REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI COMMERCIAL & ADMIRALITY DIVISON)

CIVIL CASE NO. 667 OF 2010

KIRIMA BUS SERVICES LTD.....PLAINTIFF

VERSUS

JOSEPH KARIUKI GICHIMU T/A

TAUSI ENTERPRISES & PEACOCK ENTERPRISES.....DEFENDANT

JUDGEMENT

By a plaint dated 15th October 2010 and filed in this court on 27th October 2010, the plaintiff seeks the following order against the Defendant:

> **1) An order of eviction compelling the Defendant to vacate from the Plaintiff's premises on LR No. 209/7144, and grant vacant possession.**
>
> **2) General damages for trespass and mesne profits.**
>
> **3) Costs of this suit.**
>
> **4) Interest on (b) and (c) above at court rates until payment in full.**

According to the plaint the plaintiff was the registered owner of LR No. 209/7144 (hereinafter referred to as the suit property) upon which Kirima Bus Services Building is situate. On or about 1st December 2004, the Plaintiff entered into 2 tenancy agreements with the Defendant in respect of 2 shops located in the suit property. However, it is averred that the Defendant failed to meet his rental obligations in full and this led the plaintiff to serve on the Defendant two statutory tenancy termination notices to which it is contended the Defendant never objected thus the said notices became effective. It is therefore contended that the Defendant's continued possession and occupation of the suit premises amounts to a trespass as the Plaintiff is thereby deprives of the income therefrom and has suffered loss and damage.

On the part of the Defendant it is denied that he failed to meet his rental obligations. It is contended that it is the Plaintiff who refused to accept due rents unless the Defendant paid goodwill in the sum of Kshs 3 million. It is the Defendant's position that no notices of termination were served on him taking into account the fact that the Plaintiff had always maintained the position that the tenancy was not protected. In the Defendant's view, this Court accordingly lacks the jurisdiction to determine this matter. In the Defendant's view, he has always been a protected tenant and that the Plaintiff is seeking ways of evicting him hence the current suit amounts to an abuse of the law since it ought to have been brought in the Business Premises Tribunal where there is a pending case.

In its reply to the defence the Plaintiff reiterated the contents of the plaint and averred that the reference filed before the Tribunal was not in opposition to the termination notice hence the Court has jurisdiction to determine this matter. In its view, the issuance of termination notice is a factual question not affected by the existence of a controlled tenancy within the meaning ascribed to the term by the ***Landlord and Tenant (Shops, Hotels and Catering Establishments) Act***, Cap. 301, Laws of Kenya (hereinafter referred to as the Act). According to the plaintiff since the Defendant had always asserted that the tenancy was protected he is estopped from denying the same.

The plaintiff called three witnesses who testified on its behalf. The first witness, **John Irungu Githinji**, who testified as PW-1 stated that he is a director of the plaintiff and that the Defendant if the Plaintiff's tenant in the suit property. Initially the Defendant was paying rent. However, later and for about 2 years and 2 months the Defendant defaulted in paying rents and changed the structure of the building. The Plaintiff then instructed their lawyers to give a notice of termination of the tenancy on 29th October 2008 which was served on the Defendant

on 4t November 2008. The said notice was produced as the Plaintiff's Exhibit 1(a) and 1(b). According to the witness service was effected by one **Vincent** and produced an affidavit of service as Mfi-2(a) and 2(b). According to him the Plaintiff's advocates confirmed from the Tribunal that there was no response to the said Notice. Both the letter to the Tribunal and the Tribunal's response were similarly produced as exhibits. Thereafter the plaintiff instructed their lawyers to notify the Defendant to vacate the suit property and on failure by the Defendant to do so the Plaintiff instructed its lawyers to institute these proceedings.

