Omondi & another v Otieno t/a Sifa School Siaya (Civil Appeal E017 of 2023) [2025] KEHC 8590 (KLR) (19 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8590 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL E017 OF 2023

DK KEMEI, J

JUNE 19, 2025

BETWEEN

ARTHUR J OMONDI .... 1ST APPELLANT

SUSAN J OMONDI .... 2ND APPELLANT

AND

SAMUEL OTIENO T/A SIFA SCHOOL SIAYA .... RESPONDENT

(Being an appeal against the decision and judgment of Hon. Limo B. Benjamin (PM) in Siaya CMCC No. 46/2021 dated 21{{^st}} June 2023)

JUDGMENT

1. The appeal arises from the judgment of Honourable B. Limo (PM) in Siaya CMCC No. 46 of 2021 dated 21/6/2023 wherein he found the proclamation levied by the Appellants was proper and to be adhered to and that the parties were to reconcile accounts on the correct amount of rent outstanding and thereafter the Respondent was granted sixty (60) days to clear the rent owing failing which execution was to issue. He further held that the Respondent's case had partially succeeded against the Appellants. He finally ordered that each party to bear their own costs.

2. Aggrieved by the foregoing decisions, the Appellants lodged the Memorandum of Appeal dated 20/7/2023 wherein they raised the following grounds of appeal.

    1. That the learned trial magistrate having found that the levy to distress carried out by the Appellants through Yamukho Auctioneers was lawful erred in law by directing the parties that they need to agree on the quantum of rent in arrears.

    2. That the learned trial magistrate erred in in law by finding that the Respondent had merely on the basis of unproved allegation made out a case for the rendering of accounts on the quantum of rent arrears.

3. That the learned trial magistrate erred in law by placing an unjustifiable fetter on the Appellants exercise of their right as landlords to levy distress by introducing the unpleaded and unproven issue of the need for the taking of accounts as between the parties of the quantum of the rent arrears followed by a gratuitous grace period of six months for the Respondent to pay before the exercise thereof and in effect granted an unwarranted temporary injunction to the Respondent against the law.

4. That the learned trial magistrate erred in law by granting the Respondent an unsolicited grace period of six (6) months to pay any rent arrears due to the Appellants and in effect unwittingly ended up writing the tenancy agreement between the parties thereby placing the Appellants at the mercy of the Respondent as regards rent payment past, present and future.

5. That the learned trial magistrate erred in law and fact by failing to balance the scale of justice when granting to the Respondent the disguised order of injunction in the nature of an unsolicited grace period of six (6) months to pay rent arrears without taking into account the plight of the Appellants as landlords with legitimate expectation as regards return on their investment.

6. That the learned trial magistrate erred in law by directing that each of the parties to bear its own costs and in effect denying the Appellants as successful parties the right to costs of the suit on account of an alleged uniqueness of the suit when in fact the same was a simple landlord and tenant dispute with no uniqueness.

   The Appellant therefore prayed that the appeal herein be allowed by setting aside a portion of judgment that calls for accounts on rent arrears between the parties and agreement thereon and allowing the Respondent thereafter six(6) months for the payment thereof and substitute it with an order permitting the Appellants to continue with the levy of distress, setting aside the order that each party bears its own costs and substituting it with an order allowing the Appellants costs of the lower court suit and that this court grants the Appellants costs of the appeal.

3. This being the first Appellate court, its duty is to evaluate the evidence presented before the lower court and to come to its own independent conclusion as to whether or not to uphold the decision of the lower court. See Selle Vs Associated Motor Boat Company Limited [1968] EA 123.

4. The Respondent, Samuel Otieno (PW1) testified that he is the Proprietor of Sifa School in Siaya. He adopted his witness statement dated 26/7/2021 as his evidence in chief. His case is that he had leased the Appellants' premises through a written agreement dated 16/9/2019 for a period of 10 years. That after about three months, Covid-19 arose and paralyzed his operations forcing him to close the school and was therefore unable to remit the rent to the Appellants. That the Appellants later visited the school and served him with a proclamation notice whereby they sought to sell properties via public auction for payment of alleged rent arrears of Kshs432,500/=. That he had been paying the rent to the Appellants through KCB Bank. That he is opposed to the Appellants' conduct in seeking to levy distress before proper computation of the accounts. That he is willing to pay the rent due once the accounts have been reconciled.

