



Ess Pee Ess Investment v Deegisat TV Service Limited (Applying as Legal Administrators of the Estate of the Late Oloo Agoro Oloo) (Civil Appeal 56 of 2021) [2025] KEELC 289 (KLR) (31 January 2025) (Judgment)

Neutral citation: [2025] KEELC 289 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL APPEAL 56 OF 2021
LL NAIKUNI, J
JANUARY 31, 2025

BETWEEN

ESS PEE ESS INVESTMENT APPELLANT

AND

DEEGISAT TV SERVICE LIMITED RESPONDENT

**APPLYING AS LEGAL ADMINISTRATORS OF THE ESTATE OF THE LATE
OLOO AGORO OLOO**

JUDGMENT

I. Preliminaries

1. The Judgment herein pertains to an appeal lodged before this Honorable Court by Ess Pee Ess Investment – the Appellant herein. The appeal was filed through a Memorandum of Appeal dated 10th September, 2021 and a 232 Pages Record of Appeal filed on 26th July, 2022 against Deegisat TV Service Limited, the Respondent herein. In a nutshell, the appeal revolves around the interpretation by the Business Premises Rent Tribunal of its own orders herein as seen here below.
2. The Appeal emanated from the Ruling and Order dated 30th August, 2021 delivered by the Honourable P. May-Vice Chair on the 30th August 2021 at Mombasa in the Business Premises Rent Tribunal Case No. 293 of 2020. Based on the Affidavit of Service on record the Record of Appeal was properly served upon the Respondent.
3. On 8th May, 2024 having confirmed that the Record of Appeal filed on 26th July, 2022 had been filed and served. Pursuant to that, the Honourable Court provided directions under the provision of Section 79B & G of the *Civil Procedure Act* Cap. 21 and Order 42 Rules 11, 13 and 16 of Civil Procedure Rules, 2010 and that it be discharged expeditiously.



II. The Appellant's case

4. From the filed Memorandum of Appeal, the Appellant averred as follows that: -
 - a. The Learned Vice Chair erred in law and in fact by failing to consider the written Submissions filed by the Appellant.
 - b. The Learned Vice Chair erred in Law and in fact by failing to consider the evidence tendered by the Appellant.
 - c. The Learned Vice Chair erred in Law and in fact by failing to agree with the Appellant that the Business Premises case filed at Mombasa had become Res-judicata.
 - d. The Learned Vice chair Honourable P. May erred in Law and fact by failing to consider that the Respondent entered the Shop premises on 5th October 2018 after signing a Contract Tenancy agreement of 2 ½ years which provided for termination of the said contract after the expiry of the said period and the Respondent also having paid rent for only 2 ½ months.
 - e. The Learned Vice Chair erred in Law and in fact that the Respondent herein who was a tenant of the Appellant had already been evicted from the suit premises on 18th May 2021 and the contract for the said 2 ½ years had expired on 6th May 2021.
 - f. The Learned Vice Chair erred in Law and in fact by failing to consider the Preliminary Objection dated 29th June 2021 filed by the Appellant especially that the Respondent had filed a similar case being Kwale CMCC 70 OF 2020 over the same parties and the same subject matter.
 - g. The Learned Vice Chair erred in Law and in fact by failing to consider that the tenancy between the Appellant and Respondent had already been terminated and the Business Premises had no Jurisdiction to entertain the matter.
 - h. The Learned Vice Chair erred in Law and in fact by allowing the Application dated 31st May 2021 by allowing all the prayers sought by the Respondent in the said Application dated 31st May 2021.
 - i. The Learned Vice Chair erred in Law and in fact by failing to consider that a new Tenant had already occupied the Rental Premises and the Respondent therefore no longer a Tenant of the Appellant.
 - j. The Learned Vice Chair erred in Law and in fact by failing to consider that the Director who executed the tenancy Agreement had died and the suit herein had abated.
5. The Appellant prayed that to this Honourable Court for orders that:-
 - a. That the Appeal be allowed with Costs.
 - b. That this Honourable Court do find that the Ruling and Order of the Vice Chair Honourable P. May delivered on the 30th August 2021 be set aside and substituted with an Order that the Respondent's/Tenant's Notice of Motion Application dated 31st May 2021 be dismissed with Costs
6. As stated, from the filed Pleadings, the Respondent herein filed a Notice of Motion application dated 30th May, 2021 under the provision of Section 12 (4) of the Landlord & Tenant (Shops, Hotels & Catering Establishment Act Cap. 301 Laws of Kenya seeking the following orders:-



