



"the Tribunal"), in **BPRT Case No. 298 of 2020**. The Tribunal struck out the Appellant's Reference for want of prosecution, with costs awarded to Kiriye House Limited (hereinafter "the Respondent").

2. The Appellant being aggrieved by and dissatisfied with that ruling filed this appeal vide a Memorandum of Appeal dated 17th October 2024, raising four grounds of appeal.

### **Background facts**

3. The background to this matter is largely undisputed. On 21st February 2020, the Respondent, Kiriye House Limited, as landlord of Shop No. 3 Kiriye House situated on Kirinyaga Road, Nairobi (Land Reference No. 209/136/183), issued the Appellant with a Notice to Terminate Tenancy under **Section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 (hereinafter "the Act")**. The stated ground for termination was persistent delay in paying rent. The notice specified that the termination would take effect from 1st May 2020.
4. The Appellant, being dissatisfied with the termination notice, exercised his statutory right under **Section 6(1) of the Act**

by filing a Reference to the Business Premises Rent Tribunal on 12th March 2020 (Tribunal Case No. 298 of 2020), thereby invoking the Tribunal's jurisdiction and suspending the operation of the termination notice pending determination of the Reference.

5. The matter was first listed in court on 12th March 2020 and was fixed for hearing on 26th May 2020. From the court record, nothing appears to have occurred on that hearing date, and neither party took any further steps to prosecute or progress the matter thereafter.

6. Approximately four years later, on 16th July 2024, the Respondent filed a Notice of Motion seeking to have the Reference dismissed for want of prosecution on the grounds that: (i) the Appellant had failed to take any steps to prosecute the suit for a period of over four years; (ii) the delay was inordinate, inexcusable and prejudicial to the Respondent; and (iii) it was in the interest of justice that the suit be dismissed.

**7.** The Appellant opposed the application through Grounds of Opposition filed on 5th September 2024, contending that the

Application was misconceived in law, that the Appellant's only obligation under the Act was to file the Reference, and that it was the Respondent's (Landlord's) obligation to prosecute the Reference and prove the notice under **Section 9 of the Act.**

**8.** After hearing the parties, the Tribunal, by its Ruling of 30th September 2024, allowed the Respondent's application and dismissed the Appellant's Reference with costs to the Respondent. The Tribunal held that the duty to prosecute the Reference lay with the Tenant as the party who had filed it, and that the four-year delay was inordinate and prejudicial to the Respondent.

**Grounds of appeal**

**9.** The Appellant filed a Memorandum of Appeal dated **17th October 2024** advancing four grounds, namely:

- i. That the Tribunal erred in law in failing to appreciate that, within the framework of Cap 301, the burden of proving the grounds of termination and prosecuting the same lies with the Landlord and not the Tenant;**

- ii. That the Tribunal erred in law in shifting the burden of proof from the Landlord to the Tenant;**
- iii. That the Tribunal erred in law in failing to appreciate that it is neither in the interest of the Tenant nor the Tenant's obligation to pursue the termination of his tenancy once the Reference has been filed; and**
- iv. That the Tribunal erred in law in awarding costs against the Tenant in respect of proceedings which the Tenant had no obligation to prosecute.**

**Parties' submissions**

10. Pursuant to the directions issued by this court upon admission of the appeal, it was directed that the appeal be canvassed by way of written submissions. The Appellant filed written submissions dated 26<sup>th</sup> March 2026 while the Respondent filed written submissions dated 29<sup>th</sup> April 2026.

11. The Appellant's submissions filed by **Mbichi Mboroki & Kinyua Advocates**, advance the following propositions of law:

**(a) On Burden of Proof and Prosecution:**

12. It was submitted that under Cap 301, once a tenant files a reference opposing a termination notice, the legal and evidential burden of proving the grounds of termination shifts squarely to the Landlord. The Landlord, being the party asserting the right to terminate the tenancy, is bound to prove the existence of facts that bring the case within the statutory grounds of termination as set out under **Section 7 of the Act**. Reliance is placed on **Section 107 of the Evidence Act** and on the decision in **Gatakaini Investment Limited v Gathuita t/a Talcom Communications (Environment and Land Case E021 of 2023) [2025] KEELC 18396 (KLR)**, for the proposition that the burden of proof lies on the party who alleges.