   On cross examination, he admitted that he is in rent arrears and that he does not dispute the rent computation of Kshs432,500/= as at 21/2/2023 as well as the amount of Ksh937,500/=. That he has not exhibited any document showing financial difficulties. That he is not asking the court to rewrite the agreement between him and the landlord. That the sum of Kshs937,500/= is rent arrears for about three years.

5. Arthur John Omondi (DW1) who is the 1st Appellant herein testified that the Respondent is his tenant. He adopted his witness statement dated 18/5/2022 as his evidence in chief. His case is that he entered into a written agreement with the Respondent over Plot No. Siaya township Block 1/453 which was a residential property for ten years on a monthly rent of Kshs35,000/=. That the tenant paid rent regularly until March 2020 when he started defaulting. That the premises were for residential purposes only and nothing else. That the tenant was not to carry out any other businesses or use them for any other unauthorized purposes. That the tenant went against the terms of the agreement and converted the residential property into a commercial property by putting up a school known as Sifa School Siaya. That the tenant made some structures on the plot without their consent and that they were forced to issue him with a notice of termination of the lease and issued the requisite notice through their advocate. That the tenant refused to vacate premises and pay outstanding rent. That they were surprised to find that the tenant had rushed to court to stop the levying of distress by the auctioneer. That the tenant is still running the school, collecting fees from many students but has failed to pay the outstanding rent. That they want the property back and the rent arrears cleared.

6. The appeal was canvassed by way of written submissions. The parties duly complied. The Appellants' submissions are dated 20/3/2025 while those of the Respondent are dated 14/3/2025.

7. The Appellant gave a brief history of the matter which was inter alia; that the Respondent herein entered into a lease agreement with the Appellants to lease their residential premises situate on land parcel number SIAYA TOWNSHIP/BLOCK 1/453 for a period of ten (10) years commencing January 2019. It was a term of the agreement that the tenant was under obligation to pay the agreed monthly rent in time and could only make alterations to the property after obtaining consent from the appellants and was strictly to use the leased property for the leased purpose only and not any other unauthorized purpose; that the Respondent in blatant breach of the agreement, failed to pay rent when it fell due, erected structures on the leased property thereby altering the same without the consent of the Appellants and used the property for an unauthorized purpose to wit; running a school; that the appellants then instructed auctioneers to levy distress for rent sometime on or about 15.07.21 at which point the Respondent was in arrears of Kshs.432,500/=;that the Respondent then filed a suit seeking for an order of permanent injunction restraining the Appellants from inter alia, entering the premises, attaching, removing /taking away the proclaimed properties or any property and listing the same for public auction, evicting or in any other manner interfering with the Plaintiff's tenancy and a declaration that the distress for rent by the appellants was unlawful; that the court in its wisdom found that the distress for rent by the Appellants was within the law and held that the proclamation was to remain in force save that the parties need to agree on the correct rent due and owing. The court went further to direct that the parties reconcile accounts on the rent due and granted the respondents 60 days to clear the rent due and owing failing to which execution to issue.

8. It was submitted that this being a first appeal, it is the duty of this court to evaluate and reconsider the evidence on record and draw its own conclusions. Reliance was placed in the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that: -

> " On a first appeal from the High Court, the Court of Appeal should 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. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

9. Further, reliance was placed in the case of Selle -vs- Associated Motor Boat Co. [1968] EA 123, that;

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. 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 this 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 based on the demeanor of a witness is inconsistent with the evidence in the case generally.

10. The Appellant therefore urged the court to reconsider the evidence adduced at trial, re-evaluate the same and draw its own conclusion.

11. It is the appellants' case that the Respondent neither pleaded nor made out a case for rendering of accounts and as such the trial court erred in finding that parties ought to render accounts. Reliance was placed in the of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, in which Hon. A. c. Mrima stated as follows:

> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
>
> "..... it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded ......
>
> ... In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

12. It was submitted that the Respondent herein did not in any way plead the discrepancy if at all in the amount owing that would necessitate the trial court to issue an order for reconciliation or taking of accounts. The Respondent simply sought a permanent injunction and a declaration that the levy for distress for rent was unlawful. That upon hearing of the parties, the court found that the levy for distress for rent was lawful meaning as per law mandated of a lawful distress for rent, that there existed

rent arrears owing at the time thereof. Section 3 (1) of the *Distress for Rent Act*, Cap 293, Laws of Kenya provides that: -

> " subject to the provisions of this Act, and any other written law, any person having any rent or rent service in arrear and due upon a grant, lease, demise or contract shall have the same remedy by distress for the recovery of that rent service as is given by the common law of England in a similar case."

