

REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELCA NO E075 OF 2025

TIMOTHY NJUE
APPELLANT/LANDLORD

- **1ST**

SAMUEL KAHONGE

- **2ND APPELLANT /LANDLORD**

VS

MARGARET WAITHERO THIURI

- **RESPONDENT/TENANT**

**Being an appeal from the Ruling and order of Hon Ndegwa Wahome
MBS [Chairperson] and Hon Joyce Murigi [member] BPRT in BPRT
E1078 as consolidated with E 974 of 2024 on 20/3/2025]**

JUDGMENT

1. Vide a memorandum of appeal dated the 14/4/25, the Appellants proffered this appeal against the decision of the BRPT aforesaid on the grounds that;
 - a. That the Learned Tribunal erred both in fact and law in awarding the Respondent Kshs 350,000/- as damages for loss of tenancy.
 - b. That the learned Tribunal erred in both law and fact in awarding the Respondent costs in the sum of Kshs 100,000/- without any legal jurisdiction.
2. Consequently, the Appellants sought the orders that the Ruling of the Business Premises Rent Tribunal [BPRT] dated 20/3/25 be set aside.
3. The Court directed the parties to file written submissions. Both parties have filed their submissions which I have read and considered all the submissions, which now form part of the Court's decision.

4. Having considered the appeal and the written submissions the key issue is whether the appeal is merited.
5. The Appellants were the landlords and the Respondent was the tenant in the suit premises. In the trial Court, the Respondent contended that the Appellants had issued her a text message notice, removed the doors, dumped waste at her business premises, disconnected the power supply, and denied her access to the premises, yet she was not in rent arrears. That the notice to terminate the lease was illegal.
6. The Appellants denied the Respondent's claim and argued that the Respondent vacated part of the premises while still occupying a section in the upper room. They denied ever removing any of the Respondent's tools.
7. Compensation for loss of tenancy in a controlled tenancy is grounded in Section 12(1)(l) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301, which expressly empowers the Business Premises Rent Tribunal to award compensation for any loss incurred by a tenant on termination of a controlled tenancy in respect of goodwill, and improvements carried out by the tenant with the landlord's consent. This is the primary and exclusive head of statutory compensation available to a tenant upon termination of a controlled tenancy. It is not a common law remedy but a creature of statute and must be claimed and assessed within the framework of the Act.
8. Before any compensation can be awarded, the Tribunal must be satisfied that the tenancy in question is a controlled tenancy within the meaning of Section 2 of the Act, that is, a tenancy of a shop, hotel or catering establishment that is either: not reduced to writing; in writing but for a period not exceeding five years; or in writing, containing a provision for termination otherwise than for breach within five years of commencement. This is a jurisdictional threshold. Without a controlled tenancy, the Act does not apply and no compensation under it can be awarded.

9. Compensation under Cap 301 is triggered only when the controlled tenancy is terminated. Not every landlord action result in a claim for compensation. The termination must be: in accordance with a valid notice under Section 4 of the Act; based on a Tribunal order for possession under Section 12(1)(e); or due to wrongful termination by the landlord, which may lead to a claim for damages alongside statutory compensation.
10. Section 12(1)(l) of the Act delineates compensation under two distinct substantive categories, one of which encompasses compensation for goodwill. Goodwill refers to the commercial advantage or benefit a business derives from its established reputation, customer base, and connection to specific premises. The criteria for assessing goodwill compensation include the requirement that goodwill be location-specific, deriving benefits from the particular premises and not readily transferable to others; notably, the duration of the tenancy is highly relevant. Longer tenancy periods tend to strengthen the goodwill associated with the location. Additionally, the nature of the business is a crucial consideration; for instance, a retail establishment attracting foot traffic generally possesses higher location-specific goodwill than a professional services office. Furthermore, evidence such as turnover figures, customer records, and trading history is essential for accurately measuring goodwill. The Tribunal is tasked with evaluating the proportion of goodwill that will be forfeited, as opposed to that which can be transferred to alternative premises.
11. The second limb concerns improvements carried out with the Landlord's Consent. This section covers the cost or value of improvements undertaken by the tenant to the demised premises, provided they were made with the landlord's explicit or implied consent. The principle is that improvements must have been carried out with the landlord's approval. Those performed without consent are not eligible for compensation under this section. The relevant measure is the value of

the improvement at the date of termination, rather than the original cost. Improvements that have undergone significant depreciation or have been enjoyed by the tenant over an extended period will warrant a lower award. In all cases, the Tribunal must ensure that it does not compensate for improvements already reflected in reduced rent or waived by agreement.

