

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VOI

ELC APPEAL CASE NO. E018 OF 2025

ABDUL HAMISI

APPELLANT

=VERSUS=

DAVID MWENGE MASWI

RESPONDENT

JUDGMENT

The Appeal

1. This is an appeal against the decision and orders of the Business Premises and Rent Tribunal delivered on 8th August 2025 in the Tribunal at Mombasa in the Tribunal Case No. E154 of 2023 wherein the Tribunal entered judgment in favour of the Respondent herein as follows:-

i. The Tenant/Respondent Abdul Hamisi shall pay David Mwenge Maswi the sum of Ksh 495,000/- being rent arrears due as at July 2025.

ii. The Respondent shall vacate and give vacant possession of the business premises in Voi

Town within 30 days of the date of this judgment failing which he shall be evicted by a Licensed Auctioneer who shall be given security by the OCS Voi Police Station.

iii. The Respondent shall repair and restore the premises to the condition they were in as at April 2022 within 30 days hereof failing which the Applicant shall do the same and recover the said costs from him.

iv. The Applicant shall be at liberty to levy distress in respect to payment of the arrears.

v. The Respondent shall bear the costs of the suit.

2. The Appellant being aggrieved with the said decision filed the instant appeal vide a Memorandum of Appeal dated 6th September 2025. The following grounds were raised in the Appeal: -

(i) THAT the Tribunal erred in law and in fact in failing to exercise their discretion in favour of the Appellant.

- (ii) THAT the Tribunal erred in law and in fact by disregarding the Appellant and evidence and submissions.**
- (iii) THAT the Tribunal erred in law and in fact by failing to take into consideration that the Appellant was not in possession of the same on 24th August 2023 but went ahead and tabulated rent arrears from the 15th April 2022 until the date of the judgement.**
- (iv) THAT the Tribunal erred in law by ignoring the fact that the Respondent unlawfully seized the Appellant's property of Ksh 1.892,000/-.**
- (v) THAT the Tribunal erred in law and fact by wearing a hat of the Respondent in the matter thus arriving at a totally wrong decision.**
- (vi) THAT the Tribunal erred in law and in facts and misdirected itself by acting on the wrong and unsound principles and provisions of the law.**

3. The Appellant sought the following reliefs: -

- (i) THAT the Appeal be allowed.**

(ii) THAT the judgment delivered on 8th August 2025 in Tribunal Case No. E154 of 2023 be varied and or set aside.

(iii) THAT costs of the Appeal be granted to the Appellant.

Directions of the Court

4. Pursuant to the directions issued by this court, the Appeal was canvassed by way of written submissions. The Appellant filed submissions dated 13th November 2025 while the Respondent filed submissions dated 31st December 2025.

The Appellant's submissions

5. The Appellant submitted on the following issues;

i. THAT the Tribunal erred in law and in facts to exercise their discretion in favour of the Appellant.

ii. THAT the Tribunal erred in law and in facts by disregarding the Appellant's evidence and Submissions.

iii. THAT the Tribunal erred in law and in fact by failing to take into consideration that the Appellant was not in possession of the

premises as the Respondent took control and possession of the same on 24th August 2023 but went ahead and tabulated rent arrears from 15th day of April 2022 until the date of judgement.

iv. **THAT the Tribunal erred in law and in fact by ignoring the fact that the Respondent unlawfully seized the Appellant's Property of Kshs 1,892,600**

v. **THAT the Tribunal erred in law and in fact by wearing a hat of the Respondent in the matters thus arriving at a totally wrong decision.**

vi. **THAT the Tribunal erred in law and in facts and misdirected himself by acting on wrong and unsound principles of the law.**

vii. **Costs of the Appeal.**

6. Citing the case of **Mbogo & Another vs Shah (1968) EA 93,** it was submitted that the Tribunal erred by exercising its discretion to cause injustice on the part of the Appellant and it would only be in the interest of justice

that this court intervenes to defeat the injustice made to the Appellant by the Tribunal.

