



**Piccolo Mondo Enterprises Limited v Pes (Environment & Planning Appeal  
E004 of 2024) [2025] KEELC 3160 (KLR) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3160 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & PLANNING APPEAL E004 OF 2024**

**YM ANGIMA, J**

**APRIL 3, 2025**

**BETWEEN**

**PICOLLO MONDO ENTERPRISES LIMITED ..... APPELLANT**

**AND**

**PASQUALE PES ..... RESPONDENT**

**JUDGMENT**

**A. Introduction**

1. This is an appeal against the ruling of the Business Premises Rent Tribunal (Hon. Patricia May) dated 09.04.2024 in Mombasa BPRT Case No. E004 of 2023-Piccolo Mondo Enterprises Ltd vs Pasquale Pes. By the said ruling the Tribunal dismissed the appellant's reference against the respondent dated 09.01.2023. By the same ruling, the Tribunal also dismissed the appellant's application dated 13.12.2023 for review of the pre-trial directions given on 21.11.2023

**B. Background**

2. The material on record shows that the appellant filed a reference dated 09.01.2023 challenging the respondent's notice dated 22.12.2022 seeking to terminate the tenancy. The appellant was the tenant at the material time whereas the respondent was the landlord. The respondent's notice sought to terminate the tenancy on the ground that he intended to demolish or reconstruct the demised premises or a substantial part thereof and that he could not reasonably do so without first obtaining possession. The said notice was issued pursuant to Sections 4 (2) and 7 (f) of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act (the L & T Act).
3. The material on record shows that when the reference was set down for hearing on 21.11.2023 the appellant was not present hence the Tribunal directed that the reference shall be canvassed on the basis of documents and witness statements on record and the written submissions of the parties. The matter was thereupon fixed for mention on 17.12.2023 to confirm the filing of submissions and to fix a date for



ruling. It would appear that on 13.12.2023 the appellant filed an application for review of the pre-trial directions given on 21.11.2023 and sought to have an oral hearing of the reference. It would further appear that the Tribunal decided to determine the appellant's application for review together with the reference itself.

### **C. Tribunal's decision**

4. By a ruling dated 09.04.2024 the Tribunal found no merit in the appellant's application for review. It was of the opinion that the appellant had failed to demonstrate any of the grounds for review. It was further of the opinion that the pre-trial directions given on 21.11.2023 were necessary for the expeditious disposal of the reference bearing in mind its age and the inability of the appellant to avail its witnesses. On the reference, the Tribunal was satisfied that the respondent had demonstrated genuine grounds for termination of the tenancy since major repairs or renovations were required which could not be undertaken whilst the appellant was in occupation. As a result, the Tribunal dismissed the appellant's reference for lack of merit.

### **D. Grounds of appeal**

5. Being aggrieved by the said decision the appellant filed a memorandum of appeal dated 08.05.2023 raising 26 grounds most of which were merely repetitive and argumentative. The court finds no need to reproduce them verbatim but shall summarize them into 3 broad categories viz;
  - a. Whether the Tribunal erred in law and fact in dismissing the appellant's application for review.
  - b. Whether the Tribunal erred in law and fact in dismissing the appellant's reference.
  - c. Who shall bear costs of the appeal.

### **E. Directions on submissions**

6. By the time the appeal was listed for direction on 17.02.2025, the respondent had already filed his submissions. Consequently, the appellant was granted 30 days to file and serve its written submissions on the appeal. The respondent was also granted leave to file supplementary submissions, if necessary, within 10 days upon service by the appellant. However, the record shows that the appellants were filed on 25.03.2025 outside the stipulated time.

### **F. Applicable legal principles**

7. This court as a first appellate court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of *Selle & Another –vs- Associated Motor Boat Co. Ltd & Others* [1968] EA 123 at page 126 as follows:

“...Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally.”



8. Similarly, in the case of *Peters –vs- Sunday Post Ltd* [1958] EA 424 Sir Kenneth O’ Connor, P. rendered the applicable principles as follows:

“...it is strong thing for an appellate court to differ from the finding, on a question of fact, 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...”

9. In the same case, Sir Kenneth O’Connor quoted Viscount Simon, L.C in *Watt –vs- Thomas* [1947] A.C. 424 at page 429 – 430 as follows:

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

10. In the case of *Kapsiran Clan -vs- Kasagur Clan* [2018] eKLR Obwayo J summarized the applicable principles as follows:

- a. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
- c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

11. With respect to the Tribunal’s refusal to review its pre-trial directions, it is well settled that the Tribunal was exercising judicial discretion in dismissing the said application. It has been held that an appellate court should be slow in interfering with the exercise of such discretion unless it is demonstrated that



the lower court or Tribunal misdirected itself in principle or that it took into account irrelevant factors or failed to take or consider some relevant factors in arriving at its decision.

12. In the case of *Mbogo vs Shah* [1968] EA 94 that;

“I think it is well settled that the court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should have not acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong conclusion.”

## **G. Analysis and determination**

### **a. Whether the trial court erred in law and fact in dismissing the appellant’s application for review**

13. The court has considered the material and submissions on record on this issue. The appellant faulted the Tribunal for directing that the reference be canvassed through the statements and documents on record rather than through oral evidence. It was contended that the Tribunal had previously given directions for an oral hearing; that the reference was highly contested hence the only manner of doing justice to the matter was through an oral hearing; and that it had not consented to that the abridged version of canvassing the reference.