13. It was submitted that during cross examination, the Respondent told court that he did not know the rent he had paid. He confirmed receipt of the Appellants' letters demanding rent arrears of Kshs. 105,000/= and Kshs.432,500/= which computations he did not dispute. That the Respondent also informed the court that he had seen the Appellants' rent book which showed that as at 21.02.23 the amount owing was Kshs.937,500/= and that he had not disputed the said computation. It is also the Respondent's testimony that he had not complained at all that the amount he presumed to have paid had not been reflected in the rent book and computation of arrears owed; which amount he confirmed was for rent of about three years. It was thus submitted that the Respondent having not been re-examined, then the averment ought to be taken as the truth of what was owing by him to the Appelants.

14. It was further submitted that in the foregoing, it is unfathomable as to why the court saw it fit to order the reconciliation or rendering of accounts where no such prayer had been made or evidence adduced to warrant the grant of the said order.

15. It was further submitted that the Appellants' through their meticulous records were able to demonstrate to court the arrears owed taking into consideration the amount paid by the Respondent as demonstrated in the rent book and bank statements for the period of January 2019 to 16.05.22 produced in court as DExh4 and 5. It is the Appellants' case that nothing on record, in evidence or otherwise, warranted the grant of the order for reconciliation and thus the trial court erred in finding as such the Appellants now urge this court does set aside that portion of the judgment.

16. It was submitted that the trial court erred in law by failing to balance the scale of justice when granting the Respondent the said period of sixty days to pay rent arrears disguised as an injunction without taking into account the plight of the Appellants as landlords with legitimate expectation as regards return on investment. It is not disputed that the parties herein entered into a lease agreement and that it was a term of the said agreement that the tenant was to pay rent when it fell due without fail.

17. It was submitted that it is trite that a court of law cannot rewrite a contract between parties. See the case of National Bank of Kenya Limited vs. Pipeplastic Samkolit (K) Ltd & another (2001) eKLR where the Court held that

> " a court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract unless coercion, fraud, or undue influence are pleaded and proved...."

18. It is the Appellants' submission that by the trial court granting the Respondent an unsolicited grace period of 60 days to pay rent arrears due to the Appellants resulted in the court re-writing the agreement between the parties hence a gross error in law. It is not in dispute that the Respondent fell in arrears thereby prompting the appellants to levy distress for rent which the court found to be lawful. It begs the question then why the trial court deemed it fit to grant an unsolicited and unwarranted order of injunction in favour of the respondent as opposed to directing that the appellant proceeds with the levy of distress having found that the same was lawful.

19. It was further submitted that the Appellants as landlords had the right to realize revenue from their investment being the suit property herein. By granting the grace period, it is was contended that the

trial court failed to balance the scale of justice which demand that justice must not only be done but must be seen to be done yet the Respondent had grossly breached the terms of the agreement and was not deserving of any equitable orders from the court.

20. Finally, it was submitted that the Appellants are aggrieved with the order that each party bears its own costs and in effect denying the Appellants as successful parties the right to costs of the suit on account of an alleged uniqueness of the suit when in fact the same was a simple landlord and tenant dispute over unpaid rent with no uniqueness. It was urged that this appeal be allowed by setting aside the order directing that each party bears its own costs and replace it with an order allowing the Appellants costs of the lower court suit. It was submitted that it is trite that costs follow the event and that the Appellants herein being the successful parties at trial and having been dragged to court by their tenant who was in arrears of approximately three years rent, that the only fair and just thing would have been to grant the Appellants costs of the suit. It was finally submitted that the appeal be allowed with costs.

21. The Respondent submitted that he was a tenant to the 1st and 2nd Appellants under a lease agreement regarding plot number Siaya/Township/Block1/454 for a period of 10 years, where Sifa School Siaya a pre-primary Institution offering early childhood education was established. That it is not in dispute that the said school during the entire Covid-19 pandemic did not operate and as such fell into rent arrears. That the Appellant proceed to proclaim the properties it found in the custody of the Respondent and equally sought to distress for rent and further evict the Respondent. That it is thus the Respondent's contention that before proceeding to order for eviction and subsequent commissioning of an auctioneer to distress the property of the Respondent, the 1st and 2nd Appellants were duty bound to procure a court order or a tribunal order which they did not and thus rendering the entire process a nullity.

22. It was further submitted that the issue of rent arrears demanded came into play and that the court directed that the same be determined first. That the rent arrears determination was duly done and that the Respondent was satisfied.