13. The Appellant further submits that the Tribunal's role upon receipt of a Reference is not to assume the

correctness of the termination notice but to interrogate its validity. This requires the Landlord to lead evidence in support of the grounds stated in the notice. The Tribunal therefore erred by effectively treating the Reference as the Appellant's claim and imposing upon the Appellant a duty to prosecute proceedings that are substantively the Landlord's burden to advance.

**(b) On the Tenant's Role in Proceedings:**

14. It was argued that within the statutory framework of Cap 301, it is neither the obligation nor the interest of a tenant to pursue the termination of his or her own tenancy. The Act establishes a protective regime for controlled tenancies, the purpose of which is to shield tenants from arbitrary or unjustified termination. Upon service of a termination notice, a tenant who opposes it invokes Section 6 by filing a reference. The legal consequence is the automatic suspension of the termination notice, thereby preserving the tenancy pending the Tribunal's determination. At this stage, the

tenant's role is purely defensive: to challenge the validity of the notice and maintain the status quo.

**(c) On Costs:**

15. It was submitted that the award of costs against the Tenant was erroneous in law. Since the Tenant bore no obligation to prosecute the Reference, it would be unjust to penalise such conduct through an adverse costs order, particularly where the Tenant has not initiated the claim but is responding to it. Such an order has the effect of discouraging tenants from exercising their statutory right to challenge termination notices, thereby undermining the protective purpose of the Act.

16. The Respondent's submissions dated 29th April 2026, filed by **Eunice Gakii & Associates Advocates**, advance the following positions:

**(a) On Who Bears the Duty to Prosecute:**

17. It was submitted that a termination notice issued under Cap 301 is self-operative; it takes effect on the specified date unless successfully challenged before the Tribunal. The Reference is the Tenant's challenge to the

notice, and the Tribunal proceedings are triggered by the Tenant. The survival of the tenancy is dependent entirely upon the success of that Reference. It is therefore the Tenant who must take active steps to move the Tribunal and ensure the matter is heard and determined. The Respondent relies on **Section 6(1) of the Act and Section 107 of the Evidence Act** to support this position.

**(b) On the Proper Exercise of Discretion:**

18. The Respondent submits that a delay of four years is, by any standard, inordinate and inexcusable. The principles governing dismissal for want of prosecution are well settled in **Order 17 Rule 2 of the Civil Procedure Rules**. The test is whether the delay is prolonged and inexcusable, and whether, if so, justice can be done despite the delay. Reliance is placed on the locus classicus of **Ivita v Kyumbu [1984] KLR 441**, which establishes that where prolonged delay is established and no credible excuse is offered, the natural inference is that the delay is also inexcusable.

### **On Costs:**

19. The Respondent submits that it is trite law that costs follow the event. The Reference was dismissed for want of prosecution, and the Respondent was compelled to file an application to bring the matter to a conclusion. The Tribunal acted within its mandate in awarding costs, and there is no basis for interfering with that award.

### **Issues for determination**

20. Having considered the grounds of appeal and submissions of both parties, this Court identifies the following three issues falling for determination:

**i. Whether, under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301, the obligation to prosecute a Reference once filed lies with the Tenant or with the Landlord;**

**ii. Whether the Tribunal properly exercised its discretion in striking out the Reference for want of prosecution; and**

**iii. Whether the award of costs against the Appellant was justified in the circumstances.**

**Analysis and determination**

**Issue 1: Whether the Duty to Prosecute the Reference Lies with the Tenant or the Landlord**

21. This issue lies at the heart of this appeal. It requires the Court to carefully examine the architecture of Cap 301 and the allocation of roles and responsibilities within the framework it establishes.

