



Wangui & another v Homeplus Realtors Limited & another (Environment and Land Appeal E079 of 2023) [2024] KEELC 5124 (KLR) (4 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5124 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E079 OF 2023**

JA MOGENI, J

JULY 4, 2024

BETWEEN

JANE MURINGI WANGUI 1ST APPELLANT

MUGAMBI IMANYARA 2ND APPELLANT

AND

HOMEPLUS REALTORS LIMITED 1ST RESPONDENT

MAINA GIKONYO 2ND RESPONDENT

(Being an Appeal against the entire Ruling of the BPRT at Nairobi by Hon. Andrew Muma, Vice Chairperson delivered on 9/06/2023 in BPRT/E295 of 2023 as consolidated with BPRT E478 of 2022)

JUDGMENT

1. The Landlord/2nd Respondent served the tenant/Appellant with a notice to terminate tenancy dated 21/06/2022 requiring that the tenant/Appellant vacate the premises by 1/09/2022 on the grounds that the Tenant had defaulted in payment of rent for a period of two months. The Tenant/Appellant in opposition of the notice by the Landlord/2nd Respondent, filed a reference dated 31/08/2022 under Section 6 of the [Landlords and Tenants \(Shops, Hotels and Catering\) Establishments Act](#). The Agent/1st respondent and the Landlord/2nd Respondent also filed a reference and an application dated 17/03/2023 wherein they sought for orders of immediate vacant possession of the premises.
2. The Tribunal considered the matter before it and delivered a judgment on 9/06/2024 wherein the Tribunal allowed the Landlord's Application dated 17/03/2023 in terms of prayer 2 and 3. The Tribunal ordered that the landlords, agent(s), servant(s) and/or associate(s) are allowed to take immediate vacant possession of the suit premises known as shop No 3 on LR No 209/2632 and 4355 Garden Chambers, Nairobi. The Tribunal also ordered the OCS, Central Police Station to supervise



- compliance of the court orders issued and to be effected through a licensed auctioneer of the landlord's choice.
3. The Appellants were aggrieved by the ruling of the Tribunal dated 9/06/2023 hence this Appeal. In their Memorandum of Appeal dated 29/06/2023, the Appellants raised 21 grounds of appeal. In their submissions, the Appellants condensed/summarized the said grounds to 7 which I reproduce verbatim hereunder: -
- a. Whether the appellants were afforded a fair hearing as envisaged under Article 50(1) of the Constitution of Kenya before the reference dated 31/08/2022 was terminated?
 - b. Whether the Vice-Chairman of the Tribunal erred in fact and law by making a finding that the appellants' reference dated 31/08/2022 contravened Section 4(5) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act?
 - c. Whether the Vice-Chairman of the Tribunal erred in law and fact by failing to appreciate that the landlord's notice to terminate tenancy was issued by an unauthorized person contrary to Section 4(2) (5) of Cap 301 Laws of Kenya?
 - d. Whether the Vice-Chairman of the tribunal erred in law and fact by basing the impugned ruling dated 9/06/2023 on an inspection unilaterally in the absence of the appellants on 16/05/2023?
 - e. Whether the Vice-Chairman of the tribunal erred in law and fact by granting vacant possession to the respondents claiming the appellants had abandoned the suit premises?
 - f. Whether the Vice-Chairman erred in law and fact by upholding the landlord's impugned notice to terminate tenancy dated 21/06/2022, application and reference both dated 17/03/2023 without proof rent arrears due and owing?
 - g. Whether costs should issue and to who?
4. The Appellants sought for the following prayers: -
- i. This appeal be and is hereby allowed with costs.
 - ii. The Ruling/Judgment of Honorable Andrew Muma-Vice-Chairman-Business Premises and Rent Tribunal, dated and delivered on the 9/06/2023 and all consequential orders thereto be set aside and the respondents reference dated 17/03/2023 be dismissed as prayed in the appellants' Replying Affidavit sworn on 29/05/2023.
 - iii. The appellants' reference dated 31/08/2022 is undefended/unopposed hence allowed as prayed.
 - iv. Any other order that the court may deem fit in order to meet the ends of Justice.
5. When the Appeal came up for hearing, the parties agreed to have it disposed of by way of written submissions. By the time of writing this Judgment, it is only the Appellants who had filed their submissions on 11/06/2024.
6. This being a first appeal to the High Court, it is an appeal on both facts and the law. The duty of the first appellate court which will guide me in the determination of this appeal is now well settled. It is to re-examine and re-evaluate all the evidence and material placed before the trial court to draw its own independent conclusions regarding the validity or otherwise of the decision challenged on appeal.



