REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 2974 OF 1991

ALEX KADENGE MWENDWA…………………………...…….PLAINTIFF

-VERSUS-

GRACE WANGARI NDIKIMI….…………………....…...1ST DEFENDANT

ANDREW CHEGE NDIKIMI………..……………….…….…..2ND DEFENDANT

EDWARD NDIKIMI…………………..……………………...3RD DEFENDANT

JUDGEMENT

1. LANDLORD'S NOTICE TO TENANT ON RENT GROUNDS AND FOR DESIRE TO EFFECT RENOVATIONS: PLAINTIFF'S PLEADINGS

The original plaint herein was dated 7th June, 1991 and was filed on 12th June, 1991. An amended version dated 23rd August, 2001 was filed on 30th August, 2001; and a further amended plaint was dated 10th September, 2003.

The plaintiff pleads that he is the registered owner of L.R. No. 3811/9 Kasarani, Nairobi part of which premises was leased to the "*defendant*" up to 31st December, 1990. He further pleads that he had "*served the defendant with a written notice to vacate the suit premises and give vacant possession on or before 31st December, 1990.*" The plaintiff pleads that he wants the "defendant" to vacate the suit premises "*for the defendant has persistently defaulted in paying rent since 1st August, 1989.*" He pleads further that "*The plaintiff wants to renovate the premises…*" The plaintiff pleads that "the defendant is a trespasser [in the suit premises]."

It is pleaded that the defendant failed to comply with the plaintiff's notice to vacate, "*and has continued to trespass on [the] suit premises since 1st January, 1991 causing loss and damage to the plaintiff.*" The plaintiff claims vacant possession of the suit premises, mesne profits and general damages. In total the plaintiffs prayers are for:

(i) immediate vacant possession of the premises;

(ii) general damages for trespass;

(iii) costs of the suit;

(iv) interest on general damages at Court rate;

(v) interest on costs at Court rate;

(vi) mesne profits with effect from 1st September, 1991.

II. DEFECTIVE VACANT-POSSESSION NOTICE WAS SERVED ON DECEASED TENANT; ALL RENTS PAID BUT DECLINED BY LANDLORD:

DEFENDANTS' PLEADINGS

The defendants' original defence and counterclaim is dated 5th August, 1991; it was first amended on 21st November, 2001 and filed on 3rd May, 2002; and it was further amended on 24th October, 2003 and filed on 28th October, 2003.

The defendants deny that they were ever tenants of the plaintiff in the suit premises. They deny further that they were ever served with a termination-of-tenancy notice by the plaintiff. The defendants plead that they occupy the suit premises as beneficiaries and dependants of ***John Ndikimi***, now deceased, who was the tenant of the plaintiff at the suit premises. The defendants aver that they are lawful occupants in the suit premises holding the same in virtue of their status as beneficiaries.

Without prejudice to the foregoing assertions, the defendants admit that ***John Ndikimi*** (deceased) had been a tenant on the suit premises; but they deny having been lawfully served with a notice to give vacant possession. The defendants assert that the landlord's notice was invalid, as it was communicated while the same matter was pending as a *lis* in Tribunal Case No. 112 of 1990 where the tenant was the complainant, and the landlord, even after being served with hearing notices, failed to appear before the Tribunal.

The defendants had a counterclaim: that judgement be entered for the defendants for —

(i) compensation in respect of fencing material, labour and materials in the yard of the suit premises — as special damages;

(ii) general damages for breach of contract;

(iii) interest on the special damges claimed, at Court rate;

(iv) interest on general damages, at Court rate;

(v) costs of this suit;

(vi) such other or further relief as the Court may deem fit to grant.

III. TESTIMONIES

(i) Preliminaries

The hearing of this suit extended over a protracted period, from 9th February, 2004 to 10th May, 2006. On the first occasion of hearing, learned counsel ***Mr. Korongo*** represented the plaintiff, while learned counsel ***Ms. Mbugua*** represented the defendants.

