South Coast Holdings Limited v Alibhai t/a Diani Gallery (Civil Appeal E023 of 2022) [2026] KECA 502 (KLR) (13 March 2026) (Judgment)

Neutral citation: [2026] KECA 502 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E023 OF 2022

AK MURGOR, GW NGENYE-MACHARIA & JM NGUGI, JJA

MARCH 13, 2026

BETWEEN

SOUTH COAST HOLDINGS LIMITED ..... APPELLANT

AND

MUNAVER N. ALIBHAI T/A DIANI GALLERY ..... RESPONDENT

(An Appeal against the Judgement, Decree and Order of the High Court at Mombasa (P.J. Otieno, J.) delivered on 26th May 2020 in HCC No. 75 of 2015)

JUDGMENT

1. The Respondent, Munaver N. Alibhai T/A Diani Gallery, filed a suit against the Appellant, South Coast Holdings Limited seeking:
    a. An order requiring the Appellant to open the shop and allow the Respondent possession of the same;
    b. An order restraining the Appellant from levying distress on the premises or from interfering with the Plaintiff's tenancy in any way;
    c. An order requiring the area police to assist in the opening of the shop;
    d. Loss of sales income, general damages together with interest at court rates;
    e. Costs of and incidental to this suit.
2. By way of a letter of offer dated 1st November 2009, the Appellant leased shop No. F on 1st Floor in Centrepoint Diani (the suit premises), situated in Plot No.818 Diani Beach to the Respondent. On or about January 2015, the Respondent claimed that the Appellant unlawfully barricaded the entrance to the shop by fastening chains and padlocking the front door, on account of alleged rent arrears, without issuing any prior notice or demand. As a consequence, the Respondent was, from January 2015, unable

to operate his business in the suit premises; that in addition, the Respondent also claimed that the Appellant threatened to levy distress upon the Respondent's goods, namely jewelry valued at over Kshs. 3,000,000, which remained locked within the suit premises, while at the same time continuing to charge the Respondent rent.

3. In response to the suit, the Appellant filed an Amended Statement of Defence and Counterclaim dated 13th December 2018, in which it denied all the allegations contained in the Amended Plaint, but averred that it had issued several demands and notices to the Respondent requiring settlement of the outstanding rent arrears in an amicable manner, which demands the Respondent allegedly willfully ignored.

4. The Appellant also challenged the jurisdiction of the court and gave notice of its intention to raise a preliminary objection in that regard. However, no such preliminary objection was subsequently filed or prosecuted.

5. In its Counterclaim, the Appellant contended that the Respondent, as the Defendant in the Counterclaim, had breached various provisions of the written lease agreement, as well as implied terms governing the ensuing periodic tenancy after the expiry of the lease, by failing to pay rent as and when it fell due. As a result of the said breaches, the Appellant, as the Plaintiff in the Counterclaim, was alleged to have suffered substantial loss and damage, both monetary and otherwise, including loss of business. Consequently, the Appellant sought judgment against the Respondent for:

    a. Kshs. 1,869,928/=, being rent and service charge arrears accrued and payable during the subsistence of the lease up to 30 November 2015;

    b. Kshs. 1,977,915/=, being sums allegedly due and payable from 1 December 2015, upon termination of the lease, up to 30 April 2018, when possession was surrendered;

    c. Interest on the total sums due at the prevailing court rates;

    d. Any other relief the Court might deem just in the circumstances; and

    e. Costs of the suit and the Counterclaim.

6. The matter proceeded to hearing and the Respondent, who testified as PW1, stated that although he had executed a letter of offer, he never entered into a formal lease agreement with the Appellant. He stated that in December 2014, his landlord forcefully denied him access to the suit premises by locking them, and that the premises remained closed until January 2016, despite the fact that he was not in arrears of rent. He further stated that the closure of the premises had not been sanctioned by any court order.

7. The Respondent claimed that as a result of the closure of his business, he lost his regular clientele and suffered loss of income; that based on his income tax returns for the year 2014, he had earned a total of Kshs. 1,442,500, and that for the year 2015, he had projected a 10% increase in income amounting to Kshs. 1,580,000. He further stated that although the court issued orders on 21st December 2015 directing that his shop be reopened, the Appellant only complied in January 2016, after which the Appellant began harassing him by disconnecting the electricity. As a result, the Respondent was compelled to close the shop again in 2017.