22. The relevant provisions are **Sections 4, 6 and 9 of the Act. Section 4(2)** places the obligation on the Landlord who wishes to terminate or alter the terms of a controlled tenancy to issue a notice in the prescribed form specifying the grounds relied upon. **Section 6(1)** provides as follows:

***"A receiving party who wishes to oppose a tenancy notice and who has notified the requesting party under Section 4(5) of this Act that he does not agree to comply with the tenancy notice, may before the date upon which such notice is to take effect, refer the matter to a Tribunal, whereupon such notice shall be of no effect until and subject to the determination of the Reference by the Tribunal."***

23. **Section 9 of the Act** governs the conduct of proceedings before the Tribunal and places the burden upon the party seeking to terminate the tenancy to justify that termination. Specifically, it provides that the Tribunal shall inquire into the validity of the notice, and upon the Landlord lies the burden of establishing that the grounds stated in the notice are valid and exist in fact.

24. The Tribunal in its impugned Ruling relied primarily on **Section 6(1)** to hold that since the Tenant filed the Reference, the duty to prosecute it also lay

with the Tenant. With respect, this Court is of the view that the Tribunal conflated two distinct legal concepts: the procedural act of filing a Reference which lies with the Tenant on the one hand, and the substantive duty to prove and prosecute the grounds of termination which lies with the Landlord on the other.

25. The filing of a Reference under **Section 6(1)** is in substance a defensive act by the Tenant. It is the means by which the Tenant invokes the protection of the Tribunal against the operation of the Landlord's termination notice. Once filed, the notice is suspended by operation of law. The Tenant's role from that point is to participate in the proceedings as a respondent to the Landlord's claim for termination, not as the proponent of any substantive right.

26. The Landlord, on the other hand, remains the party asserting the right to terminate the tenancy. It is the Landlord who must appear before the Tribunal and discharge the burden of proving the existence of the grounds of termination stated in the notice. This is

consistent with the general principle codified in **Section 107 of the Evidence Act**, which provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

27. This Court finds support for this interpretation in the decision in **Gatakaini Investment Limited v Gathuita t/a Talcom Communications (ELC Case E021 of 2023) [2025] KEELC 18396 (KLR)**, where it was stated that the burden of proof rests upon the party asserting a claim in the context of tenancy disputes under Cap 301, the landlord alleging grounds for termination. The decision confirms that the tenant's role is not to drive the termination process but to resist it.

28. The position advocated by the Respondent that the Tenant, having filed the Reference, bore the obligation to actively move the Tribunal and ensure the matter proceeded to hearing would, if adopted, lead to

a result that is both logically and legally untenable. It would require the Tenant to advance the very process that seeks to deprive him of his tenancy, and to actively participate in his own eviction. It would also effectively render **Section 6(1)** a trap for tenants: the Tenant would face the termination of his tenancy either because the notice was not challenged if no Reference is filed or because the Reference was not prosecuted if a Reference is filed but not advanced. Such an interpretation would fundamentally undermine the protective purpose of Cap 301.

29. This Court therefore holds that the Tribunal erred in law in finding that the duty to prosecute the Reference lay with the Appellant. The obligation to bring the matter before the Tribunal for hearing, to call evidence in support of the termination notice, and to prove the grounds stated therein lies with the Respondent as Landlord. The Appellant's obligation was limited to the filing of the Reference and to

participating in the proceedings as a respondent to the Landlord's claim.

30. It is however important to note the limits of this holding. While the substantive duty to prove the grounds of termination lies with the Landlord, that does not mean the Tenant is entirely absolved of any duty to ensure the matter progresses. Both parties to litigation carry a general duty not to allow proceedings to languish indefinitely. Where a Tenant, having invoked the jurisdiction of the Tribunal and obtained the benefit of the suspension of the termination notice, thereafter shows complete indifference to the progress of the proceedings, this Court does not hold that such conduct is beyond scrutiny or that no adverse consequences may follow.

**Issue 2: Whether the Tribunal Properly Exercised its Discretion in Striking Out the Reference**

31. Even though this Court has found that the Tribunal erred in placing the duty to prosecute squarely on the Tenant, the question of whether the Reference was properly struck out for want of prosecution must also be addressed.