- a. Spent
 - b. That this court do order the landlord/his agent/servant or anybody under his instruction to stop from levying distress, locking the tenant business premises and or throwing the tenant out of his business premises until this matter is heard and determined.
 - c. That the land lord be restrained from interfering with the smooth running of the Applicant's business.
 - d. That the O.C.S DIANI police station do make sure of compliance of the court orders and that peace prevails.
 - e. Costs of this application be provided for.
7. The application is supported by the affidavit of NICHOLAS STEEPHEN ZANI sworn on the same day as the Application.
8. The Trial Court issued the following orders in determination of the Application in the absence of the Tenant/ Applicant – the Respondent herein: -
- a. The Cause/Reference under cause No. 293 of 2020 is hereby reinstated.
 - b. The 5 years Tenancy is hereby declared as controlled.
 - c. The Landlord/Respondent/Agents/Assignee/hirelings/Auctioneers are hereby temporarily prohibited and restrained from unlawfully evicting the Tenant pending the hearing and determination of this suit.
 - d. Tenant is hereby allowed to access, enjoy peaceful tenancy and occupation of the suit premises pending hearing and determination of this application.
 - e. The Landlord/Respondent, Agents, Assignee, hirelings/ Auctioneers are hereby restrained from interfering in any way with the Tenant's quiet enjoyment of the suit premises and peaceful tenancy and occupation of the same pending hearing and determination of this suit.
 - f. The O.C.S Diani Police Station assists in enforcement of the orders.
 - g. The purported proclamation as attached DTS-1 of the Tenant's goods by the Landlord is declared illegal and the Landlord's Auctioneers, agents or hirelings be and are hereby restrained from interfering with Tenant's peaceful occupation of the suit premises.
 - h. Parties to take deliberate steps to prosecute the reference within reasonable timelines.

III. Submissions

9. On 2nd October, 2024, as stated the Record of Appeal was admitted and directions given specifically in the presence of all the parties. The Honorable Court directed that the said appeal be disposed of by way of written submissions with given stringent time lines. Pursuant to that the Counsels were granted ample opportunity file their written submissions. Subsequently, the Honourable Court reserved to deliver the Judgment on notice by Micro Soft Teams Virtual Means. The Honourable Court is sincerely grateful to the Learned Counsels for their dedication, diligence and devotion in the manner in which they had executed their mandate in this matter with utmost professionalism.



A. The Written Submissions by the Appellant

10. The Appellant through the Law firm of Messrs. Angeline Omollo & Associates Advocates filed its written submissions dated 30th May, 2024. M/s. Omollo Advocate submitted in respect to the Appellants Memorandum of Appeal dated 10th September 2021. She stated that the genesis of this Appeal was based on a ruling delivered on 30th August 2021 by the Honourable May - Vice chair at Mombasa in the Business Premises Rent tribunal case no. 293 of 2020 in respect to an Application dated 31st May 2021 seeking reinstatement of Cause no 293 of 2020 among other orders.
11. The Learned Counsel averred that the Appellant being aggrieved by the ruling delivered on 30th August 2021 filed this Appeal. The background of this case was that the Appellant and the Respondent entered into a tenancy agreement on 5th October 2018 for shops no. 0, 7 and 8 at Kenya Shillings fifteen thousand (Kshs. 15,000/=) monthly for each of the shops and a maintenance fee of a sum of Kenya Shillings Three Thousand (Kshs. 3,000/=) for each of the shops. The tenancy agreement clearly stipulated that the Respondent being the tenant then was to take the property on as it was basis. As per Clause 9 of the tenancy agreement dated 5th October 2018, all the obligations laid out were carried out by the Appellant to the latter.
12. The Learned Counsel submitted that any extra modifications to the shops were to be carried out at the expense of the Respondent. The Respondent stopped paying rent which accumulated to Kenya Shillings One million six hundred thousand (Kshs. 1,600,000/-). The Tenancy agreement had a rent distress clause in case of default for three months which the Appellant acted upon. This led to the tenant being evicted by the Appellant due to the rent arrears on 27th April, 2021. This led to the tenant being evicted by the Appellant due to the rent arrears on 27th April 2021 and a new owner is currently owns the shops.
13. The Learned Counsel further contended that the tenant being aggrieved went and filed cause no 293 of 2020, the matter came up for hearing on 15th January 2021 and the tenant never appeared. The matter came up again on 27th April 2021 and the Respondent failed to appear again and as such the matter was dismissed for want of prosecution. The Respondent filed an Application dated 31st May 2021, that is Tribunal case no. 293 of 2020 and sought to reinstate the matter that had been dismissed, the Application was allowed vide a ruling dated 30th August, 2021.
14. The Learned Counsel relied on the following four (4) issues to be considered by Court in its determination:-
 - a. Whether the matter herein is Res – Judicata.
 - b. Whether the matter had abetted.
 - c. Whether there was a Landlord - Tenant relationship.
 - d. Whether the Tribunal lacked the prerequisite jurisdiction.
15. On the first issue, the Learned Counsel submitted that the doctrine of Res judicata requires that there should be an end to litigation where a court has decided and issued Judgment over the same issues. It was based on the need to give finality to judicial decisions. The Respondent when filing this suit failed to inform the court of an ongoing matter that had been filed at Kwale court being CMCC NO.70 of 2020 over the same parties and same subject property. To buttress on this point, the Counsel relied on the case of “John Florence Maritime services Limited & Another – Versus - Cabinet secretary



