

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CIVIL APPEAL NO. E029 OF 2024**

**SAMIER MOHAMEDRAZA MURAVVEJ ..... APPELLANT**

**VERSUS**

**IDEAL LOCATIONS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. This is an Appeal arising from the Judgment of the Honourable Ndegwa Wahome as delivered on 17<sup>th</sup> July, 2024 in Mombasa BPRT Case No. E152 of 2023.
2. By a reference dated 3<sup>rd</sup> August 2023, Samier Mohamedraza Muravvej (the Appellant) contested before the Business Premises Rent Tribunal (BPRT) a Notice of Termination of Tenancy issued to him by the Landlord Ideal Locations Limited (the Respondent) in relation to business premises located on L.R. No. 14407 and 16088, Section 1, Mainland North, Mombasa.
3. The Notice of Termination of Tenancy was served by the Respondent under Section 4 of the Landlord and Tenant

(Shops, Hotels and Catering Establishments) Act on the grounds that the Appellant was highly and persistently irregular in rent payments whenever they fell due. In addition, the Respondent contended that the Tenant had defaulted in paying rent for a period of more than two (2) months and that he was in rent arrears of Kshs. 457,206.90 being rent for the months of April 2023, May 2023 and June 2023 at Kshs. 152,402.30 per month. Further, the Respondent asserted that the Appellant had committed substantial breaches in failing to pay for water amounting to Kshs. 4,872/- as well as electricity utilities amounting to Kshs. 66,752.70.

4. The Appellant did not comply with the Notice. Instead by the reference, he accused the Respondent of altering the terms of the tenancy severally over the past ten (10) years. The Appellant denied that he was in arrears of rent and asserted that in fact, it was the Respondent who owed him Kshs. 11,312,172.55 being sums illegally levied and paid as purported increased rent. It was the Appellant's case that he had a periodic tenancy with the Respondent and that rent was

payable quarterly in advance and the said notice of termination was for less than a quarter.

5. Having heard the reference and in its decision rendered on 17<sup>th</sup> July 2024 aforesaid, the Tribunal issued the following orders:

- (i) That the Tenant's Reference dated 03/08/2023 is dismissed;**
- (ii) That the Landlord's Notice of Termination of Tenancy dated 15/06/2023 is lawful and is upheld as having taken effect on the 1<sup>st</sup> day of September, 2023;**
- (iii) That the Tenant will settle all the rents in arrears, mesne profits and utility bills of up to and including 15/08/2024 or earlier and vacate the demised premises;**
- (iv) That if the Tenant does not vacate voluntarily as in 3 above, the Landlord shall be at liberty to effect eviction at the Tenant's costs; and**
- (v) That the Landlord is awarded costs at Kshs 20,000/=.**

6. Aggrieved by the said judgment, the Appellant moved to this court and lodged the Memorandum of Appeal dated 30<sup>th</sup> July 2024 urging this court to set aside the judgement on some seven (7) grounds listed as follows:

- 1. That the Learned Tribunal Chair erred in law and in fact by dismissing the Tenant's Reference dated 3<sup>rd</sup> August, 2023 and finding the Landlord's notice dated 15<sup>th</sup> June, 2023 as being lawful and upholding the same;**
- 2. That the Learned Tribunal Chair erred in law and fact by finding that the Tenant had arrears and utilities to settle and ordering him to settle the same, which finding and order went against the grain of evidence adduced by the Landlord's witness that the Tenant had no arrears of either rent or utilities;**
- 3. That the Learned Tribunal Chair erred in law and fact by failing to find that the landlord had in fact illegally increased the rent for the premises over the years and that in that case, the Tenant had in fact overpaid the rent for the premises and could not have been in default;**

**4. That the Learned Tribunal Chair misdirected himself when he applied an implied term that the rent of the premises was payable in advance against the clear evidence contained in the Statement provided by the Landlord's witness to the effect that by conduct, rent was payable upon delivery of evidence and ignored clear evidence that the Landlord would first invoice the Tenant then wait for the payment and in that case, the rent by agreement arising out of the conduct of parties, was not payable in advance but rather subject to invoices and therefore the implied term could not apply;**

**5. That the Learned Tribunal Chair failed to find that the Landlord had neither kept nor produced a book, which is a mandatory requirement for controlled tenancies and which would have laid to rest the issues of whether or not the rent was payable in advance or in arrears or whether the tenant was in default and that the failure to produce the rent book called for an adverse finding against the Landlord as to the existence of the matters that would ordinarily have been contained therein;**

**6. That the Learned Tribunal Chair, in any event and without prejudice to the grounds 1 to 5 above erred in**

law and in fact by failing to consider and apply the provisions of Sections 107 and 108 of the Evidence Act by laying the burden and incidence of proof on the Tenant and unjustly dismissing the Tenant's Reference, yet it was the Landlord who claimed that the Tenant delayed in paying rent and utilities; and

7. That the Learned Tribunal Chair erred in law and fact by misconstruing the issues in dispute, disregarding the law ultimately dismissing the tenant's Reference without having regard to the clear evidence of illegal rent increment, timely payment of rent and utilities as well as admissions adduced by the Landlord's witness and in doing so, caused a complete miscarriage of justice requiring the intervention of this Honourable Court in its appellate jurisdiction.