See: *Selle & another v Associated Motor Boat Company Limited & others*, [1968] EA 123; *Williamson Diamonds Limited v Brown*, [1970] EA 1.

Analysis and Determination

7. This appeal arises from the judgment of the trial court made on 9/06/2023 allowing the Landlord's Application dated 17/03/2023 thereby granting the landlord vacant possession of the suit premises. I have considered the record of appeal, the grounds of appeal and Appellant's submissions for this appeal and cited cases. I have also read the judgment of the learned magistrate. I shall now fix my gaze on the 7 grounds summarized by the Appellants in their written submissions and determine the same.

Whether the appellants were afforded a fair hearing as envisaged under Article 50(1) of the Constitution of Kenya before the reference dated 31/08/2022 was terminated?

8. It is the Appellants' case that the Respondents vide a defective notice to terminate tenancy dated 21/06/2022 (at page 10) purportedly gave notice to the Appellants including their intention to terminate the tenancy. The Appellants opposed the notice of termination by filing a reference dated 31/08/2022. They aver that they served the same upon the Respondent by email as seen on the Affidavit of Service dated 3/02/2023 at page 47-48 of the record of appeal. It is their claim that the Respondents did not acknowledge receipt of the same and that their reference in BPRT E778/2022 was therefore unopposed. That instead, the Respondents irregularly filed another reference together with an application dated 17/03/2023 seeking vacant possession in BPRT E295/2023. They have adduced this application at page 55-72 and the reference at page 74 in the record of appeal.
9. The Landlord/Respondents' application in BPRT E295/2023 was fixed for hearing on 17/04/2023. The Appellants informed the tribunal that there was a pending reference filed by the tenants/appellants prior to the landlord/respondents' and that the respondents were guilty of material non-disclosure. The Respondents argued that they filed a reference because they were advised by Kelvin Busuku vide a letter dated 23/12/2022 that there was no reference filed by the Appellants and that they were free to file an application for vacant possession. The purported reasoning behind that by both Kelvin Busuku and the respondents was that the Appellants failed to pay all the required court fees for the reference. The tenants/appellants aver that they paid the filing fees as per the Judiciary Invoice adduced at page 45-46 of the record and a receipt was issued after payment. That apart from the invoice paid, they did not receive any other invoice from the court or the e-filing platform to pay any additional or further court fees.
10. The tenants/appellants aver that after constant follow up on any further payments due, on 19/05/2023, they received an invoice of further court fees of Kshs. 100,150.00 raised through the e-filing platform and the appellants aver that they made the requisite payment. This has been supported by the fee receipt produced at page 53 of the record. They accuse the vice chairman of having knowledge of these facts and going ahead to only consider the Landlord/Respondents' application and reference and disregarding the Tenants/Appellants' reference. That the vice chairperson allowed the Landlord/Respondent's application for vacant possession hence granted orders which led to the eviction of the Appellants from the suit premises, at the interlocutory stage without the appellant's reference in BPRT E778/2022 being heard and determined.
11. It is their submission that the tenancy-landlord relationship had neither been terminated by parties nor by the BPRT/law. The said ruling was obtained on the basis of material non-disclosure of facts and misrepresentation by the landlords/respondents. This is because the tribunal in conjunction with the respondents argued that the tenants/appellants had not opposed the respondents' notice of termination or filed a reference. A fact which was not true, since the appellants duly filed a reference in



opposition of the respondent's impugned notice of termination. That the impugned ruling is clearly based on the application and reference by the landlords/respondents which sought vacant possession. The tribunal failed to appreciate the fact that the appellants had opposed the tenancy notice vide their reference dated 31/08/2023. The law required that the tribunal to first hear and determine the reference on merit before making a finding this was not done.