8. The Respondent further stated that as from January 2016, he did not owe any rent arrears but only accumulated service charge arrears. He stated that the invoice dated 1st April 2015 for Kshs. 210,052.28 related solely to service charge arrears and was contrary to the agreement between the parties. He also challenged the invoice dated 2nd April 2015, which demanded rent for the period between November

2014 and February 2015, together with service charge, which was despite the fact that the premises had remained locked over that period. The Respondent further stated that the statement reflecting rent arrears of Kshs. 2,058,740 that improperly included periods during which he was not in occupation of the premises.

9. Upon cross-examination by counsel for the Appellant, PW1 confirmed that he had occupied the suit premises from 2011, notwithstanding that the letter of offer was dated 2009. He stated that between 2009 and 2015, he had never been in arrears and that he was unaware that the premises had allegedly been locked due to arrears. He further admitted that he had not quantified the losses pleaded in his Plaint and confirmed that he no longer required police assistance as he had since vacated the suit premises.

10. PW1 further confirmed that he was unaware that service charge was variable and subject to increase depending on circumstances. He also stated that although he reported alleged harassment by the Appellant to the police, no action was taken.

11. In re-examination, the Respondent stated that from the statements appearing in his bundle of documents, it was not possible to distinguish whether the debits reflected rent or service charge. He further reiterated that the letter of offer had fixed the service charge at Kshs. 20 per square foot.

12. In support of its case, Mr. Sultan Khimji, DW1 a director of the Appellant stated that the Respondent was a tenant at Centre Point Plaza, Diani; that the tenancy relationship was governed by a letter of offer executed by both parties, which provided for a six-year tenancy expiring on 31st October 2015; that the Respondent had paid a security deposit of Kshs. 76,800; that service charge was set at Kshs. 20 per square foot (approximately Kshs. 7,600/= per month, subject to annual adjustment); and that the monthly rent for the final year of the tenancy was Kshs. 34,188.

13. DW1 stated that the Appellant issued a letter dated 11th May 2015 notifying the Respondent of default in rent payment, and on 4th September 2014, the Respondent was issued with a notice and demand for rent arrears of Kshs. 1,206,661 as at 20th July 2014; that on 28th September 2014, an email was sent to the Respondent demanding payment of arrears accrued over 18 months.

14. According to DW1, the Respondent responded by indicating that he had raised half of the outstanding amount and would clear the balance by December 2014; and that the Respondent issued postdated cheques, some of which were dishonoured. On 21st January 2015, the Appellant demanded payment of Kshs. 871,449 being arrears as at 31st December 2014, failing which distress would be levied.

15. DW1 further stated that by a letter dated 5th May 2015, the Respondent admitted owing rent arrears of Kshs. 884,761 and requested that his shop be reopened as he made arrangements to settle the arrears; that a final statement issued on 6th August 2015 reflected an outstanding balance of Kshs. 1,049,383.92, which later escalated to Kshs. 2,489,192 as at 31st March 2017.

16. During cross-examination, DW1 stated that the tenancy was governed solely by the letter of offer, as no formal lease had been executed; that the premises were locked in mid-2015 following default in rent payment and he confirmed that no court order had been obtained authorizing eviction. He also confirmed that there was service charge outstanding for the year 2011, though the invoice was issued in July 2014, and that all demands for rent and service charge arrears were issued in 2014.

17. DW1 admitted that he did not produce receipts demonstrating how the service charge shortfall had been calculated, nor did he explain how the service charge had been apportioned to the Respondent. He nevertheless insisted that the Appellant's further list of documents contained details of the rent arrears computation and stated that the arrears covered a period of 72 months, despite the Respondent

not being in occupation for the entire duration. He further acknowledged that pursuant to the court order of 18th December 2015, the period during which the premises were locked ought not to have been included in the computation of rent arrears.

18. DW1 confirmed that the statement of rent arrears included VAT, and that VAT had been applied again at the end of the same statement. He admitted that the figures pleaded in the Counterclaim were therefore inaccurate due to the double application of VAT, and that any change in the principal amount would necessarily affect the interest calculations; that further, the payments amounting to Kshs. 2,637,446 had been made, which exceeded the rent arrears of Kshs. 2,058,740, and attributed the excess to service charge shortfall. He denied that the statement of service charge shortfall was issued out of malice or fatigue with the tenant. When questioned on whether the Respondent's premises were relocked, DW1 stated that he could not confirm the same. He stated that although the last monthly rent payable was approximately Kshs. 34,000, the amounts charged included service charge. He ultimately conceded that demands had been made for periods during which the Respondent was not in occupation and admitted that the sums pleaded in the Counterclaim required reconsideration.