7. This being the first appeal, this court is enjoined by the provisions of Section 78 of the Civil Procedure Act (Cap 21 Laws of Kenya) to evaluate and examine the Tribunal's record and the evidence presented before it in order to arrive at its own conclusion. As was stated by the Court of Appeal in ***Selle & Another -vs- Associated Motor Boat CO. Ltd (1968) EA 123:***

**“(An Appellate Court) is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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.....”**

8. I have accordingly carefully perused and considered the Record of Appeal as well as the judgment of the Business Premises Rent Tribunal. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties.
9. The dispute herein was provoked by a Notice of Termination of Tenancy dated 15<sup>th</sup> June 2023 that was issued by the Respondent as the Landlord to the Appellant who was the Tenant in relation to business premises located on LR. Nos. 14407 and 16088, Section I Mainland North in Mombasa. In the said notice issued under Section 4(2) of the Landlord and Tenant (Shops, Hotel and Catering Establishments) Act (Cap

301), the Respondent informed the Appellant on the grounds of the termination as follows:

- (a) That you are highly and persistently irregular in rent payment whenever it becomes due and payable;**
- (b) That you have defaulted in paying rent for a period of more than two (2) months after such rent has become due and payable and in particular you are in rent arrears of Kshs 457,206.90 being rent for the months of April 2023, May 2023 and June, 2023 at Kshs. 152,402.30 per month; and**
- (c) That you have committed substantial breaches of your obligations by defaulting in paying for water charges for the months of April 2023, May 2023 and June 2023 amounting to Kshs. 4,872/- and electricity charges amounting to Kshs. 66,752.70.**

10. In response, the Appellant denied that he was irregular in rent payments and asserted that he had been meeting all his cardinal obligations under the tenancy. By his reference anchored under Section 6 of the Act, the Appellant urged the

Tribunal to investigate the matter and to determine the issues involved.

11. Having heard the dispute, the Learned Members of the Tribunal concluded as follows at paragraphs 9 to 13 of the Judgement:

**“9. It is plain that by the 3/3/2023 the Tenant was in rent arrears at Kshs. 683,838.60. This is clearly demonstrated by the landlord's exhibit No. 2 and was also admitted by the Tenant's witness Mr. Stephen Otieno Ouko. The Tenant in appreciation of the arrears paid the amount in two installments of Kshs. 341,373.90 and 342,464.70 paid on the 3/3/2023 and 13/4/2023 respectively.**

**10. It is also not in dispute and can also be inferred from the evidence on record that the rent for April, May and June, 2023 was only paid on the 21/6/2023 at Kshs. 457,207 and a further Kshs.71,625 for utility bills. That was payment of rent at 3 months in arrears when looked against the law. Where the relationship between the parties has not been reduced into writing one of the terms and conditions to be applied on tenancies is clause Viii of the schedule to the Act thereof which provides: -**

***"The lessee shall pay rent for the premises in advance".***

- 11. It is therefore plain that the rent for April, May and June 2023 was not paid in advance as dictated by the law but in arrears in obvious breach of the law. This brings us to the provisions of (Section) 7(1) (b) of the Act which provides as a ground for termination as follows:-**

***"That the Tenant has defaulted in paying rent for a period of two months after such rent has become due or payable or has persistently delayed in paying rent which has become due or payable".***

- 12. In our view the landlord has satisfied all the requirements of Sections 4(2), 4(4), 7(1) (b) of the Act and Regulation 4(1) of the Regulations to the Act. We reiterate that it has been proved that the Tenant has persistently delayed in rent payment. This is clearly demonstrated by the arrears of Kshs. 683,838.60. This was rent in arrears for approximately four (4) months.**

**13. The Tenant also paid the rents for April, May and June 2023 on the 21/6/2023. This was payment in arrears for three (3) months. We therefore determine that the landlord is entitled to vacant possession of the demised premises....”**

12. As it were, there was no dispute that the parties herein had a Landlord and Tenant relationship which is governed by the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act, Cap 301 of the Laws of Kenya. On the grounds upon which the Landlord may seek to terminate a tenancy, Section 7(1) of the said Act provides as follows:

**“7. Grounds on which landlord may seek to terminate tenancy**

**(1) Where under Section 4 of this Act served a notice of termination of a controlled tenancy on the tenant, the grounds on which the landlord seeks to terminate such tenancy may be such of the following grounds as are stated in the aforesaid notice -**

**a) .....**

- b) **that the tenant has defaulted in paying rent for a period of two months after such rent has become due or payable or has persistently delayed in paying rent which has become due or payable; and**
- c) **that the tenant has committed other substantial breaches of his obligations under the tenancy, or for any other reason connected with the tenant's use or management of the premises comprised in the tenancy;**

13. As to the record of the rents paid, Section 3(3) of the Cap 301 provides as follows:

**“The landlord of a controlled tenancy shall keep a rent book in the prescribed form, of which he shall provide a copy for the tenant and in which shall be maintained a record, authenticated in the prescribed manner, of the particulars of the parties to the tenancy and the premises comprised therein, and the details of all payments of rent and of all repairs carried out to the premises.”**