12. The Appellants submitted that at page 136, it is on record from the impugned ruling where the vice chairman indicated that the appellants filed a reference opposing the tenancy notice but failed to hear the same or give the appellants an opportunity to ventilate the issues in its reference. That the failure to hear and/or give the appellants an opportunity to have their reference heard and determined is not only an affront to the rule of law but against the rules of natural justice and the appellants' legitimate expectation to have their dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body as enshrined under the Constitution. They relied on the case of, among others, Nairobi Civil Appeal No 190 of 2015 – Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu [2019] eKLR, Eldoret ELC Case No 354 of 2016 – Samuel Kipkurgat Soi v John Kipkoech Soi [2019] eKLR and Nyeri ELCA No 24 of 2015 Real Consult Agencies Ltd v Gerald Wachira Nguthi [2016] eKLR emphasizing on the right to be heard.
13. I have perused the impugned judgment. I note that the Tribunal has acknowledged that the tenant/Appellants did oppose the landlord's notice to terminate dated 21/06/2022 by filing a reference dated 31/08/2022 in determining whether the notice issued is valid. He noted that the grounds upon which the landlord was seeking to terminate the tenancy is that the tenant has defaulted in paying rent for a period of more than two months. He relied on evidence that the landlord had filed a suit before the Magistrates Court vide Case No E1892 of 2021 wherein the landlord's application was allowed and he got orders on 14/12/2021 allowing them to distress for rent.
14. The tribunal found that the landlord executed the orders by instructing the firm of Joseph B.B.K Kimani T/A Pyramid Auctioneers to proclaim the tenant's goods. The same was not successful since the auctioneers claim that the premises were vacant which necessitated the landlord to put their padlocks to prevent vandalism. That it was as a result of this and the fact that thereafter the tenant continued to be in arrears that the landlord resulted to issuing the tenant with the notice dated 21/06/2022. The tribunal was guided by Section 4 (4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act wherein the law provides that no tenancy notice shall take effect until such date, not being less than 2 months after the receipt thereof by the receiving party, as shall be specified therein.
15. The tribunal emphasized that the provisions of the law require that any notice must accord the tenant a period of not less than 2 months within which to vacate and must provide reasons for the termination. It was held that the notice issued by the landlord satisfied these requirements. It was issued on 21/06/2022 and was to take effect on 1/09/2022 and it also provided reasons for the termination being that the tenant has defaulted in paying rent.
16. Further to the above, the Tribunal noted that the reference by the tenant opposing the tenancy notice was filed on 31/08/2022 which is after the notice was issued in June 2022. By virtue of that, the tenant did not comply with the requirements of Section 4 (5) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act which provides that the receiving party is required to notify the requesting party in writing, within one month after the date of receipt of the notice, whether or not he agrees to comply with the notice. The Tribunal found that the tenant/appellant did not respond to the notice within a month and additionally, they did not file an application seeking for extension of time or that they are allowed to file the reference out of time.



17. The issues being raised by the Appellants are important. It is the tenants/appellants' case that the vice chairman indicated that they filed a reference opposing the tenancy notice but failed to hear the same or give the appellants an opportunity to ventilate the issues in its reference. It is my humble view that the Tribunal did not hear and determine the Appellants' reference dated 31/08/2022. One of the issues that were determined by the Tribunal was whether the notice issued by the Landlord to terminate tenancy was valid. The Appellant filed a reference opposing the said notice but the reference was not heard, instead the Learned Chairman chose to hear the reference filed by the Landlord which filed six months after the appellant's reference.
18. The Appellant's reference is dated 31/08/2022 and the Landlord's reference is dated 17/03/2023 and was heard on 17/04/2023. Therefore, I agree with the allegation of the Appellants that their reference was not heard. In light of the above, it is my considered view that the appellants were not afforded a fair hearing as envisaged under Article 50(1) of the Constitution of Kenya.

Whether the Vice-Chairman of the Tribunal erred in fact and law by making a finding that the appellants' reference dated 31/08/2022 contravened Section 4(5) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act?