(ii) The Plaintiff's Case

PW1, ***Alex Kadenge Mwendwa***, was sworn and gave his testimony as follows. He is a businessman operating at Githurai, with the renting out of property as his main occupation. L.R. No. 3811/9 is his property situated at Githurai, and in 1990 he rented part of it to ***John Ndikimi***. Of that landlord-tenant relationship, PW1 testified: "*We fell out. He refused to allow rent increase. It had been Kshs.500/= per*

month." In 1990 the landlord had written a letter to ***John Ndikimi*** increasing rent to Kshs.2000/=, but the tenant refused to pay that amount. So in that year, at a later stage, PW1 *"gave him notice to vacate."* The tenant filed a tribunal case in 1990, but, according to PW1, *"he was unable to prosecute*." It was *after* the tenant moved the tribunal, that PW1 gave him notice to vacate the suit premises. Thereafter the landlord brought his case to the High Court, to have the tenant evicted. In 1998 the defendant had again moved the Business Premises Rents Tribunal — to be allowed to object out of time, to the landlord's notice of 1990.

PW1 testified that he could no longer accept rent for the suit premises at the old figure of Kshs.500/= per month, because *"it was too little."* He testified: *"The lowest-paying tenant in the area pays Kshs.6,000/=. He also testified that he "intended to build some shops and stores on the [suit] land."*

PW1 testified that he was the proprietor of a yard which was divided into small stalls, and these were then let out, each fetching a rental of about Kshs.6,000/= per month. He produced (as plaintiff's exhibit No.1) a rent book (C. No. 015090) in the name of Shakti Timber Industries, for the purpose of showing that the relevant tenant, in 2003, was paying to him in rent Kshs.6,500/= per month. He averred that the *"defendant"* had paid him no rent since 1990. He was, therefore, praying for an eviction order, for damages with interest, and for costs of the suit.

On cross-examination by learned counsel ***Ms. Mbugua***, PW1 said that the late ***John Ndikimi*** had been his tenant; and that the three persons now named as defendants are d*ependants* of the deceased who had died in 2003. PW1 testified that he was not aware that letters of administration for the estate of the late ***John Ndikimi*** had been taken. The deceased had taken possession of the suit premises in 1986, when the rent payable was Kshs.500/= per month. PW1 testified that the suit land bore the reference number 3811/9, and that this land did not pass by any other title description.

PW1 testified that he had let out the suit land as a fenced yard, and that all structures constructed therein belong to *the tenant.* The tenants had been conducting business on the said land without any written lease agreement; and *"this is why I issued [the tenant] with a card from the [Business Premises Rent] Tr*ibunal." The plaintiff acknowledged that the said tenancy is a *controlled tenancy* under the rent legislation.

Since the legal framework of the tenancy was so well appreciated by the parties, what was the source of disagreement? PW1 testified: "*My problem with **John [Ndikimi]** is that he never allowed me to increase rent*." He referred to his own letter of 24th February, 1989 a notice to increase rent which he had served on the late ***John Ndikimi***; but he then averred: "*To have lawfully increased rent, I was not aware that I should have issued notice through the Tribunal*." Most of his agreements with ***John Ndikimi*** were verbal, save that he wrote the notice for rent increase. Since 1989, PW1 testified, *"there was default in rent payment."* But he acknowledged that from 1989 to 1990 he had returned rents paid to him by money orders. Why did he do so: *"These took long to cash through the Post Office, and I did not have the time; he refused to pay me in cash."*

The reason given by the plaintiff for refusing the rent payment was not, I think, entirely candid. For on 2nd January, 1990 he had written to ***Mr. John Ndikimi*** "*reminding him for the fourth time*" that the rent had been raised from Kshs.500/= to Kshs.2000/=; in the words of PW1, *"I repeated that I would not accept anything less than Kshs.2000/=."* In February, 1990 ***John Ndikimi*** had complained before the Tribunal about the plaintiff's refusal to accept rent.

