into the failure to pay the rents as and when same was due.
15. Secondly, Learned counsel for the Appellant has submitted that the vice chair person of the Business Premises Tribunal was grossly unreasonable, unfair and oppressive in ordering and directing that the Appellant does pay the outstanding rent arrears amounting to Kes.1, 280, 000/= only, within a period of 30 days from the date of Judgment.
16. It was the submissions of counsel of the Appellant that the vice chair person of the Tribunal ought and should have taken into account the current Economic Environment in the country, whilst determining and affixing the timeline within which to pay the ascertained rent arrears.
17. Owing to the failure by the vice chair of the tribunal to take into account the harsh economic environment in the country, Learned counsel for the Appellant has thus submitted that the impugned Judgment of the vice chair of the tribunal ought to be vacated and/or quashed in the interest of fairness and justice.
18. Thirdly, Learned counsel for the Appellant submitted that the Learned vice chair of the Tribunal failed to take into account the fact that a substantial chunk of the rent arrears, which formed the basis of the Notice to Terminate tenancy, occurred during the covid-19 period. Consequently and in this respect, Learned counsel contended that it thus behooved the vice chair of the tribunal to appreciate that the failure to pay the rents was not an intentional and deliberate act on the part of the Appellant.
19. Fourthly, it was the submissions that the Learned vice chair person of the tribunal also failed to take into account and consider the comprehensive statement of accounts that was filed and lodged by the Appellant; and which statement of accounts demonstrated the history of the dispute between the Appellant and the Respondent.
20. As pertains to the statement of accounts, Learned counsel for the Appellant has submitted that had the vice chair of the tribunal considered the contents thereof, same would no doubt have found that there was a dispute as concerns the Quantum of rents in arrears. However, Learned counsel for the



Appellant has submitted that the vice chair failed to consider the dispute objectively and thus arrived at an erroneous conclusion pertaining to the final figure, which was found due and owing.

21. In view of the foregoing, Learned counsel for the Appellant has thus implored the Honourable court to find and hold that the vice chair of the tribunal did not address all the issues objectively and in appropriate manner; and thus arrived at a conclusion that is manifestly unjust and contrary to the totality of the Evidence on record.

b. Interested Party's Submissions:

22. The Interested Party herein filed written submissions dated the 3rd April 2023 and in respect of which same has raised two (2) issues for consideration by the Honourable Court.
23. Firstly, the Interested Party herein has submitted that the license agreement which was allegedly entered into between the Appellant and the Respondent and which relates to the tenancy of the demised premises was disputed and hence it was imperative that the validity and veracity thereof be ascertained before the tribunal could proceed to and entertain the dispute.
24. In particular, the Interested party has contended that though the impugned license agreement purports that same was witnessed by himself, same contends that at the time when the license agreement which underscores the tenancy relationship was signed, he (Interested Party) was out of the country and therefore could not have witnessed the execution of the license agreement, either as alleged or at all.
25. Secondly, the Interested party herein has submitted that the tribunal herein was devoid and bereft of the requisite Jurisdiction to entertain and adjudicate upon the dispute beforehand, insofar as the Applicant was not the tenant of the Respondent. In this regard, the Interested party has contended that insofar as the Applicant was not a tenant then the tribunal could not entertain the dispute beforehand and render the impugned Judgment.
26. In any event, the Interested Party has submitted that Jurisdiction is conferred by *the constitution* or by statute; or both. However, the Interested party has added that where a court/tribunal is not vested with the requisite Jurisdiction, then same cannot purport to entertain and adjudicate upon a dispute which falls outside its Jurisdiction.

PARA 27.

Furthermore, the Interested Party has submitted that where a court/tribunal issued an order which is outside its Jurisdiction then such an order is illegal, invalid and void ab initio. In this regard, the Interested Party has cited and quoted, inter-alia, Samuel Kamau Macharia & Another v Kenya commercial Bank Ltd & 2 Others [2012]eKLR, Owners of Motor Vessel Lilian S v Caltex Oil Kenya Ltd [1999]eKLR and National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 Others [2023] KCA 80 (KLR), respectively.