for Transport and infrastructure & 3 others (2015) eKLR” where the Appellate court dismissed the Appeal after satisfying itself that the suit was in fact Res judicata.

16. On the second issue, the matter herein had abated. This was the case as the Landlord who signed the tenancy agreement herein was currently deceased having passed on 17th March 2021 due to cardiopulmonary arrest. Indeed, his Certificate of death was issued by the Director of Civil Registration on 23rd March 2021. The current company directors never participated in the signing of or terms of the tenancy agreement which was being disputed in court.
17. On the third issues, the Counsel stated that the Respondent herein was evicted on 27th April, 2021 due to rent arrears and a new tenant currently owned the shops. Following the eviction, they submitted that there was no Landlord-tenant relationship between the Appellant and the Respondent herein and as such the Business premises rent tribunal court has no jurisdiction to continue hearing the matter in BPRT cause no 293 of 2020.
18. In support of this argument, the Learned Counsel relied on the Landmark case of “Owners of the Motor Vessel ‘Lillian S’ – Versus – Caltex Oil (Kenya) Limited (1989)” where the court stated:

“Jurisdiction is everything, without it a court has no power to make one more step. where a court has no jurisdiction there would be no basis for a continuation of proceedings pending evidence....where a court takes upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing”

The Appellant had annexed relevant documents to prove its case on a balance of probability as required by law.

19. In conclusion, the Learned Counsel prayed that the Appeal herein be allowed and that this Honourable court do Order that the ruling and Order of the Vice Chair Honourable P. May delivered on 30th August 2021 to be set aside and substituted with an Order that the Respondent’s/Tenant’s Notice of motion Application dated 31st May 2021 be dismissed with costs.

IV. Analysis and Determination

20. The Honourable Court has had a chance to critically assess all the pleadings filed in this Appeal being the Record of Appeal and its contents, the Memorandum of Appeal by the Appellants, the written submissions, the plethora of cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
21. For the Honorable Court to be in a proper position to arrive at an informed, plausible, just, fair and reasonable decision from the filed Appeal by the Appellant herein, the Honorable Court has condensed the subject matter into the following two issues (2) salient issues for its determination. These are: -
 - a. Whether the file appeal by the Appellant being aggrieved by the Ruling and Order dated 30th August, 2021 delivered by The Honourable P. May-Vice Chair on the same day at Mombasa in the Business Premises Rent Tribunal Case No. 293 of 2020 is merited?
 - b. Who will bear the costs of the Appeal?



Issue No. a). Whether the file appeal by the Appellant being aggrieved by the Ruling and Order dated 30th August, 2021 delivered by The Honourable P. May-Vice Chair on the same day at Mombasa in the Business Premises Rent Tribunal Case No. 293 of 2020 is merited.

22. Before embarking on the issues for analysis under this sub-heading as indicated earlier in the Judgment the Honourable Court in a preamble form the court makes two assertions. First on the re-evaluation of the evidence from trial court and secondly the brief facts of this case. This is a first appeal. In the case of “Kenya Ports Authority v Kuston (Kenya Limited (2009) 2 EA 212” this Court stated as follows regarding the duty of first appellate court: -

“This being a first appeal to this Court, the duty of the court, is to reconsider the evidence, evaluate and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect...”