14. The Tribunal was also faulted for having taken into account irrelevant considerations such as the age of the reference and the need for an expeditious trial and disposal of the reference. The appellant further faulted the Tribunal for finding that there was unexplained delay in filing the application for review whereas the delay was minimal.

15. The court has fully considered the Tribunal’s finding on the appellant’s application for review. In dismissing the said application, the Tribunal held that;

“The present application was filed on 13.12.2023, only four days before the scheduled mention date to confirm the filing of submissions on the reference. The tenant who was aware of the said directions has not offered any plausible explanation on this delay. Nonetheless, even if the Tribunal was to overlook the said delay and consider the other grounds for the review application, the same have not been sufficiently satisfied. The Tribunal considered the age of the matter and the fact that the tenant had contributed to the delay in the hearing of the reference. The matters raised could be ventilated through the documents adduced as evidence. The order to have the reference canvassed by written submissions was therefore proper and balanced the interests and rights of both parties. The application is therefore without merit.”

16. The court finds no fault with the finding and holding of the Tribunal on the application for review. It is well settled that on application for review ought to be filed expeditiously and without undue delay. The question of whether or not a given period of delay amounts to undue delay depends on the circumstances of each case. There is no doubt that the pre-trial directions were given on 21.11.2023 whereas the application for review was filed on 13.12.2023.

17. The appellant did not tender any explanation whatsoever for the delay of 21 days or so before the Tribunal. No explanation of any sort for the delay was offered before this court. In the absence of a credible and satisfactory explanation for the delay of 21 days the court finds that the Tribunal was entitled to hold that it constituted undue delay.



18. The court is unable to agree with the appellant's contention that the Tribunal was not entitled to take into account factors as the age of the reference and the need for an expeditious trial. The court also agrees with the Tribunal's finding that there was no piece of evidence which the appellant could not have tendered through witness statements and documentary evidence. An oral hearing is not the only mode of hearing through which the ends of justice could be met. The court is unable to find any error of principle in the ruling of the Tribunal.
19. The court has considered the appellant's complaint that the Tribunal determined its application for review together with the reference. The material on record shows that the Tribunal determined the application for review in the first part of the ruling whereas the reference was determined last. The appellant cannot therefore claim that it was denied a fair chance of being heard on the application for review. As a result, the first issue is answered in the negative.

**b. Whether the Tribunal erred in law and fact in dismissing the appellant's reference**

20. The court has considered the material and submissions on record on this issue. The appellant contend that it was denied a fair hearing on account of the pre-trial directions given on 21.11.2023. The appellant further contended that, in any event, there was no sufficient evidence before the Tribunal to demonstrate that the respondent intended to carry out my repairs, renovations or demolition of any part of the demised premises.
21. The court has noted from the material on record that the appellant itself had complained of structural failures and required the respondent to undertake some structural repairs. In its letter dated 08.12.2021 the appellant addressed the respondent as follows;

“We acknowledge receipt of your reply letter dated 5<sup>th</sup> December to which we respond as follows;

  1. Your re-confirmation that it is your responsibility to undertake major repairs is on record.
  2. The list of structural repairs that was presented to you on 3<sup>rd</sup> December was also included in our list of July but you have all but ignored them. This is despite them being structural fails, like in the case of flooring and which will inevitably cause accidents if left unattended.”
22. The court has also seen photographs of what appears to be major cracks on part of the demised premises. The court is satisfied upon its own evaluation of the evidence on record that there was sufficient evidence on record upon which a reasonable Tribunal properly directing itself to the facts and the law could reach the conclusion that the respondent could not carry out major repairs or renovations without first obtaining possession of the property. The court finds no fault with the Tribunal's finding in upholding the respondent's notice dated 22.12.2022 to terminate the tenancy.
23. The court does not agree with the appellant's contention that it was denied a chance of being heard on account of the nature of the trial directions made on 22.11.2023. The court takes the view that there is nothing which the appellant could have presented orally which could not have been presented in writing and other forms of documentary evidence. The court does not take the view that the provisions of the Civil Procedure Rules are strictly binding upon the Tribunal. There is no express provision in the L & T Act or the [Civil Procedure Act](#) binding the Tribunal to apply the Civil Procedure Rules except during the process of execution and appeals. Even though the Minister is empowered under Section 16 of the L & T Act to make rules and regulations to prescribe the procedure for the adjudication and



determination of a reference there is no indication that such rules and regulations have ever been made or gazetted. At least none of the parties referred the court to any such rules or regulations. As such, the Tribunal was entitled to adopt a suitable and convenient mode of trying and disposing of the reference.

24. The court is thus satisfied that there was sufficient evidence before the Tribunal to justify its finding that the respondent had sufficiently demonstrated the grounds for seeking to terminate the tenancy with the meaning of Section 7(1) (f) of the L & T Act. The Tribunal did not commit any error of law or fact in holding that the appellant's reference had no merit. As a consequence, the second issue is also answered in the negative.

### **c. Who shall bear costs of the appeal**

25. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the respondent shall be awarded costs of the appeal.

### **H. Conclusion and disposal order**

26. The upshot of the foregoing is that the court finds no merit in the appellant's appeal. consequently, the appeal is hereby dismissed in its entirety with costs to the respondent.

It is so decided.

**JUDGMENT DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 3<sup>RD</sup> DAY OF APRIL 2025.**

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**Y. M. ANGIMA**

**JUDGE**

In the presence

Court assistant Gillian

Ms. Iman for appellant

Ms. Nzisa for respondent