23. It was also submitted that an arrangement was put in place to pay the rent arrears and subsequently the Respondent willfully vacated the said premises and in lieu of some of the arrears pending, the Respondent forfeited some of the temporary structures they had constructed. That at the time of this appeal, the Respondent had long ago vacated the said premises and that it is the Respondent's view that the matter is since settled. That the trial court in all fairness directed that each party to bear their own cost owing to the special circumstances that the school found itself into.

24. As regards the Appellant's grievances against the decision of the trial court that each party do bear their respective costs of the suit, the Respondent submits that the issue of award of costs is not a mathematical precision but rather discretionary power and that courts are to determine the same on a case to case basis. According to Section 27 of the *Civil Procedure Act*, it is trite law that the issue of costs is a discretionary order that is awarded to a successful party. In the case of Republic V. Rosemary Wairimu Munene (Ex parte Applicant) v. Ihururu Dairy Farmers Co-operative Society Ltd Judicial Revie Application No. 6 of 2004 Mativo J. held that the issue of costs is the discretion of the court and is used to compensate the successful party for the trouble taken in prosecuting or defending the case and not to penalize the losing party. This position was adopted by the court in Cecilia Karuru Ngayu Vs. Barclays Bank of Kenya & Another [2016] eKLR which has been cited with approval by both parties in their submissions. The import is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exists some other good reasons and or cause for not awarding costs to the successful party. That the award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit

but also the circumstances of each case. In Morgan Air Cargo Limited v Evrest Enterprises Limited [2014] eKLR the court noted that;

> "The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that Cost follow the event" was driven by the fact that there could be 'one- size fit -all' situation on the matter. That is why the Section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions to costs have recognized this fact and were guided by the court's decision on the facts of the case respectively. Needless to state, circumstances differ from case to case."

25. It was submitted that in the present case, the trial court considered all the circumstances leading to the Respondent to approach court to seek redress. It was submitted that the trial court determined that the Appellants had not tabulated the correct rent arrears and that the mode of eviction and distress did not follow the due procedure. That was the genesis of the dispute. Further, the school had to continue to operate as parties negotiated. The special circumstances therefore were that each party ought to bear their respective costs of the suit.

26. It was submitted further that even though the Appellant is aggrieved by the decision to grant the Respondent 60 days to pay the arrears, the said days lapsed already in that the Respondent long age vacated the premises. At that time, the school could not be folded up with the students still learning when the students were not at fault.

27. It was submitted that Article 53 of *the Constitution* calls upon the court to at all times uphold the best interest of the children when faced with an issue and thus the court deemed it fit that the school being a pre-primary and primary school where pupils were learning, it held that it was proper to grant the issues that were not their creation and that the court had to take judicial notice of the reality.

28. I have considered the record of appeal and the rival submissions by the parties. It is not in dispute that the parties herein had entered into a lease agreement over premises situated on Plot No. Siaya Township Block 1/453 for a period of ten years commencing January 2019. It is not in dispute that pursuant to the said agreement, it was a term of the agreement that the tenant was under obligation to pay the agreed monthly rent in time and could only make alterations to the property after obtaining consent from the Appellants and was strictly to use the leased property for the purpose of the lease only and not any other unauthorized purpose. It is also not in dispute that the Respondent fell into arrears of rent and failed to pay the same to the Appellants. It is also not in dispute that the Respondent went against the terms of the lease by converting the residential premises into commercial and further constructed temporary structures on the plot without the consent of the Appellants. It is not in dispute that the Respondent does not deny being in rent arrears to the Appellants. It is also not in dispute that during the trial in the lower court, the Appellants did not approach the High Court for appropriate reliefs when the trial court ordered for reconciliation of accounts and granted some grace period for the same. That being the position, I find issue for determination is whether this appeal has merit.

29. It is noted that the Appellants' grouse with the trial court is that it sought to rewrite the contract between the parties by making an order that accounts be taken and that a grace period of sixty (60) days be given to the Respondent. The Appellants further contend that the order that each party to bear their own costs was unfair and now seeks a reversal of those orders. I find that these are the two key issues for this court's determination.

30. As regards the issue of rewriting contracts, it is noted that the parties duly signed a lease agreement which was to last for ten years and that the same provided for the terms to be adhered to.It is trite law

that courts should not rewrite contracts entered into between parties who are bound by the terms of those contracts. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, the High Court in Migori held:

> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
>
> "..... it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded ......
>
> ... In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."
>
> Again, in the case of National Bank of Kenya Limited vs. Pipe plastic Samkolit (K) Ltd & another (2001) eKLR the Court held that
>
> "a court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract unless coercion, fraud, or undue influence are pleaded and proved...."