32. The principles governing dismissal for want of prosecution are well settled. The leading authority in our jurisdiction is **Ivita v Kyumbu [1984] KLR 441**, in which **Chesoni J (as he then was)** enunciated the test as follows:

***"The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered... The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the Plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the***

***part of the Plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution."***

**33.** Applying this test to the facts of the present case, the following considerations arise:

**(a) Length of Delay:**

**34.** The Reference was filed on 12th March 2020. The matter was fixed for hearing on 26th May 2020 but nothing happened on that date. Thereafter, no steps were taken by either party until the Respondent filed the application for dismissal in July 2024. The total period of inactivity was therefore approximately four years and four months. This is, by any standard, an inordinate delay.

**(b) Excuse for the Delay:**

**35.** The Appellant offered no substantive explanation for the delay beyond the legal argument that it was not the Appellant's obligation to prosecute the proceedings. As this Court has observed earlier in this judgment, while the Landlord bears the primary duty to prove the

grounds of termination, the Tenant equally carries a general duty not to allow proceedings to stagnate. No affidavit was filed by the Appellant explaining the inactivity, citing any intervening circumstances, or offering any steps that were taken or attempted in furtherance of having the matter heard.

**(c) Prejudice to the Respondent:**

**36.** The termination notice issued by the Respondent in February 2020 was grounded on alleged persistent delay in paying rent. Due to the suspension of that notice by operation of **Section 6(1) of the Act** upon the filing of the Reference, the Respondent has been unable to lawfully recover or repossess the premises or to enforce the termination notice for over four years, despite the fact that the grounds of termination have never been examined or determined on their merits. This constitutes real and tangible prejudice to the Respondent.

**37.** This Court therefore finds that the delay in this matter is inordinate and, in the absence of any credible

explanation from the Appellant, must be presumed to be inexcusable. Prejudice to the Respondent has been established. On the facts, the Tribunal's decision to strike out the Reference for want of prosecution was, in the result, one that cannot be faulted in the exercise of discretion. However, the legal basis upon which the Tribunal arrived at that decision namely, that the duty to prosecute lay exclusively with the Tenant was erroneous, as this Court has held.

**38.** In the circumstances, while this Court agrees with the outcome of the Tribunal's ruling, it does so on the different and correct legal basis that both parties had a duty to ensure the matter progressed, and that the Appellant's total inactivity for over four years, combined with resulting prejudice to the Respondent, justified the striking out of the Reference.

**Issue 3: Whether the Award of Costs against the Appellant was Justified.**

**39.** The award of costs is a matter of discretion. The general principle is that costs follow the event. In the

present case, the Respondent was compelled to incur the cost of filing and arguing an application to bring to an end proceedings that had lain dormant for over four years. While this Court has found that the Tribunal erred in its legal analysis by placing the exclusive duty to prosecute on the Appellant, the application for dismissal was ultimately necessitated by the inactivity of both parties, and more particularly by the Appellant's failure to ensure the matter moved forward.

**40.** This Court is nonetheless of the view that in circumstances where the Tribunal's legal reasoning was erroneous in that the Appellant was wrongly characterised as bearing the sole duty to prosecute a full award of costs against the Appellant is not appropriate. It would be inequitable to penalise the Appellant entirely for the failure of a proceeding where the Respondent, as the party asserting the right to terminate, also had obligations it did not discharge.

**41.** The appropriate order is that each party bears its own costs of both the proceedings at the Tribunal and of this appeal.

**Disposition and final orders**

**42.** In the result, this Court makes the following final orders in respect to this Appeal:

- i) The appeal is partially allowed to the extent that the Tribunal erred in law in holding that the exclusive duty to prosecute the Reference lay with the Appellant/Tenant. The correct legal position is that the Landlord bears the primary duty to prove the grounds of termination, while both parties share a general duty to ensure that proceedings do not languish;**
- ii) The outcome of the Tribunal's ruling of striking out of the Reference for want of prosecution is upheld.**
- iii) The order for costs made by the Tribunal against the Appellant is set aside;**

**iv) Each party shall bear its own costs of the Tribunal proceedings and of this appeal.**

**It is so ordered.**

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12<sup>TH</sup> DAY OF MAY 2026.**

**E. K. WABWOTO  
JUDGE**

**In the presence of:**

**Ms. Gakii for the Appellant.**

**Ms. Mburukwa h/b for Mr. Kinyua for the Respondent.**

**Court Assistants: Mary Ngoira and David Ngoosa.**