In cross-examination by **Ms Ngugi**, learned Counsel for the Defendant, the witness confirmed that he was a director of the plaintiff and that the Directors decided to give the tenancy but the Defendant defaulted in the payment of rents before October 2008. From **Tausi**, it was stated that the Defendant had rent arrears of 2 months while in respect of **Peacock** the arrears were 2 years meaning that he had been in default since 2006. For each shop it is contended the Defendant was paying Kshs 30,000.00 and with respect to Peacock the Defendant was remitting the same through **Nduati Wamae & Associates**. According to the witness he was not aware that the rent was being paid though their agents might be aware. In his evidence the process server was connected to the caretaker to show him the two shops and the owners thereof and he believed that they were served. Although the Defendant was paying the rent he refused to sign the agreement though they had no problems along the way. The witness testified that he was unaware that the Defendant paid goodwill but denied that they sought for more money.

In re-examination the witness said that the Defendant used to pay for both premises and that the one occupied by Peacock was in higher arrears than the one for **Tausi**.

The next witness for the plaintiff was **Vincent Mambuya Sabatia**, a process server working in the firm of **Kibatia and Co. Advocates**. According to him, on 4th November 2008 he received instructions from the said firm in form of a Notice of Termination or Alteration of the Terms of Tenancy dated 29th October 2008 to serve **Peacock Enterprises** and **Tausi** in connection with the tenants of **Kirima Bus Service**. He proceeded to the building at Gikomba Road Opposite Machakos Bus Station Nairobi. There he met a person seated at the entrance of the building who informed him his name was **Mr Karuri** whom he later learnt was known as **Joseph Karuri**, the caretaker of the building. After introducing himself and asking for the shop he was showed the shop of Peacock. He met one **Mr Evans** and on inquiring the whereabouts of **Mr Joseph Kariuki** the owner of the **Peacock**, he was informed that **Mr Joseph** had left in the morning. He then served the said Mr Evans with the notice under section 4(6) of the Act. He then prepared an affidavit dated 21st November 2008 which was then produced as Exhibits 2(a) and 2(b). In his view the said notices were served in accordance with the law.

On cross-examination by **Mr Achoki**, for the Defendant, PW-2 stated that he had worked with the said firm of advocates for about 10 years and was appointed a process server in the year 2006. According to him he knows the rules of process service. He was instructed to effect service upon the owner of the premises of Kirima Business Building. He, however, did not indicate the Land Reference Number but it was located along Gikomba Road. Although he had never been there before he was directed by one of the directors of Kirima Called **John Irungu**. He, however, admitted that he did not meet the person he was to serve but said that if the owner is not there you can leave the documents at the premises or with employees. According to him Evans told him that he was such employee. He, however, reiterated that he did not serve Joseph personally but served Evans and this according to him constituted service on **Joseph** since **Evans** promised to hand the same to Joseph.

On re-examination, he said that the caretaker took him to the shop where he met **Mr Evans**. Since he was allowed to serve the employee it was his evidence that this was proper service.

The third witness for the plaintiff was one **Joseph Kamori Gichaga**. According to him he works at Kirima Bus Service Building opposite Country Bus as a caretaker and has been working there since the beginning of the year 2008. On 4th November 2008 he was called by **John Irungu**, a director, who informed him that a person was going there whom he should show Peacock. He took the said person to the shop where they found Evans an employee. After showing him the shop he left at the door. According to him Evans has uniform of the shop and works therein.

On cross examination by **Mr Achoki**, he reiterated that he has worked there since 2008. He was called at about 10.00 am by the Director and informed that a person was coming from Kibatia who he should show Peacock's Shop. According to him Evans was an employee there and head known him for 3 months. He showed the person the shop called Evans and went back to his place of work. He did not know what happened. The person who was sent just told him he was from Kibatia and wanted to be showed Peacock's shop and he just left him.

On re-examination, the witness confirmed that once he showed the person the shop he left him there.