PARA 28.

Premised on the foregoing, the Interested Party has thus implored the Honourable court to find and hold that the entire proceedings and the resultant Judgment before the tribunal were invalid and thus ought to be negated.

c. Respondent's Submissions

29. The Respondent herein filed two sets of written submissions dated the 8th March 2023 and the rejoinder submissions dated the 4th May 2023, respectively. For good measure, Learned counsel for the Respondent highlighted four (4) issues for consideration by the Honourable Court.



30. Firstly, it was the submissions of counsel for the Respondent that the Interested Party herein cannot raise and generate own issues, which are at variance with and contradictory to the issues raised and ventilated by the Appellant in this case. In this regard, Learned counsel for the Respondent has submitted that the only issue that the court should concern itself with are the issue raised by the Principal Parties to the subject dispute; and especially the issues canvassed by the Appellant.
31. In support of the submissions, that an Interested Party cannot raise and canvas separate and distinct issues, which are at variance with the ones raised by the Principal Parties, Learned counsel for the Respondent cited and relied on, inter-alia, Francis Kariuki Muruatetu & Another v Republic & 5 Others [2016]eKLR, Philomena Mbete Mwilu v The Director of Public Prosecution & Others; Stanley Muluvi Kiema (Interested Party) and International Commission Jurist Kenya Chapter [2019]eKLR and Kennedy Nyakundi Mogaka v Esther Kemuma Mogaka & Another; Bank of Africa (Interested Party) [2021]eKLR, respectively.
32. Secondly, Learned counsel for the Respondent has also submitted that the issues being raised by the Interested Party that the Appellant herein was not a tenant in the demised premises, is misconceived and mistaken. For clarity, Learned counsel for the Respondent has submitted that the Appellant herself filed the Reference before the tribunal and aptly described herself as the tenant and not otherwise.
33. Furthermore, it was also pointed out by Learned counsel for the Respondent that other than the Reference which was filed by the Appellant, the Appellant also filed a witness statement before the tribunal as well as an affidavit sworn on the 4th October 2021, in respect of which the Appellant admitted and acknowledged that same was indeed a tenant of the Respondent herein.
34. Based on the foregoing, it was the submissions of Learned counsel for the Respondent that the totality of the Evidence that was placed before the tribunal coupled with the various admission, including payments of rents by the Appellant, go along way in vindicating the Appellant's position as a tenant. In any event, Learned counsel added that the Appellant herein has not challenged the existence of a tenancy relationship between her and the Respondent.
35. Thirdly, Learned counsel for the Respondent has submitted that the finding and holding by the vice chair of the tribunal that the Appellant herein had accumulated and accrued substantial rent arrears is unassailable. In this respect, Learned counsel pointed out that the issue of rent arrears was the subject of a different tribunal cause, namely, Tribunal Cause No. BPRT 1126 of 2019, wherein it was found and established that the Appellant herein had accumulated rent arrears of Kes.980, 000/= as at May 2021.
36. Further and in addition, Learned counsel for the Respondent submitted that the decision of the tribunal in respect of BPRT Cause No. 1126 of 2019; which confirmed the rent arrears has not been appealed against and/or challenged.
37. In any event, Learned Counsel added that despite the said order, the Appellant herein failed to liquidate the rent arrears, but instead lapsed into further default.
38. Furthermore, Learned counsel for the Respondent submitted that it was the cause of the failure to liquidate the rent arrears, which had been decreed vide BPRT Cause No. 1126 of 2019, that the Respondent herein was constrained to and indeed proceeded to file BPRT Cause No. E055 of 2021, which gave rise to the current appeal.