7. It was argued that evidence that was adduced in court was clear that if the Tribunal exercised its discretion the right way then it could have ruled in favor of the Appellant. There was evidence pointing to the fact that since the Respondent gained entry into the premises then he could not have been awarded the reliefs that were granted to him at the end.
8. On whether the Tribunal erred in law and facts by disregarding the Appellants evidence and submissions, it was submitted that the Tribunal failed to appreciate and properly evaluate the evidence and submissions adduced in totality and thereby rendering judgment that is unsound in principle and not a reflection of the evidence on record. The Tribunal erred in law and principle in failing to analyse evidence tendered and give reasons for the decision arrived at on each of the item/prayer allowed in the judgment. The Tribunal made a blanket judgment over the whole claim without scrutinizing the evidence tendered against each prayer sought, and failed to properly

consider issues outlined, submissions tendered and authorities in support thereof.

9. On whether the Tribunal erred in law and in fact by failing to take into consideration that the Appellant was not in possession of the premises as the Respondent took control and possession of the same on 24th August 2023 but went ahead and tabulated rent arrears from 15th day of April 2022 until the date of judgement, it was submitted that The Respondent procured court order for breaking in the premises with the assistance of the police. The Respondent broke in and seized properties belonging to the Appellant. The Respondent went on and prepared an inventory of the good seized and filed in court and the same appears at Page 25-26 of the Record of Appeal. Despite this being brought to the attention of the Tribunal it went on and tabulated rent arrears from April 2022 to the date of judgment and it is evidently clear that the Respondent unlawfully broke into the Appellant's business premises and seized all the property belonging to the Appellant.

10. According to the Appellant, the Tribunal cannot therefore award the Respondent rent arrears from a

period which the Appellant was not in occupation of the premises since he was thrown out and had no control of the same.

11. As to whether the Tribunal erred by ignoring the fact that the Respondent unlawfully seized the Appellant's property of Ksh 1, 892, 600, it was argued that the Tribunal did not look at the Appellant's evidence in Court having clearly showed that the Respondent broke into his premises and unlawfully seized his property worth 1,892,600. Hence therefore it will be unfair when the Appellant is ordered to pay Kenya shillings 495,000 and on the other hand stands to lose his property which to date is in custody of the Respondent.

12. It was submitted that the evidence that was brought before the Tribunal clearly showed the damage caused by the Respondent at the premises where the Appellant was doing business. The Respondent had a duty of care by ensuring that he protects the property belonging to his tenant. His decision to seize the properties clearly showed that he had decided to part away with the Appellant. The Tribunal again was silent on the Appellant's properties that were seized by the Respondent.

13. On whether the Tribunal erred in law and in fact by wearing a hat of the Respondent in the matter thus arriving at a totally wrong decision, Counsel submitted that the Tribunal should not have framed own issues, argued them within themselves and made a decision in favor of the Respondent. Counsel faulted the Tribunal for being impartial in the matter and going beyond the issues raised by the parties. Reliance was placed on the Bangalore principles on judicial conduct and Article 10 of the Constitution.
14. The Court was urged to allow the appeal together with costs as against the Respondent.

The Respondent's submissions

15. The Respondent submitted on the same issues that were outlined by the Appellant.
16. It was submitted that what was before the Tribunal was not a matter requiring the Tribunal to exercise its discretion since the Respondent was demanding rent arrears, repair of his damaged premises, vacant

possession and costs. No discretion was abused or capriciously applied.

17. On whether the Tribunal erred and failed to consider that he was not in possession of the premises as the Respondent took control and possession of the same on 24th August 2023 but went ahead and tabulated rent arrears from 15th April 2023 until the date of the judgment, it was submitted that after attachment of some items the Appellant continued being in possession and even demolished but of the premises purporting that his Landlord was Keno Oil Co. Ltd and not the Appellant and he failed to provide any evidence confirming the same.