23. Similarly, in the case of “Peter –Versus - Sunday Post Limited 1958 E.A. 424” Sir Kenneth O’Connor P. rendered the applicable principles as follows: -

“It is a strong thing for an appellate court to differ from the finding on a question of facts, of the judge who tried the case and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a Jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion....”

24. The various powers of the Court on appeal the provision of Section 78 of the Civil Procedure Act, Cap. 21 provided as follows:

“78. Powers of appellate court.

(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

- (a) To determine a case finally;
- (b) To remand a case;
- (c) To frame issues and refer them for trial;
- (d) To take additional evidence or to require the evidence to be taken;
- (e) To order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

25. The only issue for determination in the appeal is whether this Honourable Court can interfere with the ruling of the tribunal by finding for the Appellant. The brief facts are discussed above in this Judgment it will be prudent to proceed with the examination of the grounds of appeal.

26. I shall examine the entire Notice of Motion application dated 30th November, 2020. In the application the Respondent sought orders under Section 12(4) of the Landlord and Tenant (Shop, Hotels & Catering Establishment) Act, CAP 301 Laws of Kenya. The Respondent sought the following orders:-



- a. Spent
 - b. That this court do order the landlord/his agent/servant or anybody under his instruction to stop from levying distress ,locking the tenant business premises and or throwing the tenant out of his business premises until this matter is heard and determined
 - c. That the land lord be restrained from interfering with the smooth running of the applicant’s business
 - d. That the O.C.S DIANI police station do make sure of compliance of the court orders and that peace prevails
 - e. Costs of this application be provided for.
27. The Respondent contended that he had been a tenant of the Appellant since the 2016. That they had been having a good Landlord - Tenant relationship. He had been running a bar/restaurant business and had never failed to pay the monthly rent. However, despite of all this, the landlord has been impatient with him since they closed the business due to the Corona virus as directed by the National Government and the Ministry of Health directions.
28. Nonetheless, the Honourable Court takes cognizance to the fact that the Appellant has raised the issue of jurisdiction under the ground 7 of its Memorandum of Appeal. It states in verbatim that:-
- “g. The Learned Vice Chair erred in Law and in fact by failing to consider that the tenancy between the Appellant and Respondent had already been terminated and the Business Premises had no Jurisdiction to entertain the matter.”
29. I concur with the Learned Counsel for the Appellant that the issue of Jurisdiction is fundamental. The powers of the tribunal are spelt out under the provision of Section 12 of the Land Lord – Tenant (Hotels, Shops & Catering Establishment) Act Cap. 301. At Section 12 (e) includes to make order, upon such terms and conditions as it thinks fit, for the recovery of possession. The process of terminating a controlled tenancy is also enumerated under sections 4, 6 & 7 of the Act of which the Plaintiff has not complied with. Jurisdiction is everything, and where a court or tribunal lacks jurisdiction, it cannot proceed with the matter but down its tools. This resonates so well from the locus classicus case of case of “Motor Vessel M.V. Lillians (Supra) where it held:-
- “Jurisdiction must be acquired before judgment. It is for this reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on evidence before the court. It is immaterial whether the evidence is scanty or limited...the moment the court determines that it has no jurisdiction it has to down its tools and proceed no further.”:
30. On the same breath, the supreme court rendered itself in the case of:- “Samuel Kamau Macharia & Ano. – Versus - KCB and 2 Others Supreme Court Civil Application no. 2 of 2011” that a court’s jurisdiction flows from either *the constitution* or legislation or both. In this case, the tenancy in question being a controlled one, the appropriate forum to ventilate any dispute ought to be the Business Premises Rent Tribunal and not before this Honourable Court. For these reason, therefore, I do find the court was rightfully in the Business Premises Rent Tribunal.
31. On ground number 6 (f), the Appellant has averred that the Learned Vice Chair erred in Law and in fact by failing to consider the Preliminary Objection dated 29th June 2021 filed by the Appellant



especially that the Respondent had filed a similar case being Kwale CMCC 70 OF 2020 over the same parties and the same subject matter.

32. The substantive law on Res Judicata is found in the provision of Section 7 of the [Civil Procedure Act](#) Cap 21 which provides that:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”

33. The Black’s law Dictionary 10th Edition defines “res judicata” as

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

34. A person may not commence more than one action in respect of the same or a substantially similar cause of action and the Court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions. In order therefore to decide as to whether an issue in a subsequent Application is res judicata, a court of law should always look at the Decision claimed to have settled the issues in question and the entire Application and the instant Application to ascertain;

- a. what issues were really determined in the previous Application;
- b. whether they are the same in the subsequent Application and were covered by the Decision.
- c. whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.