39. In the premises, Learned Counsel submitted that the decision by the vice chair of the tribunal cannot be impugned and/ or faulted, in the manner alluded by the Appellant.
40. Fourthly, Learned counsel for the Respondent submitted that the complaint relating to the timeline which was issued by the tribunal for purposes of payment of the rent arrears is not legally tenable. In this respect, Learned Counsel has pointed out that it was incumbent upon the Appellant to pay out the Rents timeously and not wait for the tribunal to make an order.
41. Nevertheless, Learned counsel added that the setting of the timeline within which to liquidate and settle the rent arrears was an exercise of discretion on the part of the vice chair of the tribunal; and hence the Appellant herein cannot be heard to complain that the timeline was short.
42. Finally, Learned counsel for the Respondent has submitted that it is the tenant's primary obligations to pay rents to the landlord, as and when stipulated. However, counsel added that where a tenant defaults to pay rents consistently and/or persistently; then the Landlord is at liberty to issue the requisite notice to terminate tenancy.
43. In a nutshell, Learned counsel for the Respondent has thus contended that insofar as the Appellant herein has accrued and accumulated rents in excess of Kes.1, 130, 000/= Only, same therefore does not deserve the mercy of the court. In this respect, Learned counsel for the Respondent has impressed upon the court to dismiss the appeal with costs.
44. In urging the foregoing submissions, Learned counsel for the Respondent has cited and relied on various decisions, inter-alia, Samuel Kipkore Ng'eno & Another v Local Authorities Pension Trust (Registered Trustees) & Another [2013]eKLR and Hedwig – Hirt Mitterlerlehner ULRCH v Hendrick Spin [2020]eKLR.

Issues for Determination:

45. Having reviewed the Memorandum of Appeal, the record of proceedings before the Business Rent Tribunal and the written submissions filed by the Parties herein, I am of the opinion that the following issues do arise and are thus worthy of determination;
 - i. Whether the Interested Party herein can raise, highlight and canvas separate and distinct issues from the ones being ventilated by the Principal parties.
 - ii. Whether the Learned vice chair of the tribunal reached and arrived at the correct decision in dismissing the Reference filed by the Appellant herein.

Analysis And Determination

Issue Number 1 Whether the Interested Party herein can raise, highlight and canvas separate and distinct issues from the ones being ventilated by the Principal Parties.

46. The Appellant and the Respondent herein entered into and executed what was termed as a license agreement, which document regulated the tenancy relationship between the Appellant and the Respondent, as pertains to the Appellant's occupation and use of a portion of the premises known as L.R No. 209/2490/7, situate within the City of Nairobi.
47. Nevertheless and with the passage of time, the Appellant herein appeared to have lapsed into substantial default in rent payments and thus precipitating the issuance of a Notice to terminate



- tenancy by the Respondent. For clarity, the Notice to terminate tenancy was dated the 13th August 2021.
48. Furthermore, upon the issuance and service of the Notice to terminate tenancy, the Appellant herein took out and lodged a Reference, wherein same challenged the validity and propriety of the Notice to terminate tenancy.
 49. Arising from the foregoing, a dispute therefore ensued which was placed before the Tribunal for hearing and determination between the Appellant and the Respondent herein. Clearly, the Interested Party was never a party to the dispute which was pending and was being prosecuted before the Business Premises Rent Tribunal.
 50. Be that as it may, on the 13th March 2023, the Interested Party sought for and obtained Leave to be joined as a Party to the instant appeal and whereupon same was instantly joined as an Interested party.
 51. Furthermore, upon being joined as an Interested Party, the Interested party was granted liberty to file written submissions in support of the instant appeal. For good measure, same proceeded to and indeed filed written submissions dated the 3rd April 2023.
 52. Be that as it may, vide the written submissions filed on behalf of the Interested Party, same has raised two substantive issues, namely; that the Appellant herein was not a tenant of the Respondent; and secondly, that the tribunal did not have the requisite Jurisdiction to entertain the proceedings between the Appellant and the Respondent.
 53. In respect of whether the Appellant herein was a tenant of the Respondent, it is imperative to state and underscore that indeed the Appellant herein filed the Reference before the tribunal and described herself as the tenant of the Respondent. Further, the Appellant also executed and filed a witness statement; and an affidavit sworn on 4th October 2021, in respect of which same amplified the fact that she was a tenant of the Respondent.
 54. Other than the foregoing, the Appellant herein also gave testimony on oath, confirming and acknowledging the existence of a tenancy relationship between herself and the Respondent.
 55. In respect of the second aspect, the Interested Party has challenged the Jurisdiction of the tribunal to hear and determine the dispute between the Appellant and the Respondent, primarily on the basis that the Appellant was not a tenant of the Respondent.
 56. Premised on the foregoing, the question that does arise and which requires to be addressed and resolved is whether an Interested Party, can raise, canvased and ventilate issues that are variance with and contradictory to the issues espoused by the primary Parties; and especially the Appellant herein, who is the owner of the appeal.
 57. To my mind, the legal terrain underscoring the scope of an Interested party's participation in the proceedings, has been well beaten and is now established and trite. For good measure, it is common knowledge that an Interested Party plays a peripheral role in a dispute where same has been joined as such Interested Party.
 58. Furthermore, the participation of the Interested Party in the proceedings is merely intended to enable the interested party to tender and/or adduce evidence or make submissions as pertains to the issue raised by the primary Parties, with a view to enabling the Honourable court to reach an appropriate, effective and just determination of the controversy beforehand.