12. When the landlord lawfully terminates based on one of the grounds specified in Section 7 of the Act (such as own occupation, redevelopment, or persistent default), the tenant is entitled to statutory compensation under Section 12(1)(l) for goodwill and improvements. However, the tenant is not entitled to additional general damages, as the termination is lawful in itself.
13. In the event that the landlord terminates the tenancy without adhering to the mandatory procedure specified in Section 4 of the Act by issuing a defective notice, failing to provide the prescribed two months' notice, or forcibly evicting without an order from the Tribunal, the tenant is entitled to statutory compensation in accordance with Section 12(1)(l) of the Act and general damages for unlawful eviction. These damages may encompass disturbance, removal costs, rent differential, and business losses.
14. Over time, Courts have distilled the guiding principles for determining a claim for loss of tenancy. I will enumerate a few of them for clarity, namely;
 - a. The validity of a notice is contingent upon its compliance with Section 4(2) of the Act, which mandates that a landlord intending to terminate a controlled tenancy shall provide notice in the designated format. This prescribed format is delineated in the First Schedule to the Landlord and Tenant (Shops, Hotels, and Catering Establishments) (Tribunal) (Forms and Procedure) Regulations. A notice failing to conform to the prescribed format shall be deemed null and void. Furthermore, Section 4(4) stipulates that no tenancy

- notice shall become effective until at least two months have elapsed from the date of receipt by the recipient, unless the parties have mutually agreed in writing to a shorter period or the tenancy agreement specifies a longer duration.
- b. When a notice fails to satisfy either of the two prerequisites, it is not merely voidable; rather, it is void ab initio. The law treats the notice as if it never existed. Consequently, the tenancy continues as if no notice had been issued. Any eviction or interference with the tenant's possession based on the defective notice is unlawful. Any damages resulting from such unlawful eviction are compensable.
 - c. In circumstances where termination is deemed unlawful due to inadequate or defective notice, the remedies available to the tenant extend beyond those applicable in legitimate termination cases. The tenant shall be entitled to: a) statutory compensation pursuant to Section 12(1)(l), which includes goodwill and consented improvements, as is customary in all termination situations; b) general damages for unlawful eviction. As the eviction constitutes a tortious act and violates statutory obligations, the tenant may claim all direct and natural losses arising from the wrongful dispossession. Such losses encompass disturbance and removal expenses, business interruption damages, costs related to refurbishing alternative premises, rent differential losses, and any other damages that are foreseeable and directly attributable to the wrongful act; c) special damages. These refer to specific, quantifiable losses that have been actually incurred and substantiated by appropriate evidence; d) compensation pursuant to Section 13 of Cap 301. This applies where the landlord has obtained any Tribunal order through misrepresentation or concealment of material facts.

- d. The fundamental principle guiding compensation for unlawful termination is *restitutio in integrum*, which means restoring the tenant, to the extent that monetary means allow, to the position they would have occupied had the unlawful act not occurred. In unlawful termination cases, this principle is applied more generously than in lawful termination cases because the tenant has lost not only goodwill and improvements but also the benefit of the tenancy itself, a valuable statutory right of which they were unjustly deprived. In such cases, the Courts have held that a landlord cannot benefit from its own misconduct.
- e. The tenant must prove that the losses claimed were caused by the unlawful termination.
- f. Compensation is confined to losses that are reasonably foreseeable and not excessively remote. Analogous to principles in contract and tort law, the pertinent criterion is whether the loss arises naturally and directly from the unlawful termination or was within the landlord's reasonable contemplation at the time of the unlawful act as a probable consequence. Losses that are speculative, contingent upon independent events, or disproportionate to what was foreseeable will be disallowed or mitigated.
- g. Even in cases of unlawful termination, the tenant bears a strict obligation to mitigate damages. This requires the tenant to actively seek alternative premises promptly after wrongful eviction. The tenant must prevent losses from accruing due to inaction. The period for recoverable business interruption is limited to the duration it would reasonably take a prudent tenant to locate and establish in comparable alternative premises. The rent differential is recoverable solely for a reasonable adjustment period, not indefinitely. Failure to mitigate results in a proportional reduction of the damages awarded. The landlord holds the burden of proving