On the part of the Defendant, **Joseph Gichimu Kariuki**, the Defendant herein testified that he is a businessman at Gikomba Market selling shoes. Where he carries out his business is owned by a company known as Kirima. He has carried out his said business for 25 years though at Kirima he has been there for 7 years without any dispute. According to him, he has been paying rent in time. On 4th November 2008 he denied having received any document from **Kibatia & Co. Advocates**. According to him he has no employee by the name Evans and that he did not receive any document from the said Evans since he does not even know him.

In cross-examination, the Defendant said he has no rent arrears. According to him the case which he filed before the Tribunal was in respect of a dispute on rent increase in terms of goodwill. Asked about a cheque, he admitted that the signature thereon was his but reiterated that **Evans** was not his employee. He, however, conceded that he has no Muster Roll in court and that the same was not part of his documents.

At the conclusion of his evidence the defence case was closed and parties filed written submissions. According to the plaintiff since the Defendant did not produce the Muster Roll the same should be held against him. In the plaintiff's view, its case has been proved since it established that notices were prepared and served on the Defendant who failed to act on them. The Defendant, on the other hand, failed to show any concrete evidence that he was not served according to the provisions of the relevant law and that the causal manner in which he approached his defence clearly shows that he knew he was properly served but failed to act as the law demands. According to the plaintiff the Defendant ought to have produced the Muster Roll for the material day as required by the law and should have called other witnesses in particular the employee known as Evans. His failure to call him can only be held against him. In support of its case the plaintiff cited **Saheb vs. Hassanally Civil Appeal No. 28 of 1980 [1984] KLR** to the effect that where a valid notice under section 4 of the Landlord and Tenant

is not referred by the tenant to a tribunal established under the Act, the Landlord is entitled to effect the terms of the notice without proof of any of the statutory grounds relied upon in the notice. The plaintiff further relied on **Salim Mohamed Garwan vs. Mohamed Said Abdalla & Aidarus Abdulrehman HCCC No. 283 of 2000** and **Reuben Muli Musyoki T/A Konza Merchants and Wayua Mutisya Kinothya & Quentine Wambua Mutisya Civil Appeal No. 3 of 2002**. It was therefore submitted on behalf of the plaintiff that he is entitled to rely on its notice without proof of any of the statutory grounds relied upon in the said notices hence is entitled to the orders sought in the plaint.

On behalf of the Defendant it was submitted that the Tribunal infound in BPRT Case No. 1113 of 2009 that a new tenancy relationship was created after the notice of termination of the tenancy, the issue of service of the notice is nolonger relevant since the Plaintiff never appealed against the said decision.

Having perused the pleadings herein and the evidence adduced as well as the submissions made these are, in my considered view the issues for determination:

1. What is the effect of the failure by a tenant to file a reference when served with a valid notice to terminate a tenancy.

2. What is the mode of service of a notice seeking to terminate a tenancy under the Landlord and Tenant Act, Cap 301 Laws of Kenya.

3. Whether the Defendant herein was duly served with the said notice.

4. What are the orders that the Court should grant in the circumstances.

5. Who should bear the costs of this suit?

Section 10 of the Act provides as follows:

> ***Where a landlord has served a notice under section 4 of this Act on a tenant, and the tenant fails to notify the landlord within the appropriate time of his unwillingness to comply with such notice or to refer the matter to a Tribunal, then, subject to section 6 of this Act, such notice shall have effect from the date therein specified to terminate the tenancy, or terminate or alter the terms and conditions, thereof or the rights or services enjoyed thereunder.***

It follows that where a notice has been served under section 4 of the Act, for the notice not to be effective, the tenant is enjoined to either refer the matter to a Tribunal or notify the landlord of his unwillingness to comply therewith. In Agricultural Finance Corporation & Another vs. Drive-In Estate Developers Ltd. Nairobi (Milimani) HCCC No. 115 of 2001 Ringera, J (as he then was) held that under the provisions of section 10 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap. 301 of the Laws of Kenya, where a tenant has been served with a landlord's notice to alter the terms or to terminate the tenancy and he does not notify the Landlord within the appropriate time of his unwillingness to comply with such notice or refer the matter to the tribunal, the notice shall take effect from the date indicate unless the tribunal has for sufficient reason permitted a reference notwithstanding such non-compliance.

