



**Diani Road Developers Limited v Maharage (Civil Appeal E741 of 2022)  
[2025] KEHC 9567 (KLR) (Civ) (3 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9567 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E741 OF 2022**

**TW OUYA, J**

**JULY 3, 2025**

**BETWEEN**

**DIANI ROAD DEVELOPERS LIMITED ..... APPELLANT**

**AND**

**CHANDE MAHARAGE ..... RESPONDENT**

*(Being an Appeal from the Judgment of the Small Claims Court at Nairobi by  
Hon. M. MUTUA (RM) delivered on 23rd August 2022 in Claim No. 932 of 2021)*

**JUDGMENT**

1. The Appellant approached this Court through a Memorandum of Appeal dated 21<sup>st</sup> September 2022, seeking Judgment in respect of the following Orders:
  - i. That this Appeal be allowed and the Judgment and Decree of the Honourable Magistrate be varied and/or set aside.
  - ii. The Order dismissing the Appellant's Counterclaim be set aside and the Counterclaim be allowed with costs and interest to the Appellant.
  - iii. Damages awarded by the trial Court to the Respondent be varied and/or set aside.
  - iv. That costs of this Appeal and the trial Court be granted to the Appellant.
2. The background to the dispute between the parties herein is as follows: the Appellant being the Landlord leased rental premises located within Karen area of Nairobi to the Respondent on 21<sup>st</sup> July 2018 for the mutually-agreed monthly amount of Ksh.350,000 until sometimes in April 2020 when the Respondent issued a notice to the Appellant terminating the tenancy.



3. The suit before the trial Court was commenced by the Respondent (then Claimant) through a Statement of Claim dated 21<sup>st</sup> August 2021 seeking a refund of Kshs.700,000 being the deposit delivered to the Appellant. The Appellant filed a response to the Respondent's claim as well as a Counterclaim dated 6<sup>th</sup> September 2021 claiming that it incurred Ksh.594,880 being the costs of repainting the house together with plumbing works for the toilet following the Respondent's occupation of the Appellant's premises as from 21<sup>st</sup> July 2018 until April 2020.
4. At the trial Court, the Respondent subscribed to the position that the amount of Ksh.594,880 demanded by the Appellant being the total costs incurred to restore the house in question to its pre-letting state was exaggerated.
5. In dismissing the Appellant's Counterclaim, the trial Court ruled that as no report was submitted before it showing the state of the house following the Respondent's departure therefrom, each party should bear 50 percent of the proposed repair costs, that is, Kshs.297,440.
6. The trial Court allowed the Respondent's claim for refund of the deposit delivered to the Appellant in the amount Kshs.700,000 less Ksh.297,440 totaling to Kshs.402,560.
7. The instant appeal is anchored on the following nine (9) grounds:
  - i. That the trial Court erred in concluding that repair and restorative costs incurred by the Appellant were exaggerated when there was no evidence to reasonably draw that conclusion.
  - ii. That the trial Court erred in law and fact in failing to appreciate the fact that the Respondent did specifically request the Appellant to customize the premises by fixing a sliding window and that the cost thereof would be recouped by the Respondent's representation that he would occupy the premises until the expiry of the lease term to enable the Appellant recoup his investment in the customization of the premises as per the Respondent's request.
  - iii. That the trial Court erred in apportioning repair and restorative costs equally between the Claimant and Respondent without legal or factual basis for that and without evidence to justify that apportionment.
  - iv. That the trial Court erred in purporting to rewrite the Lease Agreement between the Appellant and Respondent by, inter alia, overlooking the Tenant's/Respondent's obligation to yield up the premises at the end of the tenancy in a reasonable and tenantable repair in strict compliance with the terms thereof.
  - v. That the trial Court erred in basing his Judgment on matters not pleaded and/or particularized and supported by evidence.
  - vi. That the trial Court erred in granting the Respondent prayers not sought in the Statement of Claim including an award for interest which was not pleaded.
  - vii. That the trial Court erred in holding that a report was required on the state of the let premises post-vacation to justify the repair costs and expenses when there is no such requirement in law or in the contract between the parties and where there was a clear evidence on the state of the let premises and the nature of repairs required when the Claimant vacated, to support the repair and restorative works carried out by the Appellant and the expenses incurred.
  - viii. That the trial Court erred in reaching conclusion of facts not supported by evidence but based on, inter alia, speculation, conjecture and vagueness.