35. Kuloba J., in the case of “Njangu – Versus - Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported)”, held that:-

“If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....”

36. In the Court of Appeal case of “Siri Ram Kaura – Versus – M.J.E. Morgan, [CA 71/1960](#) (1961) EA 462” the then EACA stated that: -

“The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...”

The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence



a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before ...

The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.

It is therefore not permissible for parties to evade the application of Res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit.”

37. At all cost, a decision of the court must not only be obeyed but also respected as fundamental to any civilized and just judicial system. It is not a formality nor cosmetic. Judicial determinations must be final, binding and conclusive. There is injustice if a party is required to litigate afresh matters which have already been determined by the court. A Decision of the court, unless set aside or quashed in a manner provided for by the law, must be accepted as incontrovertibly correct. These principles would be ‘substantially undermined’ if the Court were to revisit them every time a party is dissatisfied with an Order and goes back to the same Court particularly when there is a change of a Judicial Officer in the Court station.
38. In its submission, the Appellant submitted that the doctrine of Res judicata requires that there should be an end to litigation where a court has decided and issued judgment over the same issues. It is based on the need to give finality to judicial decisions. Be that as it may, the Respondent when filing this suit failed to inform the court through empirical documentary evidence of an ongoing matter that had been filed at Kwale court being CMCC NO. 70 of 2020 over the same parties and same subject property. Thus, the Court holds that this argument cannot succeed whatsoever.
39. On the Preliminary objection cited under ground 6 dated 29th June, 2021; the Appellant contended that:-
 - a. That the Advocate for the Applicant is not properly before court having not complied with the express provision of Order 9 Rule 9 which requires the change of Advocate after Judgment had been entered shall not be effected unless by an order of the Court.
 - b. That the matter for determination before the Business Premises Rent Tribunal Court at Mombasa has now become res judicata as a similar matter still exist before Kwale Law Court being CMCC
40. In its submission, the Appellant has stated that the matter in CMCC NO. 70 of 2020 was ongoing meaning that the same lay on the doctrine of sub judice. On the first ground of the preliminary objection, Order 9 Rule 9 which requires the change of Advocate after Judgment had been entered shall not be effected unless by an order of the Court – considering that judgment in the trial Court had not been entered then the same does not apply. This ground therefore fails being that the suit was in the tribunal which is the correct forum. Therefore, I join issues with the Trial Court in dismissing the preliminary objection.
41. Finally on the issue of Controlled tenancy which is captured in ground 4, 5, and 9. From the application it was clear that the Appellant and the Respondent were in a controlled tenancy. Such disputes are within the consent of the Landlord and tenant (shops, Hotels catering establishment Act Cap 301



Laws of Kenya, therefore the tribunal had the jurisdiction to hear and determine the suit. Section 2 of Cap 301 provides:

“ 2.

- (1) For the purposes of this Act, except where the context otherwise requires – “controlled tenancy” means a tenancy of a shop, hotel or catering establishment which has not been reduced into writing; or which has been reduced into writing and which is for a period not exceeding five years; or contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or (iii) relates to premises of a class specified under subsection (2) of this section: Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy;..... “shop” means premises occupied wholly or mainly for the purposes of a retail or wholesale trade or business or for the purpose of rendering services for money or money’s worth; “tenancy” means a tenancy created by a lease or under-lease, by an agreement for a lease or under-lease, by a tenancy agreement or by operation of law, and includes a sub-tenancy but does not include any relationship between a mortgagor and mortgagee as such; “tenancy notice” means a notice given under subsection (2) or subsection (3) of section 4 of this Act; “tenant” in relation to a tenancy means the person for the time being entitled to the tenancy whether or not he is in occupation of the holding, and includes sub-tenant;

42. The tenancy between the parties herein was created vide a tenancy agreement dated 5th October, 2018, is a controlled tenancy. The procedure of terminating a controlled tenancy is contained in the Act. Under Section 4(1) thereof, termination of controlled tenancies can only be undertaken under the purview of the Act as follows:-

“ 4

- (1) Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall 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 the following provisions of this Act.
- (2) A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.”
- (4) No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, as shall be specified therein:



Provided that— (4) (i) where notice is given of the termination of a controlled tenancy, the date of termination shall not be earlier than the earliest date on which, but for the provisions of this Act, the tenancy would have, or could have been, terminated;