59. However, such an Interested Party cannot bring forth additional issues, which are not contained in the pleadings filed by the primary parties; and thereafter seek to canvass and ventilate same before the Honourable court.
60. In respect of the instant matter, there is no gainsaying that the Interested Party cannot purport to contest the existence of a tenancy relationship between the Appellant and the Respondent, yet the Appellant herself admits and acknowledges the existence of such a relationship.
61. Further and in addition, the Interested Party herein cannot also purport to challenge and impugn the Jurisdiction of the Business Premises Rent Tribunal to hear and determine the dispute that was placed before it by the Appellant, yet the Appellant did not have any reservation.
62. To my mind, what the Interested Party was endeavoring to do was to upstage the Appellant by purporting to take over the Appellant's case and to raise issues that had hitherto not been canvassed or ventilated in the first place. Clearly, the endeavor by the Interested Party herein is contrary to the law and is hence legally unacceptable.
63. In this respect, it is appropriate to recall and reiterate the elaborate and succinct decision of the Supreme Court in the case of Francis Karioko Muruatetu & Another versus Republic & 5 Others (2016)eKLR, where the court stated and held as hereunder;
- (41) Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.
- (42) Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court.
64. Further and in addition, the scope and extent of participation of Interested Parties in matters that same has been joined as such was further highlighted and amplified in the case of Methodist Church of Kenya v Mohamed Fugicha & 3 Others [2019]eKLR, where the supreme court stated and held thus;
- (51) The interested party's case brought forth a new element in the cause: that denying Muslim female students the occasion to wear even a limited form of hijab would force them to make a choice between their religion, and their right to education: this would stand in conflict with Article 32 of *the Constitution*. It is on this basis that he cross-petitioned at paragraph 34 of his replying affidavit,



for the Muslim students to be allowed to wear the hijab, in accordance with Articles 27 (5) and 32 of *the Constitution*.

65. Other than the Supreme Court, the role and scope of an Interested Party in any proceedings where same have been joined was also underscored by a Five-Judge bench of the High court in the case of Philomena Mbete Mwilu versus Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR, where the court found and held as hereunder;

415. What emerges from the above decisions is that an interested party is a peripheral party and cannot introduce new issues for determination by the court. Further, that in determining the matters before it, the court will only consider the issues raised in the pleadings by the principal parties. This rule will be particularly unyielding when the matter before court is a private as opposed to a public interest claim.

66. In view of the elaborate explication of the law as pertains to the scope and role of an Interested Party in a dispute, there is no gainsaying that an Interested Party cannot generate, canvass and purport to highlight issues which are at variance with and contradictory to the issues espoused by the Principal Party in the matter in dispute beforehand.

67. Consequently and in view of the foregoing, all the issues being canvassed and ventilated by the Interested Party herein are not only misconceived but are legally untenable. In this regard, I shall not ventilate and/or address same any further.

Issue Number 2 Whether the Learned vice chair of the tribunal reached and arrived at the correct decision in dismissing the Reference filed by the Appellant herein.

68. To start with, the Appellant herein had previously filed and lodged a dispute before the Business Premises Tent tribunal vide BPRT Cause No. 1126 of 2019 wherein same was seeking inter-alia orders of temporary injunction to restrain and/or prohibit the Respondent herein from, inter-alia, levying distress on account of rent arrears.