19. Upon re-examination, DW1 stated that service charge shortfall was apportioned proportionately among tenants based on occupied space, and that, although invoices were issued belatedly, they related to the subsistence of the tenancy.

20. In response to questions from the Court, DW1 confirmed that locked premises do not consume electricity, that the premises were locked in April 2015 and reopened in January 2016, during which period rent could not lawfully be charged, and further conceded that VAT ought not to have been charged twice.

21. By way of a Notice of Motion dated 5th June 2015, filed contemporaneously with the Plaint, the Respondent sought interim and substantive injunctive reliefs pending the hearing and determination of the suit. Specifically, the Respondent prayed that the application be heard ex-parte in the first instance and inter partes thereafter; that a mandatory injunction be issued compelling the Appellant to allow access to the suit premises and the goods therein; that the Appellant be restrained from levying distress or otherwise interfering with the Respondent's possession of the premises; that the Area Police be ordered to assist in the opening of the shop; and that costs of the application be provided for.

22. The application was grounded on the Respondent's contention that he was a tenant in the suit premises and that the Appellant had unlawfully locked the shop by chaining and padlocking it, thereby denying him access to the suit premises and his goods, which included jewelry. The Respondent further contended that while the suit premises remained locked, the Appellant continued to threaten to levy distress for rent. It was the Respondent's position that the tenancy was a controlled tenancy, and that the dispute related not to rent, but to service charge.

23. In response, the Appellant filed a replying affidavit and statement of defence, admitting that the suit premises had been locked, but maintained that the action was lawful and justified. The Appellant asserted that the Respondent had breached his obligations under the tenancy by failing to pay rent and service charge, and that the Appellant was therefore entitled to exercise remedies of distress and forfeiture. The Appellant contended that it had given notice to seal the suit premises and that the closure was undertaken in pursuit of recovery of rent and service charge arrears.

24. In a ruling dated 18th December 2016, the court identified the key issues to be whether the tenancy between the parties was a controlled tenancy, whether the Appellant was entitled to levy distress for rent and service charge, and whether the Appellant was entitled to close and lock the premises in order to enforce recovery of alleged arrears.

25. The court found that the lease was unregistered, and, therefore, fell within the ambit of a controlled tenancy under the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* (Cap 301) which can only be terminated or its terms altered in strict compliance with Sections 4 and 6 of the Act, and that the right of forfeiture or re-entry could only be exercised through the Tribunal. The Appellant could not, of its own motion, take possession of the premises without an order of the Tribunal.

26. In finding that the Respondent had demonstrated not only a prima facie case, but a strong and clear case, the court issued a mandatory injunction compelling the Appellant to forthwith and unconditionally open the suit premises and grant the Respondent unhindered access. A temporary injunction was also issued restraining the Appellant from unlawfully levying distress on account of service charge pending the hearing and determination of the suit. The Appellant was obligated to pay rent reserved, excluding the period during which the premises had been locked, and ordered that the tenant comply with his obligations under the tenancy.

27. Upon hearing the parties, the trial Judge rendered a Judgment and found that the relationship between the Appellant and the Respondent was a controlled tenancy within the meaning of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, a position that had already been settled by an earlier ruling of the Court and had not changed by the time of final determination. As a controlled tenant, the Respondent was entitled to the full protection of the statute.

28. The Court further found that the Appellant did not issue any valid statutory notice of termination or notice of distress as required under Section 4 of the Act; that the letters and demands relied upon by the Appellant merely sought payment of alleged rent arrears and threatened distress, but did not comply with the mandatory statutory procedure for terminating or altering the terms of a controlled tenancy. Consequently, the court found that the Appellant failed to lawfully terminate the tenancy.

29. On service charge, the court concluded that the recalculation and backdating of service charge shortfalls by the Appellant constituted an unlawful alteration of the terms of the tenancy; that any increase or recalculation of service charge to the detriment of the Respondent required service of a statutory notice under Section 4 of the Act. In the absence of such notice, and given that invoices were issued several years late and without proper explanation, the court held that the recalculated service charge and alleged shortfalls were unlawful and irrecoverable.

30. The Court also found that the Appellant unlawfully locked and padlocked the Respondent's premises without obtaining a court or tribunal order. It held that a tenancy confers a proprietary right which cannot be taken away through self-help or extra-judicial means. By locking the premises without due process, the Appellant constructively evicted the Respondent. The court, therefore, found that the eviction was illegal, unlawful, and tortious, having been carried out in blatant disregard of the law. In so finding, the court awarded general damages, of Kshs. 2,000,000 to the Respondent as compensation for unlawful and wrongful eviction, together with interest at court rates from the date of Judgment.