The plaintiff stated that as a further reason for his termination of the defendant's tenancy*: "I …..intended to carry out renovations on my premises. I wanted to build stalls*." He then changed his mind and testified: *"I wanted to build, not renovate."*

The plaintiff testified that he has "never served a notice from the Tribunal regarding increase of rent"; and that he understands that from 1990 the tenant has been making rent payment through the Court. On 19th December, 1991 ***John Ndikimi*** had served the plaintiff with orders, to the effect that rent would thenceforth be paid into the Court. Although he was indeed served with the said order, he testified: "I

have not been collecting rent from the Court." But why? In his words: "I am not aware that the money is paid into Court yearly in advance."

When learned counsel, ***Ms. Mbugua*** put it to the plaintiff that the people now being sued are not the tenants, he had no answer. When it was put to him that his notice of increase of rent was a nullity he responded: *"No, it was in writing."* When counsel put it to the plaintiff, *"nobody has stopped you from serving a proper notice and then increasing the rent,"* he answered: *"Not true."*

On re-examination by learned counsel ***Mr. Korongo***, the plaintiff averred that the defendants have come to Court in the name of ***John Ndikimi*** the deceased tenant. He further averred: "[***John Ndikimi's***] wife had been working with him through the years; other tenants are paying Kshs.6,000/=, [even though] their rented premises was also rented as open space."

(iii) The Defendants' Case

This matter next came up for hearing on 20th March, 2006 when the plaintiff was represented by learned counsel ***Ms. Kathambi***, while the defendants were represented by learned counsel ***Mrs. Waweru.***

DW1, ***Grace Wangari Ndikimi*** was sworn on that occasion and gave her evidence as follows. Her husband ***John Kamau Ndikimi***, who was the plaintiff's original tenant, died on 16th August, 2003; and both the 2nd defendant (***Andrew Chege Ndikimi***) and the 3rd defendant (***Edward Ndikimi***) are her sons. DW1 produced (defendant's exhibit No. 1) a rent book covering the period 10th November, 1986 to 1st June, 1989 in the name of her deceased husband. ***John Kamau Ndikimi*** had been a tenant of the plaintiff at the premises known as L.R. 3811/8/R/177. PW1 herself, she testified, had *"never been a tenant on the [said] premises,"* and neither has any of her said two sons held any tenancy on the premises. She further testified: "Since my husband's death no tenancy on that premises has been given to me." She averred that she has, since the death of her husband, been in occupation of the said premises, but in the capacity of administratrix of the deceased's estate; and that in this regard, she is a sole administratrix. DW1 admitted awareness that her late husband, as a tenant, had been served with a termination notice, dated 3rd October, 1990, and termination was to take effect after one month, on 1st January, 1991. She produced the said termination notice (defendant's exhibit No.2) which however, related not to the premises on which she and her husband had always operated (L.R. No. 3811/8/R/177), but to L.R. No. 13858/79 which neither ***John Kamau Ndikimi*** nor DW1 had ever occupied. DW1's husband had expressed shock when the said termination notice was served upon him, in the presence of DW1, on 2nd November, 1990. He immediately wrote a reply, dated 2nd November, 1990 in which he expressed his refusal to accept a termination notice which he described as "null and void." For some time since the rent book became filled up in 1989, there had been misunderstandings between the tenant and the landlord. The tenant asserted in his letter that it was not true he had not been paying rent — because it is the landlord who had refused to receive rent; the landlord had refused to give to the tenant a new rent book; the said termination notice came in the form of a mere personal letter — not a Tribunal order; he demanded a fair rate of rent increase if the landlord was minded to increase rent. Thereafter there was a further exchange of correspondence (defendant's exhibit No. 4), but it all came down to a disagreement between ***Alex Kadenge Mwendwa*** the landlord and ***John Kamau Ndikimi*** the tenant.

After the landlord refused to provide a new rent book, DW1's husband resorted to making rent payment by money orders forwarded through the post office (defendant's exhibit No.5); and each time payment was thus made, the plaintiff would reject and send back the money orders.