19. Section 4(5) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act provides as follows:

“ A tenant notice shall not be effective for any of the purposes of this Act unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and requires the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice, whether or not he agrees to comply with the notice.”
20. The Appellants also quoted the provisions of Section 4 (4) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act as follows: “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: ...” [Emphasis there's]
21. The Appellants submitted that the vice chairperson contradicted and misdirected himself by stating that the appellants did not comply with Section 4 (5) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, whereas the appellants objected to the termination of tenancy vide a reference as per the law. They submitted that this is an issue which the registry itself confirmed, the tribunal at the start of its ruling confirmed, it was not an issue for determination and the respondents themselves did not object the appellants reference in any manner whatsoever.
22. From the impugned judgment, in determining whether the notice of termination issued by the landlord was valid, the Tribunal found that the reference by the tenant opposing the termination notice was filed on 31/08/2022 which is after the notice was issued in June 2022. By virtue of that, the tenant did not comply with the requirements of Section 4 (5) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act which provides that the receiving party is required to notify the requesting party in writing, within one month after the date of receipt of the notice, whether or not he agrees to comply with the notice. The Tribunal found that the tenant/appellant did not respond to the notice within a month and additionally, they did not file an application seeking for extension of time or that they are allowed to file the reference out of time.
23. Further, the tenants/appellants relied on Section 6 (1) of the Act where it stated that “may, before the date upon which such notice is to take effect, refer the matter to a Tribunal, whereupon such notice



shall be of no effect until, and subject to, the determination of the reference by the Tribunal. Provided that a Tribunal may, for sufficient reason and such condition as it may think fit, permit such a reference notwithstanding that the receiving party has not complied with any of the requirements of this section'. That from this provision, the vice chairperson's argument that the appellants did not comply with Section 4 (5) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* is cured. That the vice chairperson therefore could not on its own motion fault the appellants for that which the law expressly provides for and where no objection in that regard has been raised by the respondents. I agree with this position tendered by the Appellants in their submissions.

24. Section 4 (5) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* provides that the receiving party is required to notify the requesting party in writing, within one month after the date of receipt of the notice, whether or not he agrees to comply with the notice. The tenants/Appellants' reference was filed in August 2022. The notice was issued in June 2022. The Tribunal observed that the Appellant failed to respond to the notice within a month and that they did not file an application seeking for extension of time or that they are allowed to file the reference out of time.
25. My reading of the notice issued by the Landlord indicate that the effective date had been substituted beyond the one month period to be 1/09/2022. This is an observation that the Chairman failed to make.
26. Therefore, it is my humble view that Section 6 (1) does apply in this instance as there is or was a valid reference filed by the Tenants/Appellants in opposition to the Landlord's notice of termination of tenancy.
27. The *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* provides that the notice shall not take effect until and subject to the determination of the reference by the Tribunal. The landlord issued the tenant with a notice dated 21/06/2022. The notice was to take effect on 1/09/2022. The Tribunal acknowledged that the tenants/Appellants filed a reference dated 31/08/2022 opposing the said notice. This means that the notice was of no effect until 9/06/2023. Whereas the Tribunal found that the notice was valid because the Tenant did not file the reference dated 31/08/2022 within one month of receipt of the notice of termination it is important to note that the termination date issued by the Landlord in the notice was stated as 1/09/2022 and the reference was filed on 31/08/2022.
28. Section 10 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* provides as follows:
 - "10. Effect of notice where tenant fails to refer to Tribunal, etc. Where a landlord has served a notice in accordance with the requirements of section 4 of this Act, on a tenant, and the tenant fails within the appropriate time to notify the landlord 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." [Emphasis]
29. In the end, it is my humble view that the Vice-Chairman of the Tribunal did err in fact and law by making a finding that the appellants' reference dated 31/08/2022 contravened Section 4(5) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*.

Whether the Vice-Chairman of the Tribunal erred in law and fact by failing to appreciate that the landlord's notice to terminate tenancy was issued by an unauthorized person contrary to Section 4(2) (5) of Cap 301 Laws of Kenya?

30. Section 4 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* as follows:



"4. Termination of, and alteration of terms and conditions in, controlled tenancy

(1)

(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.

(3)

(4)

(5) A tenancy notice shall not be effective for any of the purposes of this Act unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and requires the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice, whether or not he agrees to comply with the notice.

(6)"

31. Regulation 4(1) of the [Landlord and Tenant \(Shops, Hotels, and Catering Establishments\) \(Tribunal\) \(Forms and Procedure\) Regulations 1966](#) provide the following legal framework on the content and form of a notice issued under Section 4(2) of the Act:

4

(1) Notice under Section 4(2) of the Act by a landlord shall be in Form A in the Schedule to these Regulations"

32. What emerges from the above legal frameworks is that, notice of termination of tenancy under Section 4(2) of the Act ought to be in the prescribed form. Secondly, the regulations and the prescribed form [Form "A"] do not contain a specific framework relating to execution of notices by landlords who are limited liability companies.