Again in Farid Ahmed Hassan vs. William Ouko Ogola Kisii HCCA No. 112 of 2007 Musinga & Makhandia, JJ, (as they were) held:

> **"In this case the notice served on the appellants was in the prescribed form and in compliance with the section 4(5) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap. 301. It required the appellants to notify the respondent in writing, within one month after the date of the receipt of the same, whether or not they agreed to comply with the same. There is evidence on record going by the affidavit of service filed that the appellants were duly served with the Notice aforesaid personally but the appellants neither complied with the notice nor did they intimate to the respondent that they did not intend to comply with it and that in due course they would be filing a reference in the Business Premises Rent Tribunal opposing the notice. That is the least that was expected of them...The notice therefore took effect on 1st November, 2006 by which time no reference had been filed by the appellants. That fact was confirmed by an official letter from the Tribunal. In view of the foregoing, it is the court's considered opinion that having been duly and in accordance with the law served with Notice of termination of tenancy having failed to file a reference in the Tribunal in accordance with section 6(1) of the Act and in terms of section 10 of the said Act, the aforesaid Notice took effect thereby terminating the appellants' tenancy over the premises with effect from 1st November, 2006. From that date there was no Landlord/Tenant relationship between the appellants and the respondent. The respondent could not therefore have gone back to the tribunal for further orders and or directions on the Notice as submitted by the appellants as the tribunal had ceased to have jurisdiction in the absence of landlord tenant relationship between the parties. All that was left for the respondent was to move to the subordinate court to evict the appellants on the basis of the expired Notice of termination of tenancy aforesaid...Once a reference in accordance with section 6(1) of the Act has not been made to the tribunal and a tenancy notice to terminate the tenancy has taken effect from the date specified therein in terms of section 10 of the Act, the Landlord/Tenant relationship comes to an end and thereafter one can no longer talk of the existence of a controlled tenancy in terms of section 2 of the Act without which the tribunal under the Act has no jurisdiction. In the instant appeal the respondent's failure to refer the appellant's tenancy notice to the tribunal in accordance with section 6(1) of the Act resulted in the cessation of its tenancy in terms of section 10 of the Act and henceforth, there was no controlled tenancy to talk about in regard to the said premises and the landlord became entitled to possession of the same...Therefore the notice having taken effect, it follows that in the circumstances of this case that after 1st November, 2006 the appellants' continued occupation of the suit premises became untenable. In fact such occupation thereafter amounted to a tortuous act of trespass and the respondent was perfectly entitled to have them evicted therefrom. The issue as to whether the notice was valid or**

not could not have been canvassed before the learned magistrate. However, before the tribunal could be seized of jurisdiction, there must be a controlled tenancy which is lacking here."

However, the notice in question must be a notice under section 4. In other words that notice must be a valid notice. Dealing with the issue the Court of Appeal in **Narshidas & Company Limited vs. Nyali Air Conditioning and Refrigeration Services Limited Civil Appeal No. 205 of 1995** held:

> **"The Landlord and Tenant (Shops, Hotels & Catering Establishment) Act Cap 301 Laws of Kenya lays down clearly and in detail, the procedure for the termination of a controlled tenancy. Section 4(1) of the Act states in very clear language that a controlled tenancy shall not terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with specified provisions of the Act. These provisions include the giving of a notice in the prescribed form. The notice shall not take effect earlier than 2 months from the date of receipt thereof by the tenant and the notice must also specify the grounds upon which termination is sought. The prescribed notice in Form A also requires the landlord to ask the tenant to notify him in writing whether or not the tenant agrees to comply with the notice...The notice to quit purportedly relied on by the defendant in this appeal is by no means a notice which in any way complies with Form A as prescribed in the Act. Such notice can only have been given pursuant to the provisions of section 7(1)(g) of the Act. The notice to quit given or issued by the defendant was clearly void and had no effect in law on the plaintiff's tenancy and the plaintiff was under no duty, legal or otherwise to react to it."**