Further misunderstanding between landlord and tenant came to pass, when the plaintiff gave out one half of the defendant's rented premises to a different tenant. ***John Kamau Ndikimi*** complained about such act by the landlord (defendant's exhibit No.7) and filed Tribunal Case No. 112 of 1990 — which measure led to the departure of the plaintiff's new tenant.

The plaintiff still would not accept rent, while the tenant continued to pay the same by money orders. After the filing of Tribunal Case No. 112 of 1990 the tenant applied for, and obtained orders authorising

deposit of rent in Court. The orders were given by ***Mr. Justice Mbito*** on 13th January, 1992 within the framework of the suit herein. DW1 produced a bundle of receipts (defendant's exhibit No. 10) showing the systematic manner of rent payment through Court, since then. The tenant also paid into Court all previous rent payments of money orders which the plaintiff had refused to accept; and consequently, the defendant is now fully paid-up, to-date.

DW1 averred that the plaintiff has never, to-date, served her with a rent-increase notice from the Tribunal; and neither has the plaintiff ever made recourse to the Tribunal in this matter, or attended a hearing at the Tribunal.

DW1 denied the truth of the plaintiff's claim that he should have back possession of the suit premises because *"he intends to carry out renovations."* In the words of DW1: *"When the [suit] premises were first let out, it was an undeveloped open field. The landlord showed us the four corners; we fenced; we put up timber structures, toilets etc. according to our requirements. He gave us bare land….There is nothing which the landlord can come to renovate. The structures were not his."*

DW1 averred that she was not opposing rent increase just for the sake of it: "*If the plaintiff approached me with a proper notice to increase rent, I would agree*." In Tribunal Case No. 112 of 1990, DW1's husband had been complaining that the landlord was unreasonably increasing rent, giving unlawful quit-notices, trespassing upon the suit premises, and harassing the tenant. Twice, in February and April, 1990 the late ***John Ndikimi*** served the plaintiff with notice to appear before the Rent Tribunal, but he never did. Consequently the matters were not finalised before the Tribunal, but later, on 2nd June, 1991 the landlord filed the instant suit, and his grievance coincided with the same ones which had been in issue before the Tribunal.

DW1 testified that the importance of the suit premises to her was that she carries on the business of selling unprocessed timber therein, and this was her only occupation. This business enabled her to care for and to educate her three children. In pursuance of those goals, DW1 had made significant investments in the suit premises: she has purchased wood-processing machines on loan which she is servicing (relevant documents produced as defendant's exhibit No. 11 and 12). Underlining the importance to her of the business which she plies at the suit premises, DW1 remarked: "For two-to-three years I have been a widow. To take me out of this business would render me as good as dead. If the landlord deals with me straight, I would be happy to negotiate for a fair rent. [Outside this business] I would have no place to take the machinery. I would lose it all….I would have no way of repaying the loan." DW1 prayed that the plaintiff's case be dismissed with costs.

On cross-examination by learned counsel ***Ms. Kathambi,*** DW1 testified that she does not occupy L.R. No. 13858/79, but instead she occupies L.R. No. 3811/8/R/177. She averred that she has no tenancy agreement in force; she occupies as administratrix of the estate of the deceased, ***John Kamau Ndikimi***.

DW1 averred that "*renovation*" is a process which can only apply to structures in place, where the object is to improve them; but in the instant case, the fences, the sheds, the latrines etc. were not the property of the plaintiff and so there was nothing for him to renovate. And moreover, in his notices to the tenant to vacate, the landlord had not indicated that he wanted to build stalls in the suit premises. DW1 averred that she thought the size of the suit premises would be something in the order of 100 feet by 100 feet.

In the course of DW1's testimony I recorded my observation as follows: "*Witness in my assessment is a truthful witness; businesslike and to the point. She has made her case clear and unambiguous*."