- ix. That the trial Court erred in dismissing the Appellant’s Counterclaim against the Respondent when there was no Defence and/or evidence to contest the averments therein.”
8. The appeal was dispensed by way of written submissions.
  9. The Appellant filed written submissions dated 4<sup>th</sup> June 2024 through its Counsel and raised the jurisdictional point that the trial court lacked the jurisdiction to entertain the Respondent’s claim. Reliance was placed on the provisions Section 12(1)(b) of the *Small Claims Court Act* to anchor the argument that tenancy disputes fall outside the remit of the Small Claims Court. Hence, the trial Court was wrong to entertain the Respondent’s suit. Guidance was sought in the reasoning of the Court in *Lisa Kristine Christoffersen v Kavneet Kaur Sehmi T/A The Random Shop* [Milimani High Court Commercial Appeal No. E036 of 2022]; and, *Samuel Kamau Macharia v Kenya Commercial Bank and others SCK Application No.2 of 2011 eKLR*, to buttress the preceding position.
  10. Making reference to Section 7 of the Magistrate’s Court Act, 2015, it was argued that rent arrears are matters of tenancy and fall outside the jurisdiction of the Small Claims Court.
  11. Further, at the trial Court the Respondent admitted he never carried out any restorative work on the subject property prior to his departure in April 2020, having resided thereon since July 2018. That at the Respondent’s request, the Appellant installed sliding windows overlooking the veranda of the suit property resulting in an expense of Kshs.350,000.
  12. Further, the total repair costs incurred by the Appellant arising out of the Respondent’s occupation of the subject property amounting to Kshs.944,880 (inclusive of sliding door installation costs of Kshs.350,000, exceed the total security deposit of Kshs.700,000 tendered by the Respondent by Ksh.244,880.
  13. That, the Respondent vacated the subject property prior to the agreed-upon due date of the lease agreement and left the premises in a deplorable state, resulting in repair costs of Kshs.944,880, borne by the Appellant.
  14. That the governing Lease Agreement mandated the Landlord (the Appellant herein) to apply the security deposit towards repairs, redecoration, painting and general restorative works and the Courts cannot re-write contract for the parties as held in the case of *National Bank of Kenya Limited V Pipe Plastic Samkolit (k) Ltd & Prof. Samson Ongeru* (2001) eKLR. Furthermore, in directing the Appellant and the Respondent to bear the restorative costs equally, the trial Court re-wrote the Contract between the parties herein.
  15. That the Respondent failed to demonstrate to the trial Court that the repair costs claimed by the Appellant in the sum of Kshs. 944,880 were exaggerated.
  16. The Respondent filed written submissions dated 13<sup>th</sup> June 2024 through its counsel and submitted that the Appellant’s contention that the trial Court lacked jurisdiction to render the impugned decision was not one of the grounds of the subject appeal, and the Appellant should not be allowed by the Court to introduce new matters as per Order 42 Rule 4 of the Civil Procedure Rules.
  17. Further, the proceedings before the trial Court were not in respect of rent or rent arrears as submitted by the appellant and the Respondent’s cause of action concerned “money held and money received” within the meaning of Section 12(1) (b) of the *Small Claims Court Act*.
  18. The cases relied upon by the Appellant namely, *Lisa Kristine Christoffersen Vs Kavneet Kaur Sehmi T/A The Random Shop* [Milimani High Court Commercial Appeal no. E036 of 2022]; and, *Samuel Kamau Macharia V Kenya Commercial Bank and others SCK Application No.2 of 2011 eKLR*, were



distinguished from the suit before the trial Court on grounds they pertained to rent arrears whereas the Respondent's suit concerned security deposit emanating from a contract as per Clause 2(iv) of the Agreement dated 18<sup>th</sup> July 2018.

19. The Respondent upheld the trial Court's finding that the Appellant failed to verify the Inspection Report in respect of the contested restorative works. Thus, imposing unverified and exaggerated costs upon the Respondent.
20. Citing the provisions of Order 42 Rule 4 of the Civil Procedure Rules, the Respondent urged the Court to disregard the Appellant's submissions on the issue of breach of contract, to the effect that the Respondent vacated the Appellant's property before the due date, as the question of breach of contract did not comprise one of the grounds for the instant appeal.
21. Furthermore, the Appellant failed to demonstrate before the trial Court that the Respondent had requested for the installation of a sliding window hence, no basis was laid before the Court to justify imposing the expense upon the Respondent, according to the provisions of Section 107 of the Evidence Act. Further guidance was placed in the reasoning of the Court in *Saul Sewe Ochieng Nyamogo V Kijos Holdings Limited* (2018) eKLR.
22. On the issue of interest, it was submitted that the same was within the discretion of the trial Court as per the provisions of Section 26(1) of the Civil Procedure Act. Further guidance was sought in the holding in *Mbogo V Shah* (1968) EA 98.
23. Having carefully considered the grounds of appeal, the record, the parties rival written submissions together with all the authorities cited, I find that the issues arising for my determination are Whether the trial court had jurisdiction to hear this matter and whether this appeal is merited.
24. The duty of the Court in a first appeal such as this one was stated in *Selle & Another v Associated Motor Boat Co. Ltd. & others* (1968) EA 123 in the following terms:

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 (*Abdul Hammed Saif – vs- Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270).”