31. However, with regard to the Respondent's claim for loss of business and loss of sales, it was held that such a claim being in the nature of special damages, it must be specifically pleaded and strictly proved, and having failed to plead the alleged loss with particularity, the claim for loss of sales and business income therefore failed.

32. On the Appellant's counterclaim, the trial court held that rent is only payable where a tenant enjoys possession of the premises. Having found that the Respondent was unlawfully dispossessed between January 2015 and January 2016, the court held that the Appellant was not entitled to rent or service charge for that period, and that the recalculated service charge was equally unrecoverable; that although no defence had been filed to the counterclaim, the Appellant still bore the burden of proof, and its

own witness had admitted that the figures claimed were inaccurate, that VAT had been applied twice; and that rent had been demanded for periods when the Respondent was not in occupation.

33. The court nevertheless found that the Respondent was in lawful occupation of the premises between January 2016 and April 2018, during which period rent had properly accrued. Based on the prevailing rent, the court awarded the Appellant Kshs. 1,203,732 as unpaid rent for that period, together with interest at court rates from the date of the counterclaim.

34. In the final result, the Court entered Judgment for both parties in part: awarding the Respondent general damages of Kshs. 2,000,000 for unlawful eviction and awarding the Appellant Kshs. 1,203,732 being unpaid rent for the period of lawful occupation. In view of the mixed outcome, the Court ordered that each party bear its own costs.

35. Aggrieved, the Appellant has filed an appeal to this Court on grounds that; the learned Judge was in error in awarding the Respondent Kshs. 2,000,000 as general damages for alleged breach of contract despite the settled principle of law that general damages are not applicable to claims arising from breach of contract; in awarding the Respondent Kshs. 2,000,000 which was neither pleaded nor proved as damages arising from the alleged breach of contract; in failing to apply the principle of law to the effect that loss or special damages must be specifically pleaded and strictly proved; in failing to find that the Respondent had breached the written lease agreement and various implied terms and conditions despite admissible evidence adduced by the Appellant demonstrating such breach; in failing to find that as a result of the Respondent's breach of contract and refusal or failure to pay the Appellant the undisputed rent and accrued service charge, the Appellant suffered colossal monetary damage; in failing to award the Appellant Kshs. 1,869,928, being monies payable as arrears of rent and service charge due and payable during the pendency of the lease up to 30th November 2015, and Kshs. 1,977,915, being amounts due and payable to the Appellant from 1st December 2015, when the lease terminated, up to 30th April 2018, when the Respondent surrendered possession.

36. The appeal came up for hearing on a virtual platform, where learned counsel Mr. Aluvisia holding brief for Mr. Gabo appeared for the Appellant and learned counsel Ms. Moolraj appeared for the Respondent. Both parties filed written submissions. In their written submissions, counsel for the Appellant submitted that the dispute between the parties was purely contractual in nature, arising from a landlord and tenant relationship governed by the terms contained in a written lease and/or letter of offer. Counsel argued that since the cause of action arose from an alleged breach of contract, the trial court erroneously departed from the settled principle of law that general damages are not recoverable in claims founded on breach of contract. In this regard, counsel relied on the decision of this Court in the case of Kenya Tourist Development Corporation vs Sundowner Lodge Limited [2018] KECA 312 (KLR) where this Court overturned a High Court decision and reaffirmed that general damages are not awardable for breach of contract Counsel further submitted that the trial court compounded this error by awarding the Respondent a sum of Kshs. 2,000,000 for which the Respondent had neither pleaded nor proved. Counsel urged us to interrogate the pleadings and conclude that the award was issued in a vacuum and contrary to settled principles. In support of this position, reliance was placed on Provincial Insurance Co. EA Ltd vs Mordekai Mwanga Nandwa (KSM CACA No. 179 of 1995), for the proposition that special damages must be specifically pleaded and strictly proved, and that general damages cannot be awarded in lieu thereof in contractual claims; that a party alleging loss arising from breach of contract must produce cogent evidence to prove the alleged loss and that mere assertions of liability are insufficient.

37. Counsel submitted that the evidence on record demonstrated that the Respondent had admitted being indebted in rent arrears, and that the trial court's findings were contradictory, having acknowledged the Respondent's obligation to pay rent while at the same time attributing liability to the Appellant. It was

further submitted that the trial court failed to appreciate that the Respondent had breached various express and implied terms of the lease agreement, despite clear and admissible evidence adduced by the Appellant demonstrating persistent default in rent payment, dishonored cheques, and admitted arrears, which evidence was not properly evaluated by the trial court. On the damages suffered by the Appellant, counsel submitted that as a direct result of the Respondent's breach of contract and refusal or failure to pay rent and service charge, the Appellant incurred colossal monetary loss.