33. In the present appeal, the notice was issued by Sylvester Ndung'u Njonde, the Managing Director of the 1st Respondent. Trial before the Tribunal proceeded from the premise that there was a valid notice issued by the Landlord. Indeed, in the absence of statutory notice from the landlord, there would be no basis for substantive hearing of a reference under the Act. A notice that does not emanate from the landlord stands to be struck out and cannot form the basis of a substantive hearing. However, a perusal of the record demonstrates that the Tenants/Appellants did not raise this issue prior to the commencement of the hearing or even during the hearing. The same was not canvassed by the parties during the hearing of the references and/or applications. The Tenants/Appellants failed to file a notice of preliminary objection seeking to have the notice struck out. The Judgment of the Tribunal also did not touch on the issue. The tenants/appellants only issue was that they were not accorded a fair hearing. Noting that this issue was not raised in the Tribunal, it would be unprocedural to address the issue on appeal. The Appellants therefore cannot raise this new issue in this appeal that was not canvassed by the parties during the hearing of the references and/or applications of both parties. In so holding I am guided by the decision of the Court of Appeal in [Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others ex-parte Tom Mbaluto](#) [2018] eKLR (as cited in [Frera Engineering Company Limited v Morris Mureithi Mutembei](#) (2020) eKLR) where the court stated that -

"...It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also *George Owen Nandy v Ruth Watiri*



Kibe, CA No 39 of 2015 and *Openda v Abn* [1983] KLR 165). In this case we have stated that the appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned judge, quite properly did not address the issue and, to make the matters worse, the appellant did not raise the issue in his memorandum of appeal in this Court.... As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance.”

34. In the premises, I decline to consider this ground of the memorandum of appeal.

Whether the Vice-Chairman of the tribunal erred in law and fact by basing the impugned ruling dated 9/06/2023 on an inspection unilaterally in the absence of the appellants on 16/05/2023?

35. The Tribunal ordered for the site visit to determine the occupation of the tenant. From the proceedings before the Tribunal, the tenants’ advocate Mr. Otieno stated that the registry official was biased and was working in cahoots with the advocate. They had genuine concerns only. I note that the Vice Chair ordered that the parties be supplied with the report and can comment on the same before close of business on 2/06/2023. The Tribunal also gave a ruling date for 9/06/2023.

36. Evidently, the tenants/appellant did not support their allegations vide adducing evidence by 2/06/2023. It is trite that he who alleges must prove. The tenant adduced their comments on 6/06/2023 despite Court orders which provided that the same should be filed by 2/06/2023. It can be understood that it appears that the tenant abandoned this issue. The issue raised in this appeal was clearly not canvassed by the parties during the hearing in the Tribunal. It is my finding once again that the Appellants cannot raise this new issue in this appeal as it was not canvassed by the parties during the hearing in the Tribunal. In the end, I decline to consider this ground of the memorandum of appeal.

Whether the Vice-Chairman of the tribunal erred in law and fact by granting vacant possession to the respondents claiming the appellants had abandoned the suit premises?

37. The Tribunal in an attempt to establish the current situation in the suit premises, it carried out two inspections/site visits on 16/05/2023 and 22/05/2023 especially to the benefit of the tenants. I say benefit because the Appellant filed a reference opposing the Landlord’s termination of tenancy notice. In demonstrating whether there was a landlord-tenant relationship, it is my considered view that it would be reasonable to determine the possession or occupation of the suit property by the tenant. Though the alleged site visits established that the premises was empty and dark indicating that it had not been occupied for a while. It is not lost to me to note that in the application dated 23/10/2023 by the appellants attached a letter dated 12/10/2023 to Pyramid Auctioneers from the respondents to evict the appellants.

38. This being the case, it means that the appellants were and have been in possession upto and until the letter dated 12/10/2023 was issued to Pyramid Auctioneers. It is not possible as the respondents have argued that the appellants were not in possessions yet this appeal was filed on 4/07/2023 and the eviction letter issued on 12/10/2023. The eviction letter could not have been issued to non-tenants it therefore follows that it is true that the suit property was not vacant since the appellants had not been evicted. The letter issued for eviction dated 12/10/2023 is testament to this.