25. The Appellant submitted that the trial Court lacked jurisdiction to entertain the suit giving rise to the present appeal as it concerned a claim for rent or rent arrears and the parties herein were in a tenancy relationship which is a matter reserved for the Magistrates Courts as distinguished from the Courts established under the Small Claims Act.
26. Section 12 of the Small Claims Act provides as follows:
  - “ 1. Subject to this Act, the Rules and any other law, the Court has jurisdiction to determine any civil claim relating to—
    - a. a contract for sale and supply of goods or services;



- b. a contract relating to money held and received;
- c. liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;
- d. compensation for personal injuries; and
- e. set-off and counterclaim under any contract.”

27. The Court has considered the Statement of Claim filed by the Respondent before the trial Court dated 31<sup>st</sup> August 2021. It is evident that the Respondent’s Statement of Claim is not in respect of rent or rent arrears as argued and submitted by the Appellant; but, for refund of the security deposited still held by Appellant following termination of the tenancy between the parties herein in or about April 2020.
28. Upon perusal of the pleadings filed before the trial Court, the Court is persuaded to disregard the Appellant’s submissions to the effect that the Respondent terminated the tenancy prior to the ‘agreed-upon’ termination date because the foregoing issue was not raised before the trial Court.
29. In this event, the Court finds and holds that the trial Court possessed the necessary jurisdiction to entertain the Respondent’s claim which claim, in substance, did not concern a tenancy-related matter falling within the exclusive preserve of the Magistrates Courts. The Respondent’s claim fell squarely within the provisions of Section 12 (1) (b) of the Act, being a contract for money held and received. See the holding of the Court in *Muhanda v LP Holdings Ltd* [2025] KEHC 393 (KLR).
30. Having disposed of the Appellant’s jurisdictional point, the Court will consider the merits of the appeal before it.
31. The Appellant subscribed to the position that the trial Court by directing the parties herein to shoulder the restorative costs equally, in effect, re-wrote the contract executed as between themselves.
32. Clause 2(iv) of the Agreement dated 8<sup>th</sup> July 2018 executed by the parties herein stipulates as follows:  
“The deposit shall be refundable without any interest, to the Tenant after the expiry of this Tenancy, and delivery up of the premises in proper condition and in accordance with the provisions thereof.”
33. Under Clause 2(viii) thereunder, the Tenant (the Respondent herein) covenanted as follows:  
“To keep the premises and fixtures and fittings therein clean and in good condition and to hand over the premises and fixtures at the expiry or earlier termination of the tenancy in the same condition and repair as on entry, fair wear and tear excepted.”
34. The Respondent disputed the amount claimed by the Appellant being restorative costs as exaggerated and argued that as there was no joint inspection of the property, the Appellant’s figure of Ksh.944,880 was incapable of being verified.
35. As per the terms of Clause 2(viii) of the governing contract it was necessary for an inspection of the premises to be conducted in order to ascertain what sort of repairs amounted to “fair wear and tear” hence, the responsibility of the Appellant; and which were not, hence, should be borne by the Respondent. There was no “hand-over” of the premises as contemplated under the preceding clause.
36. The trial Court directed both parties to bear the restorative costs in equal part as no report was issued by the Landlord about the status of the house upon being vacated by the Tenant. The lack of a report



setting out the condition of the premises upon being vacated by the Tenant also formed the basis for dismissal of the Appellant's Counterclaim by the trial Court.

37. This Court is not minded to interfere with the trial Court's directive that the parties bear the restorative costs equally as the same was anchored upon a sound application of the provisions of Section 107 of the [Evidence Act](#) and demonstrates that the Court appreciated the weight of the evidence placed before it.
38. In the event, the Court upholds the trial Court decision on the question of interest as there was no wrongful exercise of discretion in that regard.
39. The Court makes the following final orders:
  - i. The instant appeal is found unmerited and same is hereby dismissed entirely.
  - ii. The Respondent is awarded the costs of the appeal and at the trial Court.
  - iii. The respondent is awarded interest on the above from the date of filing of Respondent's suit.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 3<sup>RD</sup> JULY 2025.**

**HON. T. W. OUYA**

**JUDGE**