- the tenant's failure to mitigate after the tenant demonstrates the primary loss.
- h. The Court must consider the Principle of Proportionality. The damages sought should reflect actual loss. This means damages are assessed according to the real loss incurred, not to what the tenant claims would have been an ideal outcome. When the tenant re-enters possession promptly or experiences minimal disruption, the award will be nominal or modest. Excessive or unsupported claims will be discounted.
 - i. Where a technical unlawful termination occurs but the tenant suffers little or no actual loss. For instance, if possession is swiftly restored by injunction or the business remains largely unaffected, the Court may award nominal damages to acknowledge the legal breach without compensating for unmaterialised loss.
 - j. In instances where the landlord's conduct in effectuating the unlawful termination was deliberate, high-handed, or fraudulent, the following enhanced remedies are available: If any Tribunal order was obtained through misrepresentation or concealment of material facts, Section 13 of Cap 301 authorizes the Tribunal to award any sum deemed appropriate as compensation for the damages or loss incurred. This constitutes a separate head of compensation from Section 12(1)(l). When the landlord bypasses the Tribunal entirely and evicts the tenant without any Tribunal order by changing locks, removing goods, or disconnecting utilities, the full spectrum of general damages may be awarded. The intentional nature of the misconduct serves as a factor in increasing the quantum of damages. Additionally, exemplary damages may be granted in egregious cases where the landlord's conduct was intended to deprive the tenant of a remedy.
 - k. The burden of proof rests with the tenant. The magnitude of each loss must be substantiated by compelling documentary evidence,

including accounts, receipts, valuation reports, and comparable market data.

1. In instances of unlawful termination, the application of the clean hands doctrine is limited. Unlike cases of lawful termination, where the tenant's breach directly substantiates the grounds for termination, in situations involving unlawful termination the landlord cannot depend on the tenant's conduct to justify eviction, as no procedural steps were undertaken that would have permitted an assessment of such conduct. Nonetheless, the tenant's conduct may be pertinent for purposes such as reducing the period of recoverable damages and disallowing certain claims, for example, when the tenant was in arrears and the landlord's lawful eviction was imminent.
15. In this case, the Tribunal found that the notice to terminate the tenancy was illegal and, on 4/9/2024, ordered the Appellants to allow the Respondent back onto the demised premises, grant her quiet possession, restore electricity, and remove the waste dumped at the access to her premises. The Appellants did not comply with these orders. The Respondent claimed compensation for loss of income amounting to Kshs 1,232,000/- and for lost tools valued at Kshs 141,000/-. However, the Tribunal held that these damages were akin to special damages, which must be pleaded and strictly proven, and therefore denied the claim on that ground.
16. However, despite the above, the tribunal held that the Appellants' actions cannot go unpunished and awarded the Respondent compensation for loss of tenancy, Kshs 350,000/-, and an additional Kshs 100,000/- for costs. It is this award that has prompted the appeal.
17. The Appellants submitted that the burden of proof lay with the Respondent to demonstrate loss, and that, in the absence of supporting evidence, the tribunal erred in awarding them Kshs 350,000/-. In addition, the Appellants offered Kshs 10,000/- in costs.

18. On the other hand, the Respondent urged the Court to uphold the tribunal's award of costs.
19. I agree with the tribunal that, because the termination was illegal, the Respondent was entitled to damages under section 12(1)(1), including damages for goodwill and improvements made. These damages must be pleaded and proven. I also agree with the tribunal that, since they have not been proven, they cannot be allowed.
20. It is not in dispute that the Appellants' conduct in refusing to comply with lawful orders worsened the Respondent's position; therefore, the Court agrees with the tribunal that the Respondent is entitled to general damages. However, I will nonetheless revise the damages upwards to Kshs 400,000/-
21. With respect to the costs of the suit, I find the sum of Kshs 100,000/- unexplained. For that reason, I order the Appellants to pay the costs of the suit at the tribunal and on appeal on a higher scale.

22. Final orders for disposal;

In the end the appeal succeeds partially. I make the orders as follows;

- a) General damages in the sum of Kshs 400,000/- in favour of the Respondent payable by the Appellants.
- b) The Appellants shall meet the cost of the suit in the tribunal and on appeal on a higher scale.

23. Orders accordingly

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF
APRIL 2026 VIA MICROSOFT TEAMS.**

J. G. KEMEI

JUDGE

Delivered Online in the Presence of:

1. Mr Ojienda for the Appellants
2. N/A for the Respondent
3. C/A - Ms Yvette Njoroge

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