IV. FILING OF SUIT NULLIFIED TRIBUNAL PROCEEDINGS; DEFENDANT DIDN'T COMPLAIN; SO THE NOTICE TOOK EFFECT — SUBMISSIONS FOR

THE PLAINTIFF

Learned counsel ***Ms. Kathambi*** submitted that it emerged from the evidence that following the filing of Tribunal Case BPRT No. 112 of 1990 by ***John Kamau Ndikimi***, the plaintiff had served upon him a

tenancy termination notice dated 3rd October, 1990 — a notice which was to take effect on *31st December, 1990*. Counsel submitted that "The deceased did not object to the notice or file a reference." Counsel stated that the plaintiff had good cause for his notice to terminate tenancy: "*he wanted to build stalls in order to fetch higher rent*;" "since 1990 the plaintiff has not received any rent from the *deceased or his family."*

Ms. Kathambi submitted that *"the main issue for determination is the legality of the notices to increase rent and [of] the termination of tenancy…"*

Learned counsel submitted that by s.4(3) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap. 301), a tenant can obtain a re-assessment of rent for a controlled tenancy; the deceased had been notified of rent increase; he filed *BPRT No. 112 of 1990* complaining of unreasonable rent increment. Counsel has, in effect, clouded the status of BPRT Case No. 112 by stating: *"The reference is said to be pending."* She goes on to note that her client's suit was filed on *7th June, 1991*. She then urges that *"The [issue of] increase of rent could have been raised during the hearing [of the suit]."* She urges*: "…the High Court has unlimited jurisdiction in civil and criminal matters and, therefore, the issues raised in BPRT 112 of 1990 could have been heard and determined in the instant suit*."

I would understand learned counsel to be urging that BPRT Case No. 112 of 1990, which the evidence shows the plaintiff refused to attend, has become irrelevant from the time the *plaintiff* filed the instant suit.

Learned counsel assumed the propriety of the termination notice which he served upon ***Mr. John Kamau Ndikimi*** on *3rd October, 1990.* She proceeds then to the legal prescription for the taking of effect of such notice *once it has been issued.* She urges that by s.4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments Act (Cap.301), a tenancy notice takes effect two months after the intended recipient receives. Such a notice is only required to specify the *grounds* upon which termination is sought.

Ms. Kathambi urged that a tenant must notify the other party of his *unwillingness to comply with the termination notice,* and then refer the matter to the Tribunal before the tenancy notice takes effect as specified in s.6 of the Act.

Learned counsel cites *default in rent payment,* demolition or reconstruction of the premises as reasons, under s.7 of the Act, for which termination of tenancy may take place.

Counsel urged: *"If a tenant fails to communicate his unwillingness to comply with the termination notice within one month or refer the matter to the Tribunal, the notice [then] takes effect on the date specified."* She urged that the termination notice of *3rd October, 1990* met all the requirements. In the words of counsel: "The deceased did not file a reference against the termination and it therefore took effect on *2nd January, 1991."* Counsel urged that "*The occupation of the premises by the deceased and his dependants is illegal and amounts to a trespass."*

Learned counsel urged that the offer to negotiate rent was *"not a serious one"* — because since 1991 no attempts have been made to achieve such negotiation. Counsel maintained that the plaintiff had rightly refused the defendants' rent payments — "*as the deceased ceased to be his tenant on 2nd January, 1991."*

Counsel prayed for a decree providing for *eviction* of the defendants; general damages for trespass; mesne profits (1st Sept. 1991 – Feb 2004 – March, 2004 — to-date); interests; costs.

V. DOES THE PLAINTIFF HAVE A CAUSE OF ACTION AGAINST THE DEFENDANTS? WAS TERMINATION-OF-TENANCY NOTICE VALID? WAS SUCH NOTICE JUSTIFIED, ON THE FACTS? — SUBMISSIONS FOR THE DEFENDANTS

Learned counsel ***Mrs. Waweru*** noted that while the suit had been filed against ***John Kamau Ndikimi*** on

7th June, 1991 the plaintiff did not, after the defendant died in 2003, join in the administratrix in substitution; instead he amended his plaint and sued ***Grace Wangari Ndikimi*** and her two sons in their personal capacities as "tenants" (*vide* Further Amended Plaint dated 10th September, 2003).