69. Arising from the dispute, the tribunal proceeded to and investigated the issues which were raised by the current Appellant and thereafter the tribunal filed and established and held that the Appellant herein was indeed in rent arrears amounting to Kes.980, 000/= as at May 2021.

70. Furthermore, having found and established that the Appellant was in rent arrears amounting to Kes.980, 000/= only, details in terms of the preceding paragraphs, the tribunal ordered and directed the Appellant to settle the said rent arrears and in default the Respondent was granted liberty to levy distress.

71. Instructively, despite the fact that the tribunal issued the order directing the Appellant to pay the named amount of rent arrears, it is not lost on the Honourable court that the Appellant failed and/or neglected to pay/settle the said rent arrears. To the contrary, the Appellant continued to accumulate and accrue more rent arrears.

72. Nevertheless and despite the failure by the Appellant to liquidate and/or settle, inter-alia, the rent arrears which had hitherto been ascertained vide BPRT Cause No. 1126 of 2019; the Appellant herein continued to operate as though everything was normal.



73. Pricked by the fact that the Appellant was not paying the accrued rent arrears, the Respondent proceeded to and issued the Notice to terminate tenancy dated the 5th August 2021 and which thereafter responded to by the Appellant. For clarity, the Appellant took out and filed the Reference.
74. During the hearing of the Reference, it was established and ascertained that the Appellant herein had indeed accumulated and accrued substantial rent arrears. Firstly, there is no dispute that the Appellant did not appeal against the decision of the tribunal in BPRT Cause No. 1126 of 2019, which found the Appellant to be in rent arrears of Kes.980, 000/= only, as at May 2021.
75. Further and in addition, there was no evidence tendered by and on behalf of the Appellant that same had fully liquidated and/or settled the said rent arrears spoken to and underscored at the foot of the orders of the tribunal issued on the 6th August 2021.
76. Moreover, even during the proceedings before the tribunal, the Appellant herein herself testified and stated as hereunder;

“I don’t agree that the rent arrears was kes.1, 280, 000/= as at November 2021. According to me, the arrears were approximately Kes.700, 000/= or less. The payments that brings down the figure are captured in expenses which are not before court which I made with the landlords consultation”

77. In my humble view, the Appellant herein was indeed confirming and acknowledging that same had accumulated substantial rent arrears, which remained due, owing and unpaid. Indeed, the Notice to terminate tenancy was informed by, inter-alia, the chronic and persistent default by the Appellant to pay rents in respect of the Demised premises.
78. Nevertheless and in any event, it is worthy to recall that the fact that the Appellant was in substantial rent arrears is not even disputed by the Appellant’s own advocate, who confirms and admits same in the entirety of the written submissions dated 9th February 2023.
79. In the premises, the question that does arise is what was reasonably expected of the vice chair of the tribunal. Surely, the moment it was proved and established that the Appellant was in substantial rent arrears, which was not being liquidated, then the tribunal had no other alternative, but to dismiss the Reference and ratify the Notice to terminate the tenancy.
80. I am alive to the contention that the Business Premises Rent tribunal was indeed established with a view to offering protection to controlled tenants from unscrupulous landlords, who would wish to subject controlled tenants to arbitrary and illegal malpractices and evictions, as was highlighted and amplified by the Court of Appeal in the case of Gusii Mwalimu Investment Co. Ltd & 2 others v Mwalimu Hotel Kisii Ltd [1996] eKLR.
81. Nevertheless, it cannot be over emphasized that where a tenant breaches and violates the terms of tenancy agreement; then such a tenant certainly cannot accrue and partake of the protection of the tribunal and by extension the court. For good measure, it is the payment of the rents by the tenant that confers upon the tenant the legal security of tenure, to remain in possession of and to enjoy the benefits attendant to quiet possession of the demised premises.
82. Consequently, the moment a tenant breaches and infringes the main obligation which revolves around payments of rents, as and when due, such a tenant cannot seek asylum/refuge before the tribunal and by extension the court under guise that the tribunal was created to protect the tenants.