38. Finally, counsel submitted that the Appellant had specifically pleaded and proved its claim for rent and service charge arrears amounting to Kshs. 1,869,928 for the period up to 30th November 2015, and Kshs. 1,977,915 for the period between 1st December 2015 and 30th April 2018 when the Respondent surrendered possession, and that the trial court failed to properly consider the evidence and misdirected itself in law and fact by declining to award the Appellant the pleaded sums.

39. Submitting on behalf of the Respondent, counsel stated that the appeal was devoid of merit and should be dismissed. It was contended that the learned Judge correctly applied both the law and the evidence on record. Counsel maintained that the Appellant had mischaracterized the nature of the Respondent's claim by portraying it as one founded purely on breach of contract, whereas the judgment clearly demonstrated that the award of damages was made on the basis of unlawful eviction, which is tortious in nature and attracts general damages.

40. Counsel further submitted that the relationship between the parties gave rise to a controlled tenancy under the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, and that the Appellant unlawfully evicted the Respondent by padlocking the premises without a court order. It was argued that the High Court had jurisdiction to entertain the matter and to grant both a mandatory injunction and general damages, even in the context of a controlled tenancy. In support of this proposition, reliance was placed on Sammy Kipruto Tuito vs Jeremiah Koech & Another (HCCA No. 43 of 2008) and Francis Muriithi vs Bernard Gathuku Ngugi (HC Misc. Application No. 1352 of 2006), which affirmed the court's jurisdiction in cases involving unlawful eviction.

41. Counsel emphasized that the learned Judge properly found that the Appellant carried out an illegal eviction without a court order, a fact that was admitted by the Appellant's own director during cross-examination. In this regard, counsel relied on the decisions in the cases of Gusii Mwalimu Investment Co. Ltd vs Muahimu Hotel Kisii Ltd [1996] eKLR and Ripples Limited vs Kamau Mucuha (Nairobi HCCC No. 4522 of 1992), for the proposition that landlords cannot repossess premises through self-help and must obtain court or tribunal orders before evicting tenants.

42. It was further submitted that the award of Kshs. 2,000,000 was neither arbitrary nor based on breach of contract, but was grounded on settled principles governing damages for unlawful eviction. Counsel argued that the Appellant's reliance on authorities relating to breach of contract was misplaced and irrelevant. To demonstrate that general damages are awardable in cases of unlawful eviction, counsel cited the case of Mattarella Limited vs Michael Bell & Another [2018] eKLR, where the court awarded general damages for eviction carried out through illegally.

43. Counsel further submitted that the Respondent had properly pleaded unlawful eviction and general damages, and that evidence in support was placed before the trial court. The cases of Francis Githuku Kabue vs Kimani Chege & Another [2009] eKLR, and Francis Muringu Mureu t/a Jem Corner Bar vs John Murang'a Kungu (Nairobi HCCC No. 119 of 1988), were relied on for the proposition that tenants who are unlawfully evicted are entitled to both punitive and general damages.

44. On the Appellant's contention that no wrongdoing was pleaded or proved, it was submitted that the Respondent had pleaded and proved that the Appellant locked the premises for over a year without a court order, disconnected utilities, and ignored court orders directing reopening of the premises. These

facts, it was argued, were admitted by the Appellant's own witness, thereby justifying the conclusions reached by the trial court.

45. With respect to the counterclaim, counsel submitted that the trial court correctly dismissed it in part after finding that the Appellant's records were erroneous and misleading, that VAT had been applied twice, and that rent had been demanded for periods when the Respondent was not in possession. As a consequence, the Appellant could not lawfully benefit from its own unlawful acts; that the unlawful eviction constituted a tort, and that courts have jurisdiction to award general damages for such conduct. Reliance was placed on Jolieti Wambui Njeri vs Stanley Ondimu & Another [2019] eKLR, where the court held that trespass and forcible eviction constitute torts compensable by general damages.

46. This being a first appeal, this Court's duty is to reconsider the evidence, evaluate it and draw our own independent conclusions, but making allowance for the fact that we have not seen or heard the witnesses.