The rationale for this strict compliance with the law was stated in **Lall vs. Jeypee Investments Ltd Nairobi HCCA No. 120 of 1971 [1972] Ea 512** in which it was held:

> **" The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act is an especially enacted piece of legislation which creates a privileged class of tenants for the purpose of affording them the protection specified by its provisions against ravages of predatory landlords. Such protection can only be fully enjoyed if the provisions of Act are observed to the letter otherwise the clearly indicated intention of the legislature would be defeated. In order to be effective in this fashion the Act must be construed strictly no matter how harsh the result...The provisions of section 4(5) are peremptory and imperative, and any notice given by a landlord pursuant thereto must comply with its requirements absolutely and without any deviation. The importance of this is that a tenant who is sought to be ousted from his place of business where he has been carrying on his trade and is earning a livelihood must be informed in the clearest possible terms of his right to resist ejectment under and in accordance with the provisions of the Act... In the present case the notice served by the landlord was not in conformity with the mandatory provisions of section 4(5) inasmuch as it did not require the tenant to serve a counter notice within one month after the date of receipt of the landlord's notice. Subsection (5) states that a tenancy notice shall not be effective for any purposes of the Act unless it is a language which is emphatic and which is clear and explicit has been used, and the language which can leave no doubt in the mind of anyone who reads it that an application to be effective must comply with the time limits imposed. The Landlord and Tenant Act laid down a code which Parliament intended to be followed and if a landlord does not give notice of termination as prescribed, the notice will be ineffectual. This may seem a technical and unmeritorious defence, but there is no doubt that the Court has no power to dispense with these time limits if the defendant chooses to object at the proper time. If the words of the Act are so inflexible that they are incapable in any context of having but one meaning, then the court must apply that meaning, no matter how unreasonable the result – it cannot insert other words....Parliament deliberately altered the expression "after the giving of this notice" to "after receipt of this notice", in an attempt to bring the new prescribed form in conformity with subsection (5). It was not a meaningless or accidental alteration. "Giving" is not synonymous with receiving or "receipt"; the "giving" is not the same as the "receipt" of a notice. The difference between the two could lead to annihilation of the rights of a tenant. Therefore the Tribunal erred in holding that because the notice was served on the same day as it was written the use of the word "receipt" or "giving" made no difference. The landlord should not be exonerated because he used the form that was available to him at the time he gave his notice. It matters not that at the time of the giving of the notice by a landlord no service has been prescribed or there is in existence a prescribed form which is not in conformity with the provisions of the Act. A landlord giving notice must strictly comply with subsection (5). The court is forbidden by subsection (5) to enforce any notice which is not given in strict conformity with the provisions of the Act...It is recognised that each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context; secondly, the object of the legislation is a paramount consideration...The manner of interpreting section 4(5) in its context is to see whether the notice is in conformity with the express provisions of the Act and if it is not in conformity with the express mandatory provisions of the Act, then it is a bad notice. It is not enough that it contains all that is required substantively by the Act and the Regulations. This is an Act which requires, insofar as the giving of the notice is concerned, absolute and complete not merely substantive compliance with its peremptory provisions."**

What then is a valid notice? In **Saheb vs. Hassanally [1986] KLR 371 Muli, J** (as he then was) expressed himself as follows:

> **"Form A under the Landlord and Tennant (Shops, Hotels and Catering establishments) Act (Cap 301 Laws of Kenya) is the prescribed form under section 4(1) of the said Act and the form itself appears to have been couched with alternatives so that the Landlord has just to complete it appropriately. Section 4 of the said Act is also couched in the alternative by the use of "or" in it. Section 7 thereof gives several grounds on which the Landlord may give the tenant for termination of the tenancy. On reading both section 4, which provides for the termination of and alteration of terms and conditions of controlled tenancy and section 7, which provides grounds, which the Landlord may seek to terminate the tenancy, there is no prohibition against the Landlord relying on one or more grounds or relying upon them in the alternative. But the Landlord cannot enforce more than one ground at a time. On the tenant complying or refusing to comply with the Notice the Landlord will be bound by the acceptance of any one ground or by the refusal of all the grounds in the Notice. For example the Notice cannot have double-barrelled effect of terminating the tenancy as well as increase in rent. It must be one or the other...In this case it must either be termination or increase of rent but not both. If termination, then what follows would be the question of mesne profits. If the Notice did not terminate the tenancy then the increase of rent becomes in issue but this again would be subject to the tenant complying with the increase or by reference to the tribunal. In any case where the Notice is couched with a**

ground for termination of tenancy and in the alternative ground of alteration of terms or conditions of the tenancy and the tenant does not notify the landlord his willingness to comply with the Notice or to refer the matter to the Tribunal, then the Notice "shall have effect from the date therein specified to terminate the tenancy, or to terminate or alter the terms and conditions thereof or the rights or services enjoyed thereunder"...Here again the effect of the Notice is in respect of termination or alteration which are subjunctive and section 10 of the Act makes this clear. Section 72 of the Interpretation and General Provisions Act (Cap 2) Laws of Kenya provides that save as is otherwise expressly provided, whenever any form is prescribed by any written law, an instrument or document which purports to be in such form shall not be void by reason of any deviation therefrom which does not affect the substance of such instrument or document, or which is not calculated to mislead. In the instant case there is no deviation in the form used from that, which is prescribed by the Act. The substance is clear the effect of which is to terminate the tenancy or to alter the rent. And the notice is not misleading in any way...Therefore it is held that the notice complied with the prescribed form under the Act and is not void by reason of deviation or misleading. The substance is clear and remains unaffected."

In this case no question arises as to the validity of the notice and hence nothing turns on that point.

The next issue for determination is what the mode of service of a notice seeking to terminate a tenancy is under the Landlord and Tenant Act, Cap 301 Laws of Kenya. Section 4(6) of the Act provides:

"A tenancy notice may be given to the receiving party by delivering it to him personally, or to an adult member of his family, or to any other servant residing within or employed in the premises concerned, or to his employer, or by sending it by prepaid registered post to his last known address, and any such notice shall be deemed to have been given on the date on which it was so delivered, or on the date of the postal receipt given by a person receiving the letter from the postal authorities, as the case may be."

This provision was the subject of **Saheb vs. Hassanally** (supra) in which it was held:

"Under section 4(6) of the Act the modes of service of the Notice appear to be two-fold, namely, either by delivering to the tenant personally or to an adult member of his family, or to a servant residing with him or employed in the premises or to his employer or by sending it by prepaid registered post to his last known address. In this case the service was done by prepaid registered post to the defendant's address in Nairobi and it was received and acknowledged by his son as having been received. This was on October 29, 1976 and the notice was deemed to take effect on December 31, 1976 more than two months after service as provided under section 4(4) and 10 of the Act. Therefore it is held that the notice was duly served within time, and it was capable of taking effect on December 31, 1976 being a period of more than two months from the date of service. Registered post is an alternative and not a residual method of effecting service and the notice was therefore properly served."

It therefore follows that a notice seeking to terminate the tenancy or alter the terms thereof may be properly served on a servant employed in the premises and such service if proved is valid.