31. Even though the Respondent herein did not plead the discrepancy in the amount owing in his pleadings, it is noted that the issue of reconciliation of accounts cropped up during the hearing of the matter at the interlocutory stage which necessitated the trial court to issue an order for reconciliation or taking of accounts. Indeed, this was a departure from the pleadings of the Respondent but the fact that the parties agreed to go along with the court's direction clearly left no doubt that the Appellants were quite comfortable with it. Indeed, the parties presented documents showing the extent of payment of rent and the amounts outstanding for the court's perusal and determination. It is instructive that the Appellants did not raise any objection and neither moved to the High Court for redress if need be the moment the lower court issued the orders on reconciliation of accounts and granting a grace period. The Appellants are now raising the issue on appeal yet they agreed to go along with the directions of the trial court until conclusion of the matter. I find therefore that there was acquiescence on the part of the Appellants and hence the Appellants plea for setting aside the lower court's order regarding the issue of reconciliation of accounts must be rejected.

32. As regards the issue of costs, it is noted that the Appellants are aggrieved with the order that each party bears its own costs and in effect denying them as successful parties the right to costs of the suit on account of an alleged uniqueness of the suit when in fact the same was a simple landlord and tenant dispute over unpaid rent with no uniqueness. The Appellants have contended that it is trite that costs

follow the event and hence, being the successful parties at trial and having been dragged to court by their tenant who was in arrears of approximately three years rent, that the only fair and just thing would have been to grant the them costs of the suit.

33. On the part of the Respondent, it was his view that he had already vacated the premises and that the matter is now settled and that the Appellant's grievances against the decision of the trial court that each party do bear their respective costs of the suit should be rejected as the same is a discretionary power and that courts are to determine the same on a case to case basis and that according to Section 27 of the *Civil Procedure Act*, it is trite law that the issue of costs is a discretionary order that is awarded to a successful party. Reliance was placed in the case of Republic V. Rosemary Wairimu Munene (Ex parte Applicant) v. Ihururu Dairy Farmers Co-operative Society Ltd Judicial Revie Application No. 6 of 2004 where Mativo J (as he then was) held that the issue of costs is the discretion of the court and is used to compensate the successful party for the trouble taken in prosecuting or defending the case and not to penalize the losing party. Also in Cecilia Karuru Ngayu Vs. Barclays Bank of Kenya & Another [2016] eKLR the same position was held by the court. The import is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exists some other good reasons and or cause for not awarding costs to the successful party. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In Morgan Air Cargo Limited v Evrest Enterprises Limited [2014] eKLR the court noted that;As

> " The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that Cost follow the event" was driven by the fact that there could be 'one- size fit -all' situation on the matter. That is why the Section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions to costs have recognized this fact and were guided by the court's decision on the facts of the case respectively. Needless to state, circumstances differ from case to case."

34. As per the provisions of section 27(1) of the *Civil Procedure Act*, the costs of any suit follows the event. This is the standard principle but the courts have the sole discretion to either award or not award costs depending on the circumstances of the case. The Appellants have contended that it was the Respondent who dragged them to court yet the Respondent was in arrears of rent to the tune of hundreds of thousands of shillings. It also transpired that the Respondent had violated the terms of the lease in many ways such as changing the suit premises from residential to commercial and then putting up temporary structures without the consent of the Appellants as well as failing to pay rent for a very long period. The Appellants will now have the task of putting everything back at great cost. Even though the Respondent has since vacated from the premises, this does not disentitle the Appellants the costs of the suit. Iam satisfied that the Appellants are entitled to costs of the suit which was strenuously defended. It is noted that the trial court bended itself backwards in a bid to give the Respondent an arena with which to engage the Appellants over the rent dispute and hence to deny the Appellants the costs of suit was quite unfair. To that extent, the finding by the trial court that each party was to bear their own cost was in error and must be interfered with.

35. In the result, it is my finding that the Appellant's appeal partially succeeds to the extent that the trial court's order directing the parties to bear their own costs is hereby set aside and substituted with an order that the Appellant be awarded the costs of the suit. The Appellant is also awarded half costs of this appeal.

DATED AND DELIVERED AT SIAYA THIS 19TH DAY OF JUNE, 2025.

D. KEMEI

JUDGE

In the presence of:

N/A Ouma Njoga...............for Appellants

Oduol.........................for Respondent

Okumu......................Court Assistant