Mrs. Waweru submitted that the following were the issues for resolution in this suit:

(a) does the plaintiff have any cause of action against the defendants at all?

(b) without prejudice to the outcome of question (a),

(i) was the plaintiff's termination-of-tenancy notice effective to terminate the tenancy?

(ii) did the facts issuing from the testimonies justify giving the termination-of-tenancy notice?

(c) who should bear the costs incurred in the suit?

Does the Plaintiff have a Cause of Action against the Defendants?

Learned counsel submitted that from all the evidence adduced in Court, the plaintiff's tenant had been ***John Kamau Ndikimi*** (deceased). The defendants, namely the widow and the two sons of the deceased, have never been the plaintiff's tenants; they have not been served with any notice of termination of tenancy; they have not trespassed upon the plaintiff's property; they are under no obligation to pay any rent to the plaintiff; and, counsel further urged, they have *"nothing to give vacant possession of."*

Mrs. Waweru urged that the cause of action in the suit had survived the deceased, and hence the plaintiff ought to have substituted the deceased under the provisions of Order XXIII of the Civil Procedure Rules. Thus the plaint in its amended form, counsel urged, *"is on a totally different cause of action from the one originally filed*"; and for this reason, it was submitted, *"the plaintiff's cause of action as amended must fail."* The new cause of action, counsel urged, would not attach to the deceased.

Suppose the Plaintiff's Cause of Action attaches to the Deceased, Was there an effective Notice to terminate the Tenancy?

Learned counsel began from the premise that the late ***John Kamau Ndikimi's*** tenancy was a *protected tenancy*. A proper determination of such a tenancy would have had to be in accordance with the terms of s.4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap.301). On the terms of such statutory provision, counsel urged, the plaintiff's termination of tenancy issued to the late ***John Kamau Ndikimi*** had been defective and thus devoid of legal effect.

The reason, as stated, is that it is clear from the evidence before the Court that the property which had been let to the deceased was "ALL THAT piece or parcel of land known as 3811/9 Kasarani, Nairobi; yet the premises whose tenancy is sought to be terminated is L.R. No. 13858/79 Githurai. This disparity is material, it was urged, because *"the portion naming the premises in the prescribed form is not in vain. It is meant for proper description of the property."* Counsel urged that "*Misdescription of the suit premises means that the tenancy to be terminated was a different tenancy*." On this account, learned counsel urged, *"the notice … could not be effective to terminate a tenancy that it did not describe."*

Termination Notice to take Effect Two Months after Date of Service

Learned counsel noted that by s.4(4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap.301), the effective date of the notice must be two months after the date of service upon the tenant. The two-month allowance has been held judicially to be significant. In ***Auto Engineering Ltd. v. M. Gonella & Co. Ltd*** [1978] KLR 248 the High Court (***Hancox, J***) held (pp.254 – 55):

> ***"We can well understand that any cutting down of the tenant's rights so far as the period of notice is concerned might make serious inroads into the protection intended to be conferred… Obviously, therefore, the time limit imposed by section 4(5) must be strictly construed.***

Mrs. Waweru noted that the plaintiff's notice in the instant case, though dated 3rd October, 1990 was served on *2nd November, 1990* to take effect on *1st January, 1991*. The notice period, in that case, was *less than two months* from the date of service of the same. The notice therefore, counsel urged, was defective, and thus incapable of terminating the tenancy.

Reasons given for termination of Tenancy — default in rent payment; need to effect renovations

The plaintiff's stated reasons for the tenancy - termination notice were: tenant's failure to pay rent; and landlord's desire to effect renovations.

Mrs. Waweru noted that at the time the plaintiff's notice was issued, there was pending in the Business Premises Rent Tribunal a complaint, relating to unlawful increase of rent, as well as harassment of tenant by landlord — and this was BPRT Case No. 112 of 1990. This is the context in which the tenant refused to accept the rent increase; and the plaintiff reacted by refusing to accept existing rents paid by the deceased (the tenant). All rents paid by money order were returned by the plaintiff, and subsequently the plaintiff obtained Court orders authorising him to deposit the rents due in Court; and to-date the rents due have been discharged in that manner. DW1's evidence was that she had deposited all rents due in Court, up to and including the December, 2006 rent.