47. In the case of Selle vs Associated Motor Boat Company Limited [1968] EA 123, 126 where the Court set out the principles upon which the Court acts in a first appeal thus:

> " Briefly put they [the principles] 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 witness and should make due allowance in that 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."

48. Upon consideration of the Record, (which we point out omitted to include the proceedings that were before the trial court) and the submissions by counsel, the following issues arise for determination:

    i. Whether any wrongdoing or liability on the part of the Appellant was lawfully pleaded and proved so as to justify the award of damages against the Appellant.

    ii. Whether the learned Judge was wrong in failing to find that the Respondent was in breach of the written lease agreement and/or implied terms of the tenancy, and whether such breach entitled the Appellant to relief.

    iii. Whether the learned Judge awarded the Respondent Kshs. 2,000,000 as general damages for breach of contract.

    iv. Whether the learned Judge failed to appreciate that the Appellant suffered loss and damage as a result of the Respondent's breach of contract and the failure to pay rent and accrued service charge.

    v. Whether the learned Judge was wrong in failing to award the Appellant the sums claimed in the counterclaim, namely arrears of rent and service charge for the periods pleaded.

49. We begin with whether any wrongdoing or liability on the Appellant's part was pleaded and proved so as to justify the award of damages against the Appellant. The Appellant's argument is that the Respondent failed to establish any actionable wrong capable of attracting liability, and that the award of damages was, therefore, made without a proper legal foundation.

50. A perusal of the pleadings discloses that the Respondent specifically stated that the Appellant unlawfully barricaded, chained, and padlocked the suit premises without notice and without a court order, thereby denying him access to the suit premises and to his goods. The Respondent further pleaded that the Appellant continued to charge rent and threatened to levy distress while the suit premises remained locked. These averments, taken together, clearly disclosed a cause of action founded on unlawful eviction and trespass, both of which are recognized torts in law. Furthermore, at the trial, the Respondent adduced evidence in support of these pleadings.

51. Significantly, the Appellant's own witness admitted under cross- examination that no court or tribunal order had been obtained prior to the locking of the premises. The witness further conceded that the premises were locked for a prolonged period and that rent and service charge were demanded for periods during which the Respondent was not in possession. These admissions materially corroborated the Respondent's case and established the factual basis of its unlawful eviction.

52. It is also worthy of note that, in a ruling dated 18th December 2016, the High Court made a definitive determination that the relationship between the parties constituted a controlled tenancy within the meaning of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*. No appeal or review were preferred against this determination and, therefore, it remained binding on the parties and the trial court when the final Judgment was delivered.

53. The procedure for termination of a controlled tenancy is provided under Section 4(2) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* and specifies:

> " A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under such a tenancy, shall give notice in that behalf to the tenant in the prescribed form."

54. This Court in the case of Narshidas & Company Limited vs. Nyali Air Conditioning and Refrigeration Services Limited, Civil Appeal No. 205 of 1995, it was stated that:

> "The Landlord and Tenant (Shops, Hotels & Catering Establishment) Act Cap 301 Laws of Kenya 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 and the notice must also specify the grounds upon 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...The notice to quit purportedly relied on by the defendant in this appeal is by no means a notice which in any way complies with Form A as prescribed in the Act. Such notice can only have been given pursuant to the provisions of section 7(1)(g) of the Act. The notice to quit given or issued by the defendant was clearly void and had no effect in law on the plaintiff's tenancy and the plaintiff was under no duty, legal or otherwise to react to it."

55. In the case of Lall vs Jeypee Investments Ltd Nairobi HCCA No. 120 of 1971 [1972] EA 512, the court stated:

> " The *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* is an especially enacted piece of legislation which creates a privileged class of tenants for the purpose of affording them the protection specified by its provisions against ravages of predatory landlords. Such protection can only be fully enjoyed if the provisions of Act are observed to the letter otherwise the clearly indicated intention of the legislature would be defeated. In order to be effective in this fashion the Act must be construed strictly no matter how harsh the result... The Landlord and Tenant Act laid down a code which Parliament intended to be followed and if a landlord does not give notice of termination as prescribed, the notice will be ineffectual. This may seem a technical and unmeritorious defence, but there is no doubt that the court has no power to dispense with these time limits if the defendant chooses to object at the proper time. This is an Act which requires, insofar as the giving of the notice is concerned, absolute and complete not merely substantive compliance with its peremptory provisions."