18. In respect to the Appellant's seized property of Ksh 1, 892, 600 and whether the Tribunal failed and erred in disregarding the same, it was submitted that the Respondent never broke into the premises, the same was done lawfully by duly authorised auctioneers, It was contended that the Appellant is still in occupation, not paying rent and has refused to repair the damaged premises. The Appellant did not prosecute the said claim before the Tribunal and further the same was a special

damage claim which ought to have been specifically pleaded and proved.

19. It was further submitted that the Tribunal properly considered the evidence on record. The Appellant failed to plead and prove the alleged loss of Ksh 1,892,600.00 and the said allegation lacked merit.

20. On whether the Tribunal erred in law and fact by wearing the Respondent's hat and arriving at a wrong decision, it was submitted that the Appellant was being unfair to the judicial officers who were just carrying out their mandate. The Tribunal made a decision based on the law and evidence and the mere fact that the decision was against the Appellant it is not prima facie indication that the judicial officer took sides since there is an avenue for appeal.

21. It was further submitted that the Appellant entered into a tenancy agreement with the Respondent on 15th April 2022 and paid one month rent and deposit and as such the Tribunal arrived at the correct decision. The Appeal has no merit and the same ought to be dismissed with costs.

Analysis and Determination

22. This being a first appeal, the power of this court is set out in **Order 42 Rule 32** of the **Civil Procedure Rules**. Being steered by the principles enunciated in the well-cited case of **Selle v Associated Motor Boat Company Ltd [1968] EA 123**.

23. In view of the aforementioned case, three complementary principles ensue; first, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions; second, in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and third, it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

24. The court has considered the entire record of appeal, the Memorandum and grounds raised in this appeal together with the parties written submissions and has outlined the following issues for determination: -

(i) Whether the Tribunal erred in law and fact in failing to properly consider the Appellant's evidence and submissions before it.

(ii) Whether the Tribunal erred in law and in facts and misdirected itself by acting on the wrong and unsound principles and provisions of the law.

(iii) What are the appropriate reliefs to grant herein.

Issue No. (i)

Whether the Tribunal erred in law and fact in failing to properly consider the Appellant's evidence and submissions before it.

25. This issue seeks to address grounds 2, 3 and 4 of the memorandum of appeal.

26. It was the Appellant's contention that the Tribunal erred in failing to consider his evidence, submissions and this included the fact that the Tribunal failed to consider that he was not in possession of the premises as the Respondent took control and possession of the same on 24th August 2023 but went ahead and tabulated rent

arrears from the 15th day of April 2022 until the judgment date.

27. The Appellant also faulted the Tribunal for disregarding the parties submissions and framing its own while determining the matter.

28. The Respondent in submitting on the said issue argued that the matter before the Tribunal was conducted via viva voce evidence, submissions were filed and judgment delivered.

29. A perusal of the record of appeal reveals the following, that the Appellant testified and called Jimmy Chuma to also testify on his behalf while the Respondent testified as the sole witness in support of his case.

30. During trial before the lower court at page 72 of the record of appeal, the Appellant the land belonged to Kenya Oil Company and that he was paying rent to Jimmy Chuma. While Jimmy Chuma on the other during cross examination, he conceded that there was an agreement between the David Mwenge Maswii the Respondent herein and Abdul Hamisi the Appellant in this appeal. He also conceded during trial that the Appellant was put into the property by the Respondent and was given the premises

by the Respondent and that is why there was an initial agreement between the two. He also stated at page 73 of the record of appeal that the Respondent is the owner of the premises.

31. From the evidence that was tendered it is therefore clear that while the Appellant claims Jimmy Chuma is the Landlord whom he was paying rent, Jimmy Chuma himself conceded that the building on the said property belongs to the Respondent, the Respondent is the one who put up the same, the Respondent is equally the one that brought the Appellant to the premises and that the initial agreement was even done between the Appellant and the Respondent. This evidence collaborated with the testimony that was tendered by the Respondent and as such the Appellant's contention that Jimmy Chuma was the Landlord is one that has no basis at all.