39. It is therefore my finding that the Learned Chairman's erred in law by granting vacant possession to respondents yet all along it is the appellants who were in possession going by the facts presented above. Thus there was a landlord-tenant relationship between the appellants and the respondents.

Whether the Vice-Chairman erred in law and fact by upholding the landlord's impugned notice to terminate tenancy dated 21/06/2022, application and reference both dated 17/03/2023 without proof rent arrears due and owing?

40. The Tribunal determined that the landlord indicated that the grounds upon which they sought to terminate the tenancy was that the tenant defaulted in paying rent for a period of more than two months. The Tribunal considered evidence before it whereby the landlord in support of their case that due to the tenant's default, the landlord had instituted a suit before the Magistrate's Court vide case No E1892 of 2021 wherein their application was allowed and the landlord got orders on 14/12/2021 allowing them to distress for rent. That the landlord thereafter executed the orders by instructing auctioneers to proclaim the tenant's goods. The same was not successful since the auctioneers claimed that the premises were vacant which necessitated the landlord to put their padlocks to prevent vandalism. It is a result of this and the fact that thereafter the tenant continued to be in arrears that the landlord resulted to issuing the tenant with the notice to terminate tenancy dated 21/06/2022.
41. Besides this, I have perused the record and there were claims by the 2nd Appellant that the 1st Appellant vacated the premises in 2020 due to rent arrears.
42. The tenant/1st Appellant stated that the 2nd Appellant took over the tenancy from her after paying rent accrued by the 1st Appellant and continued to pay rent to the landlord as they had agreed. The Tribunal noted that the tenant disputed the landlord's application seeking vacant possession and stated that they are up to date with payments of rent, having entered into an agreement with the 2nd Appellant for them to clear the arrears owed to the landlord and thereafter take over possession of the premises. That this was done with the consent of the landlord.
43. However, as explained herein above, the Tribunal took note that the Landlord had filed an application to levy distress in the Magistrate's court and that the landlord had adduced orders granted allowing them to levy distress vide auctioneers of their choice. There is no evidence that the tenant/appellants opposed the orders issued by the Magistrate's court for distress for rent. There was no evidence adduced before the Tribunal that the said orders had been varied or dismissed or stayed.
44. The Tribunal took note of this evidence in determining the issue on whether the notice to terminate was valid. It was after consideration of this evidence that the Vice Chair found that the notice did not comply with the requirements of the law. The Tribunal found that the reference filed by the tenant opposing the notice did not comply with the requirements of Section 4(5) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*.
45. The Landlord on the other hand has not refuted the evidence presented by the 2nd appellant paid up the rent owed by the 1st appellant and took over the tenancy. The Landlord does not deny receiving the outstanding rent paid by the 2nd appellant leading to the 1st appellant vacating and the 2nd appellant taking over.
46. Therefore, the finding of the Tribunal that there was rent arrears owing is not in order. It is my humble view that the Tribunal did err in upholding the landlord's impugned notice to terminate tenancy dated 21/06/2022, application and reference both dated 17/03/2023 without proof of rent arrears due and owing.



Whether costs should issue and to who?

47. Section 27 of the *Civil Procedure Act* gives the Court the discretion to grant costs. It is trite that costs usually follow the events. In this instant case, the Appellants are the successful party and are therefore entitled to the costs of the Appeal.

Disposal Orders

48. The net result is that the appeal herein succeeds and I grant the following orders:

- i. The Ruling/Judgment of Honorable Andrew Muma-Vice-Chairman-Business Premises and Rent Tribunal, dated and delivered on the 9/06/2023 and all consequential orders thereto be set aside and the respondents reference dated 17/03/2023 be dismissed as prayed in the appellants’ Replying Affidavit sworn on 29/05/2023.
- ii. The appellants’ reference dated 31/08/2022 to heard by the Business Premises Rent Tribunal.
- iii. Appellants are granted costs of this Appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY 2024

MOGENI J

JUDGE

In the virtual presence of:

Mr. Ndegwa for Respondent

Mr. Otieno for Appellants

Caroline Sagina - Court Assistant

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MOGENI J

JUDGE