56. It is not in dispute that there was no lease agreement signed between the parties. It is not also disputed that at no time was a statutory notice of termination or notice of distress ever issued in accordance with Section 4 of the Act. Instead, the Appellant relied upon correspondence that merely demanded payment of alleged arrears and threatened distress, but it failed to comply with the mandatory statutory requirements for the termination or alteration of a controlled tenancy. In the absence of such notice, the Appellant had no lawful basis on which to interfere with the Respondent's possession of the suit premises. Yet, with the padlocking of the suit premises in the absence of a statutory notice and without obtaining a court or tribunal order, thereby denying him access to the premises and to his goods, and the continued demand for rent and threats to levy distress while the premises remained locked was unlawful, and established clear wrongdoing on the Appellant's part. In view of the pleadings and the evidence, the learned Judge was fully justified in reaching a finding that the Appellant was liable for the loss and damage occasioned to the Respondent. In effect, the Appellant's contention that no actionable wrong was established is therefore unfounded.

57. Having so found, the next issue is whether the learned Judge awarded the Respondent Kshs. 2,000,000 as general damages for breach of contract.

58. The Appellant's primary grievance is that the learned Judge was in error in awarding the Respondent Kshs. 2,000,000 as general damages, allegedly in contravention of the settled principle of law that general damages are not recoverable for breach of contract, and further that the award was neither pleaded nor proved.

59. Indeed, it is trite law that general damages are not awardable in claims founded on breach of contract. In the case of Dharamshi vs Karsan [1974] EA 41, the Court of Appeal for Eastern Africa, the predecessor of this Court held that, general damages are not allowable in addition to quantified contractual damages, as such an award would amount to impermissible duplication. This position has consistently been reaffirmed, in later cases including Securicor (K) Ltd vs Benson David Onyango & Another [2008] eKLR and Kenya Tourist Development Corporation vs Sundowner Lodge Limited (supra).

60. And in the case of Eric Adome & another vs Pauline Kasumba Osebe & another [2014] KECA 417 (KLR), this Court made an award for general damages in similar circumstances thus:

> "The first appellant alleged that the second respondent had closed the premises for a period of ten (10) months and thus was not doing business in the premises, but that was rebutted

when Pauline who was declared a competent witness by the trial court and who was the agent of the second respondent stated in cross-examination that she only closed the shops temporarily to see her husband at the hospital and was returning to the shop to open it regularly. In any case that the second respondent kept on paying rent and that some stock, however few were found in the premises and taken away by the appellants was evidence that the premises broken into by the respondents and thereafter closed with their padlock was being used for business the purpose for which it was hired. That business was abruptly stopped and hence general damages was properly claimed. What was difficult in the entire matter was the basis for assessing the quantum of that general damages and we think that is what the trial court meant when it said that the second respondent did not adduce "clear evidence to the effect of costs However, the plaintiff did not have the proposal or the amount," - sentiments that are difficult to appreciate. We too agree, like the learned Judge did agree that the second respondent was entitled to award of general damages. In the English case Koufos v. C. Czarnikow, Ltd, (1967) 3 All E.R. 686, it was stated as follows on the principles that guide the court when considering whether or not to award general damages in cases of breaches of contract:

"The general principle on which damages are assessed for breach of contract is succinctly stated by Parke, B., in Robinson v. Herman (158):

"Where a party sustains a loss by reason of a breach of contract, he is so far as money can do it, to be placed in same situation with respect to damages as if the contract had been performed."

In this case, the wrong done was eviction of a tenant against the contractual obligation agreed by the parties."

61. In the present appeal, a careful examination of the Judgment discloses that the learned Judge did not award damages for breach of contract. Rather, the award was for damages for unlawful eviction expressly grounded on a finding that the Respondent had been unlawfully and wrongfully evicted. As such, this ground is without merit.

62. On the award itself, this Court in the case of Catholic Diocese of Kisumu vs Sophia Achieng Tele Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> " It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its won for that awarded by the court below simply because it would award different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

63. Similarly, in the case Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457, it was held that:

> "The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect....A member of

an appellate court when naturally and reasonably says to himself "what figure would I have made" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own."

64. The Appellant has not specified in what way the learned Judge fell into error in the award made to the Respondent, as to warrant interference by this Court. For this reason, we have no basis on which to disturb the trial court's award. This ground is also without merit.

65. As concerns the Appellant's counterclaim and whether the Respondent was in breach of the lease offer or implied terms of the tenancy, and whether such breach entitled the Appellant to payment of outstanding rent for the periods of April 2015 to January 2016 and from January 2016 to April 2018 together with service charge, the learned Judge had this to say:

> "...the Plaintiff was a controlled tenant who was constructively evicted, it follows that the landlord cannot be entitled to rent for the duration the plaintiff was deprived of possession. The defendants counter claim being based on rent entitlement cannot in fairness include rent for the period of unlawful dispossession. It must exclude the period of the dispossession from January 2015 to January 2016. The plaintiff is therefore relieved from the obligation for the payment of all the sums claimed as rent and service charge for the period of dispossession".