14. According to the Respondent, the basis for the termination of the tenancy was the fact that the Appellant was highly and

persistently irregular in remitting rent for the demised premises. In support of that position, the Respondent's property Manager Talasam Mohamed (LW1) told the court in his evidence-in-chief as follows:

**“The Tenant has persistently been inconsistent and irregular in the payment of rent and other affiliated charges as the Tenant has been paying rent and service charges in arrears rather than paying in advance. I hereby produce the statement for the Tenant as LEXH 2.**

**The Tenant failed to pay the rent for the months of April 2023, May 2023 and June 2023 as and when (they) fell due in according to the law (sic). Even despite having been issued with invoices for payment thereof, the Tenant still failed to duly pay rent. I hereby produce the respective invoices collectively as LEXH 3 and as LEXH 4 the extract of the delivery book showing receipt of the invoices.**

**.....”**

15. The fact that the Appellant by practice always paid rent after the issuance of the invoices was confirmed by the Appellant's Accountant Stephen Ouko (TW1) who on being questioned by

the Tribunal stated that according to his accountancy profession he could only make the payments upon receipt of an invoice.

16. From the material placed before the court, it was evident that the Respondent had not kept a rent book as required under Section 3(3) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. Thus in its efforts to prove that the tenant had defaulted in payment of rent for a period of two months after it became due or payable the Respondent relied on what it called a "Statement for the Tenant." It was not clear to me how the Tribunal authenticated the said statement which appears on the Respondent's Letterhead (pages 25 to 28 of the record).
17. That notwithstanding, the statement provided was for the period 1<sup>st</sup> January 2023 to 31<sup>st</sup> December 2023. A perusal thereof reveals that the first invoice was raised on 7<sup>th</sup> January 2023 while the second and third were raised on 1<sup>st</sup> February 2023 and 1<sup>st</sup> March 2023 respectively. Even assuming that the due dates for the invoices were the entry dates in the Respondent's Statement, it was apparent to me that none of

them was paid after two months from the date upon which they were due to warrant a termination under Section 7(1) (b) of the Act. This is so because from the record, the Appellant paid the sum of Kshs. 341,343.90 which was credited to the Respondent on 3<sup>rd</sup> March 2023.

18. That position clearly applied for the period April to June 2023 for which the Appellant was said to be in default. The record reveals that the invoice for April was first raised on 26<sup>th</sup> April 2023 for the sum of Kshs. 232,568.40. A similar invoice for the same amount was raised on 2<sup>nd</sup> May 2023 and on 2<sup>nd</sup> June 2023. Those invoices were corrected by the Respondent for apparently being erroneous on the amount of rent and new entries were made on 15<sup>th</sup> May 2023 and 2<sup>nd</sup> June 2023. On 21<sup>st</sup> June 2023, the Respondent was paid the sum of Kshs. 457,207.00 for rent and another sum of Kshs. 71,625 for utilities.
19. Arising from the foregoing, it was apparent to me that there was no point at which any invoice was paid two months after its due date even assuming that the due date was the date on which the entry was made on the Respondent's statement.

20. From the material placed before the court, it was evident that the mode of practice by the two parties was that the Landlord would first raise an invoice and that the Tenant would thereafter make a payment which would be noted by the Landlord in his statement. From the evidence of the Landlord's sole witness (LW1) it was apparent that the Appellant had leased the premises for more than 12 years. The Respondent did not adduce any evidence that they had raised any complaint or indicated to the Tenant/Appellant that they were unhappy with the mode of payment and that they now wished to be paid rent in advance.
21. As a fundamental legal principle, the doctrine of estoppel operates to prevent a party from asserting a particular right or position if their prior conduct, statements or legal actions would make it unfair or unjust to allow them to do so. In the matter herein, it was clear that the Respondent continued raising and delivering invoices to the Appellant on the basis of which the Appellant was expected to make remittances of rent. There was no evidence of any demand letter or any correspondence made whereby the Respondent protested any delay in rent

payment and the accusation that the Appellant persistently delayed in payment of rent was without basis.

22. It follows that I am persuaded that there was merit in this Appeal. Accordingly, I make orders as follows:

- (a) This Appeal is hereby allowed.**
- (b) The Judgment delivered on 17<sup>th</sup> July 2024 in Mombasa BPRT Case No. E152 of 2023 is hereby set aside in its entirety.**
- (c) The Respondent's Notice of Termination of Tenancy dated 15<sup>th</sup> June 2023 is hereby set aside.**
- (d) The Costs of the Reference in Mombasa BPRT Case No. E152 of 2023 shall be borne by the Respondent**
- (e) Each party shall bear their own costs in regard to this Appeal.**

**Judgement dated, signed and delivered in open court and virtually at Mombasa this 13<sup>th</sup> day of November, 2025**

.....  
**J.O. OLOLA**  
**JUDGE**

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) Ms. Ongeso holding brief for Mugandi Advocate for the Appellant
- c) Mr. Hassan Advocate for the Respondent