Counsel submitted hat the defendants had not only discharged the rent-payment obligation in accordance with the law, but the claim by the plaintiff that he should have back the suit premises for renovation was an invalid claim. This is because only a vacant plot had been let to the deceased (***John K. Ndikimi***); it was not even fenced; "[it] *is the deceased who fenced and built structures on the premises";* and consequently "[t]*here was … nothing for the plaintiff to renovate once the deceased vacated."*

Mrs. Waweru urged that the Court should not allow the plaintiff to evict an innocent *tenant's estate* from the suit premises. This land -possession as asset in the estate of ***John Kamau Ndikimi****,* learned counsel submitted, was the defendants' sole source of livelihood.

Case Law

Learned counsel ***Mrs. Waweru*** relied on the Court of Appeal decision in ***Waljee v. Rose*** [1976] KLR 25 in which it was held (p.28):

> ***"It is to be noted that there is nothing in the [Landlord and Tenant (Shops, Hotels and Catering Establishments) Act] to suggest that death of the tenant would terminate a controlled tenancy under [the] common law: 'A tenancy does not determine by the death of the lessee, but will vest in his legal personal representatives, who are entitled to give or receive the proper notice to quit', see Woodfall: Landlord and Tenant (27th Edn.), page 964."***

In ***Lall v. Jeypee Investments Ltd*** [1972] E.A 512 it was held that a landlord issuing a termination-of-tenancy notice had to count the date of effectiveness of notice from the time of *receipt* of the same by the tenant; and the notice itself had to be formal and expressed in the *prescribed form*. In the words of ***Madan, J*** (as he then was) (p.515):

> ***"I do not accept the argument that the landlord should be exonerated because he used the form that was available to him at the time he gave his notice. In my opinion it matters not that at the time of giving of notice by a landlord no form has been prescribed or there is in existence a prescribed form which is not in conformity with the provisions of the Act. It is quite useless to serve a notice which is not in conformity with the provisions of the Act. A landlord giving notice must strictly comply with subsection (5). If I may use a word from the judgement of Plowman, J in Zenith Investments (Torquay) Ltd. v. Kammins Ballrooms Co. Ltd (No.2) [1971] 1 W.L.R.***

1032 at p.1036, the Court is forbidden by subsection (5) to enforce any notice which is not given in strict conformity with the provisions of the Act."

VI. FINAL ANALYSIS AND DECREE

It is common cause that the tenancy which the late ***John Kamau Ndikimi*** had held as against the plaintiff as landlord, was a *controlled tenancy* under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap.301). Any complaints in respect of such a tenancy thus, stood to be resolved within the framework of the said enactment, and the *primary jurisdiction* in dispute settlement unquestionably fell to the Business Premises Rent Tribunal.

It is clear that when the deceased, ***John Kamau Ndikimi*** quite legitimately disputed rents and attempts to terminate his tenancy and rightly filed BPRT Case No. 112 of 1990, the plaintiff declined to present himself to the jurisdiction of that Tribunal, and instead filed the instant suit in the High Court. Is the legal system characterised by a parallelism such as would confer legality upon such disdaining of the jurisdiction of a statutory tribunal, citing as justification the fact that the High Court is vested with superior powers?

Learned counsel ***Ms. Kathambi,*** for the plaintiff, significantly thus contended: (i) "The increase of rent could have been [contested by the defendant] during the hearing [of this suit]"; (ii) "…the High Court has unlimited jurisdiction in civil and criminal matters and, therefore, the issues raised in BPRT [Case No.] 112 of 1990 could have been heard and determined in the instant suit."