PARA 83.



To my mind, the contention by and at the instance of the Appellant that the Business Premises Tribunal was meant to protect the tenants, if taken at face value would be tantamount to saying that even where a tenant, like the Appellant herein, has accrued substantial rent arrears, same must no doubt remain in situ in the Demised premises.

PARA 84.

I am afraid, that was not the intendment of Parliament, when same enacted the Landlord and Tenants (Shops, Hotels and Catering Establishment) Chapter 301 Laws of Kenya.

PARA 85.

In view of what I have discussed herein before, I am obligated to find and hold that the vice chair person of the tribunal indeed reached and arrived at the correct decision. Clearly, there was no other alternative. In fact, a contrary decision, aimed at protecting the Appellant and allowing her to remain in the Demised premises, would have been contrary to Equity and Social Justice.

PARA 86.

To buttress the foregoing arguments, I am inclined to and do hereby adopt and reiterate the exposition of the law as elaborated upon in the case of Samuel Kipkori Ng'eno & Another v Local Authorities Pension Trust (Registered Trustees) & Another [2013]eKLR, where the court stated and observed as hereunder;

“A tenant’s first and main obligation is to pay rent as and when it becomes due, for the landlord has the right to an income from his investment. Why would a tenant allow himself to fall into such huge arrears of rent”

PARA 87.

Invariably, a similar situation like the one beforehand was also canvassed and dealt with by the court in Hedwig – Hirt Mitterlerlehner ULRICH versus Hendrick Spin [2020]eKLR, where the court found and held as hereunder;

“ The plaintiff was clearly in breach of the terms of the document presented as a lease for not paying rent to the defendant. She cannot claim that she did not know where to pay rent for she did pay rent up to the year 2006. She was never informed that rent ought not to be paid into that account that she was paying previously and it follows that this is the exact account where she needed to pay her rent. It would be unconscionable for the plaintiff to claim that she has a right to purchase the property or to be compensated for developments, on the basis of the same document that she herself has breached with impunity. That would be unjust to the defendant.

28. Whichever way one wants to look at it, the case of the plaintiff is hopeless to say the least. Her case is hereby dismissed.

29. I have already mentioned that the defendant is entitled to rent arrears and mesne profits which I have calculated at Euros 21,960. I thus enter judgment in favour of the defendant for the sum of Euros 21,960. This sum will attract interest at court rates from 27 May 2014 which is the date that the counterclaim was filed. The defendant is also entitled to vacant possession of the property and the plaintiff is hereby ordered to give vacant possession within 14 days of this judgment. In default, the defendant is at liberty to appoint



a court bailiff and have the plaintiff and/or her servants agents or anyone claiming possession under her to be evicted.”

PARA 88.

To my mind, the Respondent as the landlord constructed and/or developed the suit premises or better still, acquired same for purposes of investment and an earning returns therefrom. In this respect, it would be unjust to deny and deprive a developer/investor of a return which ought to accrue unto him as a result of the fruit of his sweat.

PARA 89.

To do so will be absurd. In this respect, any order allowing the current appeal and (sic) returning the Appellant to the suit premises wherein same does not pay rents shall constitute and amount to sanctioning absolute impunity.

PARA 90.

Consequently and to my mind, the only just, equitable and humane order is one that beckons for the Dismissal of the Appeal.

Final Disposition:

91. From the foregoing analysis, it must become apparent and evident that the Appeal beforehand which has been propagated by the Appellant who does not pay rents, over and in respect of the Demised Premises, is certainly devoid of merits.
92. Consequently and in the premises, the only lawful and legitimate order that commends itself to me, is one that calls for the Dismissal of the Appeal.
93. In a nutshell, the appeal be and is hereby Dismissed with costs to the Respondent. For good measure, the costs shall be agreed upon and default, same shall be taxed and certified by the Deputy Registrar of this Honourable Court.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY, 2023.

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – court Assistant.

Mr. Kinyua for the Appellant.

Mr. Kefa Ombati for the Respondent.

Mr. Eliud Karanja Matindi – Interested Party