The next issue is whether the Defendant herein was duly served with the said notice. That service is crucial to a notice for termination or alteration of the terms of the tenancy cannot be overstated. This was reiterated in **Agricultural Finance Corporation & Another vs. Drive-In Estate Developers Ltd**. (supra) in which the Court held that the service of the notice under section 4(2) of the Landlord and Tenant Act, being the foundation on which all the orders sought are predicated, a denial thereof shows a pivotal triable issue which issue cannot be resolved on the basis of conflicting affidavit evidence, since, when one party affirms service of a document on oath and another denies such service on equally solemn oath and indeed goes as far as stating that his purported signature in the delivery book is a forgery, the Court cannot determine the issue at that stage without in effect trying the suit on affidavits and the only permissible course to adopt in those circumstances is to hear *viva voce* evidence.

The Plaintiff contends that the Notice was duly served on an employee of the Defendant. The Defendant has however denied that the alleged employee was its employee and that no such notice was served. Section 107(1) of the Evidence Act provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. Clearly therefore the burden was on the Plaintiff to prove its allegation that the Defendant was duly served. What is a person who is not served with such notice expected to do? In **Jayantilal R. Shah vs. Hussein Nanji Padamshi & 5 Others Civil Appeal No. 5 of 1982 [1984] KLR 531** the Court of Appeal held that a party who contends that he did not receive a particular letter by post can do no more than to deny the receipt of it, and bare though the denial appears by itself, it is capable of raising a triable issue. Although that decision arose from an application for summary judgement the same principle applies to a situation where the Defendant contends that he was not served in which case the burden is on the Plaintiff to prove otherwise. As was held by **Visram, J** (as he then was) in **Mbura and Others vs. Castle Brewing Kenya Limited and Another [2006] 1 EA 185,** the Evidence Act provides that an act is not proved when it is neither proved nor disproved.

Similarly, Ringera, J (as he then was) in Gandhi Brothers vs. H K Njage T/A H K Enterprises Nairobi (Milimani) HCCC No. 1330 of 2001 while dealing with an application for setting aside ex parte judgement held that where service of summons is asserted by one party and denied by the other, both the assertion and the denial being on solemn oath taken before a Commissioner for Oaths the Court cannot but be left in a quandary in the absence of cross-examination of the deponents to the contradictory affidavits. In those circumstances the Court is constrained to decide the matter on the basis of fundamental rule of evidence, which is codified in Section 3 of the Evidence Act Cap. 80 Laws of Kenya that a fact is not proved if it is neither proved nor disproved. It is therefore not proved. In this case, the only evidence with respect to service of the notice comes from PW-1, the process server. His evidence was unfortunately not corroborated by PW-3 the caretaker who decided to go back to his place of duty without witnessing the service of the notice on the alleged Defendant's employee.

Although the plaintiff alleges that the Defendant ought to have proved that the said Evans was not his employee by producing the Muster Roll, I am unable to agree with this position. Presumably, the Plaintiff was relying on section 109 of the Evidence Act which provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any

law that the proof of that fact shall lie on any particular person. In this case the Defendant was not asserting the existence of any fact. To the contrary, his evidence was a denial of existence of a fact. To that extent this provision was not applicable as that would have meant expecting the Defendant to prove a negative rather than an assertion as contemplated under section 109 aforesaid.

In the foregoing premises I am unable to find that the notice was duly served. Without convincing evidence with respect to service of the notice, it follows that the foundation of this suit must crumble.

Even if I had found that service was duly effected on the Defendant, in BPRT Case No. 1113 of 2009 the Tribunal found that a new tenancy relationship was created the moment the landlord's agent received the rent from the tenant after the effective date hence the relationship between the parties became a month to month tenancy governed by the provisions of Section 4 of Cap 301. Without that decision being set aside, it follows that the earlier notice could not be relied upon by the Plaintiff herein as giving rise to his cause of action. If he wanted to terminate or alter the terms of the tenancy he was bound to issue afresh notice to that effect.

It follows that the order that commends itself to me is that this suit lacks merits and the same is dismissed. The Defendant will also have the costs of this suit.

Dated at Nairobi this 25th day of March 2013

G V ODUNGA

JUDGE

Delivered in the absence of the parties.