So it is clear, the plaintiff regards as immaterial the fact that the defendant's gravamen had been lodged within the jurisdiction of a statutory tribunal. Is this tenable in law? I do not think so. There is a jurisdictional question attached to the definitions of rights and obligations in the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap.301), which takes the basic dispute-settlement forum to be the Business Premises Rent Tribunal; and the jurisdiction of that tribunal is not to be excluded but for good cause. When, therefore, the deceased tenant submitted a business premises dispute before the tribunal, he thereby activated a *legal process* which required the plaintiff herein to deal in the first place with that tribunal, and not leapfrog into the High Court. I therefore reject counsel's submissions that the plaintiff's grievances should only have been resolved in the High Court.

Does the plaintiff have a cause of action against the three defendants? Learned counsel for the plaintiff has maintained that the "*defendants have [been brought before the] Court in the name of* ***John Ndikimi***"; because the defendant's widow (1st defendant) had worked with the deceased for many years at the suit premises. Such a contention, it is quite clear to me, invokes the mere fact of *association* between the deceased and the 1st defendant, as the procedural validation for suing the three defendants. That cannot be right, with due respect. Joinder of parties, in a situation in which a party has died, must be based on specific provisions of the law, and in particular on the requirements of Order XXIII of the Civil Procedure Rules. The moment the tenant, ***John Kamau Ndikimi*** died, his *estate* became the legal successor; and any surviving suit had to incorporate the successors-in-title of the deceased. The law is clearly stated in ***Waljee v. Rose*** [1976] KLR 25, at p.28: "*A tenancy does not determine by the death of the lessee, but will vest in his legal personal representatives, who are entitled to give or receive the proper notice to quit*" (quoted from ***Woodfall: Landlord and Tenant***).

In the instant case the landlord filed a plaint that enjoins the administratrix of the estate but in a purely *personal* capacity. This exemplies a failure to comply with the terms of Order XXIII of the Civil Procedure Rules. Quite clearly, in these circumstances, no cause of action is shown against the three defendants.

Yet in the circumstances, there can be no doubt that the defendants are quite lawfully in occupation of the suit premises. They have continued in occupation as part of a *succession process*; and the deceased himself *was* in lawful occupation. That being the position, the defendants herein can only be made to vacate the suit premises through a *lawful procedure:* either by being properly joined in a suit which in the event, determines that they are to vacate the premises; or by a valid notice under the Landlord and Tenant

(Shops, Hotels and Catering Establishments) Act (Cap.301). They have not been properly joined in this suit; and from the evidence, no valid notice has been served upon the defendants under the said statute.

Although the plaintiff has complained about rent payment by the defendants, this complaint is, in my judgement, flimsy and cannot be acted upon by this Court: for the plaintiff has over the years refused, without good cause, to receive rents due to him and actually paid up by the defendants. Moreover, the defendants have made it clear in Court that they could not properly oppose the plaintiff's proposals for increased rent if the right procedures are followed. The plaintiff's evidence in Court, regarding his refusal to accept rent, is somewhat strange: *"[The money order payments] took long to cash through the Post Office, and I did not have the time; [the tenant] refused to pay me in cash."* Such was, I believe, not truthful evidence, as the plaintiff had elsewhere testified: "*My problem with **John [Ndikimi**] is that he never allowed me to increase rent*." Lack of candour is doubly shown in the plaintiff's evidence when he also proffers the desire to effect renovations to the suit premises, as reason to terminate the tenancy. Candid evidence was tendered by the 1st defendant, who testified that the deceased had taken possession of a suit premises that was bare land, and he is the one who thereafter constructed upon it temporary structures to support his timber-yard business.

I have considered the pleadings, the testimonies and the submissions made in this case, and the drift of my analysis, which represents my overall assessment, is clear. My final decision may be set out as follows: The plaintiff's suit is dismissed with costs to the defendants. ***Decree accordingly***.

DATED and DELIVERED at Nairobi this 26th day of May, 2006.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court clerk: Mwangi

For the Plaintiff: Mr. Korongo; Ms. Kathambi — instructed by M/s. Malonzo & Co. Advocates

For the Defendants: Ms. Mbugua, Mrs. Waweru — instructed by M/s. V.W. Mbugua & Co. Advocates