**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(Coram: Gachuhi, Kwach & Omolo JJ A )**

**CIVIL APPEAL NO 203 OF 1994**

**BETWEEN**

**MUNAVER N ALIBHAI T/A**

**DIANI BOUTIQUE.....APPELLANT**

**AND**

**SOUTH COAST FITNESS & SPORTS**

**CENTRE LIMITED .....RESPONDENT**

(Appeal from the judgment of the High Court of Kenya at Mombasa (Justice Wambilyangah) dated 21st September, 1993 in HCC Appeal No 111 of 1992)

**JUDGMENT**

This is a second appeal from a decision of the Resident Magistrate, Mombasa giving vacant possession of the suit premises to the respondent.

The appellant appealed to the superior court against that decision and its appeal was dismissed, giving rise to the present appeal. There is a concurrent finding by the magistrate and the judge that the appellant was a protected tenant with a controlled tenancy under the Landlord & Tenant (Shops, Hotels & Catering Establishments) Act (Cap 301). The respondent served a notice on the appellant purporting to terminate the appellant's tenancy. The appellant ignored this notice and took no steps to refer it to the tribunal contending that the notice was invalid as it did not comply with the statutory requirements. The respondent treated the notice as valid and effective and sued the appellant for possession.

The appellant in its defence before the magistrate challenged the court's jurisdiction and also raised the issue of the invalidity of the notice of termination. The respondent applied for summary judgment under order 35 rule 1 of the Civil Procedure Rules claiming that the appellant had no defence to its claim. Both courts found that the appellant was a protected tenant. The magistrate also held that the notice of termination served on the appellant by the respondent was both valid and effective and, on that basis, the magistrate thought he had jurisdiction to make the order for possession, which he did. The judge, on the other hand, was of the view that the notice, strictly construed, did not comply with the requirements of the Act, but having so found, he went on to uphold the magistrate on the ground that the appellant had not reacted to the invalid notices sent to him. The judge thought the appellant was bound to react to the invalid notices by, for example, making a reference to the tribunal, so as to be able to claim the protection afforded to it by the Act. There can be no doubt that both the judge and the magistrate were clearly wrong

in the respective stands taken by each of them.

The Act lays down clearly and in detail, the procedure for the termination of a controlled tenancy. Section 4(1) of the Act states in very clear language that a controlled tenancy shall not terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with specified provisions of the Act. These provisions include the giving of a notice in the prescribed form. The notice shall not take effect earlier than 2 months from the date of receipt thereof by the tenant. The notice must also specify the grounds on which termination is sought. The prescribed notice in Form A also requires the landlord to ask the tenant to notify him in writing whether or not the tenant agrees to comply with the notice.

As there is no cross-appeal against the concurrent finding by the magistrate and the judge that the tenancy here was controlled, we have to accept that finding as conclusive. The notice of termination given by the respondent was clearly void and had no effect in law on the appellant's tenancy and the appellant was under no duty, legal or otherwise to react to it. If any authority were required on the manner of terminating a controlled tenancy, then we need go no further than the decision of this Court in the case of *Tiwi Beach Hotel Ltd v Juliane Ulrike Stamm* [1990] 2 KAR 189. Neither the magistrate nor the judge had jurisdiction in this matter as the tenancy in issue was a controlled one. And in signing summary judgment in favour of the respondent, the magistrate acted without jurisdiction. The judge also fell into the same error.

The result is that this appeal is allowed and the judgments and decrees of the magistrate and the judge are set aside and substituted by an order dismissing the respondent's suit and application for summary judgment with costs. The appellant will also have the costs of the appeal in the High Court and in this court.

**Dated and delivered at Mombasa this 24th day of July 2 1995**

**J.M GACHUHI**

**.....**

**JUDGE OF APPEAL**

**R.O KWACH**

**.....**

**JUDGE OF APPEAL**

**R.S.C OMOLO**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of theoriginal.

**DEPUTY REGISTRAR**