66. The record also shows that the learned Judge did, in fact, recognize that rent was payable for the period when the Respondent remained in lawful occupation of the suit premises, that is, between January 2016 and April 2018. For this reason, the court went on to order that Kshs. 1,203,732 as unpaid rent for that period, together with interest at court rates was payable by the Respondent.

67. However, with respect to the claims for rent for the period from April 2015 to January 2016 and service charge when the suit premises was locked, the Judgment shows that the learned Judge carefully evaluated the Appellant's own evidence and declined to award the additional sums claimed after finding that the Respondent's eviction was unlawful and that the Appellant's own evidence was inconsistent, inaccurate, and unreliable.

68. An examination of the Appellant's testimony on service charge, previous rent, and VAT as set out in the Judgment is most revealing. In this regard, Judgment set out the Appellant's evidence thus:

> "On cross-examination by Mr. Moolraj, DW1 stated that the agreement with the Plaintiff was based on the letter of offer because no formal lease was entered into and that the premises were locked in mid-2015 when the Plaintiff defaulted in the payment of rent and no order was obtained from Court to evict the Plaintiff. DW1 further confirmed that the invoice at page 17 of the Defendant further list of documents is for service charge for the year 2011 but issued in July 2014 and further that all the demands for rent arrears and service charge were issued in 2014.
>
> DW1 also confirmed that he did not avail receipts on how the shortfall of service charge was calculated and that he did not show the plaintiff how service charge was apportioned. He however insisted that at page 23 of the Defendant's further list of documents there is a document that shows the details on how the rent arrears were calculated and that the rent arrears are for 72 months though the Plaintiff was not in occupation for entire period. DW1 also confirmed that under the Court order of 18/12/2015 at page 21 and 22 of the

Plaintiff's bundle, it was stated that the period the Plaintiff's premises were locked should not be factored in the statement of rent arrears.

The witness went on and confirmed that in its statement on rent arrears contained at page 25 of the Plaintiff's bundle, the sum indicated include VAT yet there is a second application of VAT at the end of the same statement. He also confirmed that the figures claimed in the counterclaim are not accurate owing to the fact that the total amount charged had the double application of V.A.T and that if the principal figure changed then the interest that was applied must also change.

DW1 confirmed that there had been a payment of Kshs. 2,637,446/= which was more than the rent arrears of Kshs. 2,058,740/= because of service charge shortfall and denied that they gave the statement of service charge shortfall in 2014 because they were tired of the tenant. When asked whether they relocked the Plaintiff's shop, DW1 stated that he could not confirm the same. There was a further confirmation by the witness that the last rent payable was Kshs. 34,000/= but the sum charged included service charge. He lastly admitted that a demand for the entire period was made to the tenant yet the tenant was not in possession for the entire period.

Therefore, he conceded, the sums in the counterclaim needed to be relooked....

When questioned by the court, DW1 confirmed that locked premises do not consume power, that the premises were locked in April 2015 and opened in January 2016 during which time he could not lawfully collect rent and further that it is not correct to charge VAT twice."

69. Upon reevaluating this evidence, what becomes apparent is that, firstly, in view of the unlawful eviction of the Respondent, who was a controlled tenant as established above, the Appellant was not entitled to claim rent for the period from April 2015 to January 2016 when the Respondent was not in possession of the suit premises. The Respondent having been unlawfully evicted, we agree with the trial Judge that any rent claimed by the Appellant for this period was not due or payable.

70. Secondly, the evidence definitively pointed to admissions by the Appellant's witness of errors in the computation of service charge and VAT which went to the root of its counterclaim. This evidence disclosed material errors, inconsistencies, miscalculations, and unwarranted demands, that undermined and discredited the amounts claimed, and for this reason the trial court was right to reject it.

71. As a consequence, we find that on account of the unlawful eviction of the Respondent, and because the amounts claimed were undisputedly erroneous, inaccurate and without basis so that they remained unproved, the Appellant was not entitled to the sums claimed, and for these reasons, the learned Judge cannot be faulted for declining to award the amounts set out in the counterclaim.

72. In sum, the appeal lacks merit and is hereby dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 13TH DAY OF MARCH, 2026.

A.K. MURGOR

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR

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