32. Whether the Tribunal framed its own issues and thus disregarding the issues that were set out in the submissions of the parties, it is worth noting that a Court or Tribunal is required to state its issues, findings or decisions with reasons upon each decision on each issue. Framing of issues is an important step in determination of

a case as it defines the areas of controversy and narrows down the scope of inquiry. The Court in the case of **Haj Ibrahim Mohamed Saeed vs AL- Haj Othman Kaid Saliam [1962] EA 149** reiterated the importance of framing issues by the trial court stating that failure to do so misleads the trial court in its consideration. However, failure to frame issues is not necessarily fatal. In the instant case, a perusal of the record of appeal shows that parties did not file any agreed issues, each party submitted on its own issues where some issues were similar upon which the Tribunal proceeded to the issues and render its judgment. In the circumstances the Tribunal cannot be faulted on the same.

33. In view of the foregoing, it is not entirely true that the Tribunal did not consider the Appellant's evidence and submissions since the Tribunal had an obligation to consider the entire evidence tendered both oral and documentary before pronouncing itself and considering the totality of the weight of the evidence tendered, the Tribunal did not err when it held that the tenancy agreement, mpesa payment and occupation by the

Appellant supported the existence of a landlord tenant relationship.

34. On the other aspect as to whether the Tribunal erred in not considering the fact that the Respondent unlawfully seized the Appellant's goods worth 1,892,600/ upon which the Appellant was entitled to be compensated for the same. A perusal of the response filed by the Appellant shows that no particulars were offered for the same. The same was akin to special damages claim which is trite law that any claim for special damages ought to be specifically pleaded and proved to the satisfaction of the court. Equally the Tribunal cannot be faulted for failing to consider the same.

Issue No. 2

Whether the Tribunal erred in law and in facts and misdirected itself by acting on the wrong and unsound principles and provisions of the law.

35. This issue seeks to address grounds number 1, 5 and 6 of the memorandum of the appeal.

36. It was the Appellant's contention that the Tribunal erred in failing to exercise its discretion in his favour, further the Tribunal erred in law by wearing a hat of the Respondent

and thus arriving at a wrong decision and that the Tribunal erred in law and facts and misdirected itself by acting on the wrong and unsound principles and provisions of the law.

37. On the issue of discretion, the Respondent submitted that the issues before the Tribunal was not one that could be determined by exercise of discretion but through evaluation of evidence and the law.

38. From the record of the appeal filed herein, it is evident that the Respondent's claim before the Tribunal was in respect to rent arrears, repair of the damaged premises, vacant possession and costs. In considering the said reliefs that were sought, save for costs, it remains uncertain as to how the Tribunal was to exercise its discretion in considering all the other reliefs.

39. As to whether the Tribunal was biased in wearing the Respondent's hat and arriving at a wrong decision, it is worth noting that such an issue ought to be substantiated by cogent evidence for this court to consider. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence. The said biasness must be manifestly clear that

is visible from the entire proceedings and not only in the decision. In the absence of any evidence to the contrary this court is unable to find in favour of the Appellant on the said issue.

40. The Appellant also faulted the Tribunal in rendering its decision, however this court having pronounced itself earlier on the issues raised herein, it is the finding of this court that the Tribunal cannot be faulted for the orders issued and it is therefore not open for this court to interfere with the same.

Conclusion

41. The upshot is that after careful review and analysis of all the grounds of appeal and the entire record, this court finds no fault with the decision of the Tribunal.

42. On the issue of costs, costs are in the discretion of the court and in any event to a party who is successful. However, considering the circumstances of this case it will not be prudent to condemn the Appellant to bear the costs of the appeal. In the circumstances, this court directs each party to bear own costs of the appeal.

Final orders

43. In conclusion, this court is not persuaded to interfere with the decision of the Tribunal rendered on 8th August 2025. It is the finding of this court that the Appeal has no merit, the same is hereby dismissed and each party to bear own costs of the Appeal.

Dated, Signed and Delivered Virtually this 28th day of January 2026.

E. K. WABWOTO
JUDGE

In the presence of:-

Mr. Mwazighe for the Appellant.

Mr. Wahome for the Respondent.

Court Assistant: Mary Ngoira.