



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kiute v Girolstein & another (Environment and Land Appeal  
E029 of 2022) [2024] KEELC 292 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 292 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL E029 OF 2022  
NA MATHEKA, J  
JANUARY 31, 2024**

**BETWEEN**

**ELIZABETH KIUTE ..... APPELLANT**

**AND**

**WOLFGANG GIROLSTEIN ..... 1<sup>ST</sup> RESPONDENT**

**ABDULLAH SHEIKH OMAR ABDULLAH ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The appellant being aggrieved by the Ruling and decision of the Honourable P. May aforesaid Appeals to this Honourable Court on the following grounds;
  1. That the Learned Vice Chair erred in law and fact in dismissing the Tenant/Appellant's Application dated 14<sup>th</sup> July, 2021 for injunction against enforcement of the Interested Party's Notices for termination of Tenancy when the Interested Party had not established or proved that he was entitled to vacant possession.
  2. That the Learned Vice Chair erred in law and fact in dismissing the Tenant/Appellant's Complaint dated 14<sup>th</sup> July, 2021 when the interested Party had not demonstrated that he had the locus to seek for vacant possession of the suit premises on behalf of the Landlord.
  3. That the Learned Vice Chair erred in law and fact when she failed to appreciate the basic principle that the Interested Party had no right or Claim against the Tenant and could not enforce any right for vacant possession in the absence of the Landlord.
  4. That the Learned Vice Chair erred in law and fact in failing to appreciate that the alleged Agreement between the Landlord and the Interested Party could not be enforced against the Tenant by the Interested Party and the Interested Party's Claim, if any, could only be against the alleged Vendor in the agreement dated 14<sup>th</sup> September, 2018.



5. That the learned Vice Chair erred in failing to find that Clause 7 of the purported Agreement dated 14<sup>th</sup> September, 2018 was void and contrary to the Rental & Compensation Agreement dated 11<sup>th</sup> July, 2016 signed between the Tenant and the Landlord for refund of renovation, repair and improvement works on the rented premises totaling Kshs. 400,000/= prior to termination of the lease and/or grant of vacant possession.
  6. That the learned Vice Chair erred in holding that the Interested Party was the proprietor of the suit premises as at 21<sup>st</sup> November, 2018 when there was no confirmation of such fact by the Landlord and there was no proof of payment or receipt of the alleged Purchase Price of Kshs. 10,000,000/=.
  7. That the Learned Vice Chair failed to address her mind and apply the law on the import and effect of Clauses 1.1.1. (d), 3.2, 5, 6, 7 and 8 of the purported Agreement dated 14<sup>th</sup> September, 2018 vis-a-viz the Tenant's right to occupation and possession.
  8. That the Learned Vice Chair erred in failing to consider the Tenant's evidence on record and Submissions thereby arriving at a wrong decision.
2. The appellant prays that;
- a. That the Appeal herein be allowed.
  - b. That the Ruling and decision by the Learned Vice Chair of the Business Premises Rent Tribunal dated July 8, 2022 be set aside and be substituted-with a decision allowing the Tenant's Complaint dated July 14, 2021 in its entirety.
  - c. That costs of this Appeal and the Complaint be awarded to the Appellant.
3. This court has carefully considered the appeal and the submissions therein. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & Another vs Associated Motor Boat Co. Ltd & others* (1968) EA 123, this principle was enunciated thus:
- ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."
4. The brief background is that the Appellant avers that she is a tenant of the 1<sup>st</sup> Respondent where she operates a bar and restaurant business pursuant to an agreement dated 14<sup>th</sup> July 2016. On the 11<sup>th</sup> July 2016 the 1<sup>st</sup> Respondent and the Appellant entered an agreement requiring the 1<sup>st</sup> Respondent to compensate the Appellant in the sum of Kshs. 1,400,000/= being agreed repair charges in respect of the suit premises before the termination of the lease and/or grant of vacant possession. The 2<sup>nd</sup> Respondent submitted that the Appellant and the 1<sup>st</sup> Respondent entered into a lease dated 14<sup>th</sup> July 2016 wherein the Appellant leased Shop 1 situated at Plot 2197/III/MN, C.R. 24756 in Mtwapa for a rent of Kshs. 14,000/= per month. That the lease was for a fixed term which was to expire on 14<sup>th</sup> July 2021. The Appellant was informed in writing that the term of her lease would end on 14<sup>th</sup> July 2021 as schedules and would not be renewed. The Appellant filed a suit against the 1<sup>st</sup> Respondent in BPRT 163 of 2012. The 1<sup>st</sup> Respondent had transferred the subject property to the 2<sup>nd</sup> Respondent and the 2<sup>nd</sup>



Respondent applied to be enjoined as an Interested party. The Plaintiff's suit was dismissed, hence the appeal. I have perused the court file and find that the Appellant has attached an agreement dated 11<sup>th</sup> July 2016 called Rental and Compensation agreement allegedly signed by the 1<sup>st</sup> Respondent marked "EK-5" stating that the amount of Kshs 1,400,000/= will be refunded to the Appellant within three months from the said date of 11<sup>th</sup> July 2016. It did not state that the 1<sup>st</sup> Respondent to compensate the Appellant in the sum of Kshs. 1,400,000/= being agreed repair charges in respect of the suit premises before the termination of the lease and/or grant of vacant possession find that the 2<sup>nd</sup> Respondent was not bound by this agreement and the Appellant ought to have pursued the 1<sup>st</sup> Respondent- and /or his estate if at all. The learned Vice Chairman stated that;

I also do not think it is necessary to issue a notice to terminate tenancy when the tenancy terminates by the effluxion of time. In this case the tenancy was terminating on the 14<sup>th</sup> July 2021. In the absence of the renewal of the lease, the landlord was entitled to vacant possession."

5. The Vice Chair further stated that;

The Respondent, Wolfgang Girostein having sold the suit premises well before this suit was instituted, the complaint filed against him by the tenant has no basis and no purpose would be served retaining the same in the system."

6. Consequently, I find that the Vice Chair considered the testimonies and submissions before making the decision. Based on the foregoing, it is my opinion that the learned Vice Chairperson properly applied herself to the facts and the law and came up with a just conclusion. Consequently, I find that this Appeal is not merited and is dismissed with costs.

7. It so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 31<sup>ST</sup> DAY OF JANUARY 2024.**

**N.A. MATHEKA**

**JUDGE**