- (i) where notice is given of the termination of a controlled tenancy, the date of termination shall not be earlier than the earliest date on which, but for the provisions of this Act, the tenancy would have, or could have been, terminated;

(Emphasis provided)

43. The tenancy agreement clearly stipulated that the Respondent being the tenant then was to take the property on as it was basis. As per Clause 9 of the tenancy agreement dated 5th October 2018, all the obligations laid out were carried out by the Appellant to the latter. The Respondent stopped paying rent which accumulated to Kenya Shillings One million six hundred thousand (Kshs. 1,600,000/-). The Tenancy agreement had a rent distress clause in case of default for three months which the Appellant acted upon. This led to the tenant being evicted by the Appellant due to the rent arrears on 27th April, 2021. This led to the tenant being evicted by the Appellant due to the rent arrears on 27th April 2021 and a new owner currently owns the shops.
44. It is trite law that the termination of an agreement, can be by a way of a notice. It is however more important to note that, the said notice must be made properly. Cap 301 of Kenya laws define who a controlled tenancy is. Section 2 provides:-
- “controlled tenancy” means a tenancy of a shop, hotel or catering establishment—
- (a) which has not been reduced into writing; or
45. The provision of Section 7 of Cap. 301 contains grounds upon which a landlord may seek to terminate a controlled tenancy. Among the grounds itemized are commission of substantial breach by the tenant of his obligations under the tenancy or any other reason connected with the tenant’s use or management of the premises comprised in the tenancy. I therefore do not hesitate to hold, just like the trial court did, that this was a controlled tenancy. There was a termination clause which gave liberty to the parties to terminate at any time and for any reason within the tenancy period. From the case at hand Respondent had defaulted in rent payments and by the time this Court was retiring to write down this judgment the Respondent had been evicted and there was a new tenant in the suit premises.
46. Consequently, I find fault on the Tribunal’s finding that the tenancy relationship between the Appellant and the Respondent is still in play when the Respondent had breached the agreement due to rent arrears.
47. In light of the foregoing, save for prayers (d), (e) and (i) of the Memorandum of Appeal, I have not found any substantial ground out of the ten grounds itemized by the Appellant which warrant this Honourable Court’s interference with the finding of the Tribunal. The net result is that the appeal herein is partially allowed with respect to the setting aside of the Ruling and Order of the Vice Chair Honourable P. May delivered on the 30th August 2021. While setting it aside, it shall be substituted with an Order that the Respondent’s/Tenant’s Notice of Motion Application dated 31st May 2021 be dismissed with Costs to the Appellant.



Issue No. b). Who will bear the costs of the Appeal

48. The issue of Costs is at the discretion of Courts. Costs mean the award that a party is granted at the conclusion of any process, legal action or proceeding in any litigation. The Proviso of the provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 provides that Costs follow the event whereby by events it means the result of the said process, legal action or proceedings. In the instant case, I find that the Appellant having partially established his claim on the appeal shall be entitled to the costs of the appeal.

V. Conclusion and Disposition

49. The upshot of the foregoing, and having conducted an in-depth analysis of the framed issues herein, the Honorable Court finds that the Appeal by the Appellant has merit and is hereby dismissed. Accordingly, and for avoidance of any doubts, the Honorable Court makes the following orders for disposal thereof: -

- a. That the appeal filed through a Memorandum of Appeal dated 10th September, 2021 and a Record of Appeal filed on 26th July, 2022 herein be and is hereby found to partially have merit and is allowed exclusively with respect to prayers (d), (e) and (i) of the said memorandum of Appeal.
- b. That the Honourable Court reserves the right and discretion to dismiss the Ruling and Order of the Vic Chair Honourable P. May delivered on the 30th August 2021 be set aside and substituted with an Order that the Respondent's/Tenant's Notice of Motion Application dated 31st May 2021 be dismissed with Costs.
- c. That the Appellants shall have the costs of the Appeal.

It is so ordered accordingly

JUDGEMENT DELIVERED THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 31ST DAY OF JANUARY 2025.

.....

HON. MR. JUSTICE L.L. NAIKUNI
ENVIRONMENT AND LAND COURT AT
MOMBASA

Judgment delivered in the presence of:

M/s. Firdaus Mbula, Court Assistant;

M/s. Omollo Advocate for the Appellant

Mr. Wameyo Advocate for Respondent.

