Bahari (T) Company Limited v Alibhai Ramji Investment Limited (Civil Appeal 51 of 2020) [2023] KECA 1284 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KECA 1284 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 51 OF 2020

P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA

OCTOBER 27, 2023

BETWEEN

BAHARI (T) COMPANY LIMITED ..... APPELLANT

AND

ALIBHAI RAMJI INVESTMENT LIMITED ..... RESPONDENT

(An appeal against the Judgment and Decree of the High Court at Mombasa (D.O. Chepkwony, J.) delivered on 4th June 2020 in HC Civil Appeal No. 135 of 2019)

Nature of rent assessment notices

The appeal concerned rent arrears, termination notice, and repair costs for a leased warehouse. The appellant contended that rent payable was disputed before the Tribunal, no notice to vacate was required, and repair costs were not properly proven. The High Court upheld rent arrears and repair costs, adding a two-month notice payment under Landlord and Tenant (Shops, Hotels & Catering Establishments) Act. The Court of Appeal dismissed the second appeal, holding that the notice to reassess rent was invalid, rent arrears were properly assessed, and repair costs were adequately supported by an assessment report. The appellant's appeal was dismissed in its entirety.

Reported by John Ribia

Land Law *– tenancy – controlled tenancy – business premises – notice to reassess rent – validity of notice – notice issued where a matter was before the Business Premises Rent Tribunal – what were the conditions that a court looked into to determine if a rent re-assessment notice was valid - whether a tenant could lawfully withhold or unilaterally reduce rent when a dispute was pending before the Business Premises Rent Tribunal - whether a landlord was entitled to rent in lieu of notice upon a tenant's unilateral vacation of controlled premises - whether rent arrears could accrue if a tenant ceased paying enhanced rent ordered by a Tribunal - whether a valid notice of reassessment of rent must be responded to for it to take effect under tenancy law - whether a tenant who paid disputed rent for an extended period could later challenge its validity under the doctrine of estoppel by conduct – Landlord And Tenant (Shops, Hotels And Catering Establishments) Act (Cap. 301) section 4.*

Land Law *– damages – special damages – need to specifically plead and prove special damages – proof of repair costs in tenancy disputes - whether invoices and an assessment report constituted sufficient proof of repair costs in tenancy disputes.*

Civil Practice and Procedure *– appeals – second appeals – nature of matters that can be determined on second appeal - whether an appellant could introduce new arguments on second appeal if not raised before lower courts.*

Brief facts

The appellant leased premises from the respondent and used it as a warehouse from January 2001 to April 2018. Upon vacating, the respondent claimed rent arrears, failure to issue a termination notice, and costs for repairs to restore the premises to a tenantable state.

The respondent filed a suit at the Magistrate's Court, seeking: rent arrears (December 2017 – April 2018) totaling Kshs. 2,723,274, two months' rent in lieu of notice (Kshs. 1,089,309.60), and repair costs (Kshs. 182,385). The Chief Magistrate's Court awarded rent arrears and repair costs, but dismissed the claim for two months' notice. The High Court, on first appeal, upheld the ruling and allowed the cross-appeal, awarding the two months' rent in lieu of notice under the Act.

Dissatisfied, the appellant filed the instant second appeal, challenging findings on rent arrears, notice requirements, and repair costs.

Issues

i. What were the conditions that a court looked into when determining if a rent re-assessment notice was valid?
ii. Whether a tenant could lawfully withhold or unilaterally reduce rent when a dispute was pending before the Business Premises Rent Tribunal.
iii. Whether a landlord was entitled to rent in lieu of notice upon a tenant's unilateral vacation of controlled premises.
iv. Whether rent arrears can accrue if a tenant ceased paying enhanced rent ordered by a Tribunal.
v. Whether invoices and an assessment report constituted sufficient proof of repair costs in tenancy disputes.
vi. Whether a valid notice of reassessment of rent must be responded to for it to take effect under tenancy law.
vii. Whether a tenant who paid disputed rent for an extended period could later challenge its validity under the doctrine of estoppel by conduct.
viii. Whether an appellant could introduce new arguments on second appeal if not raised before lower courts.

Held

1. The terms of tenancy that the appellant enjoyed over the respondent's demised premises was a controlled tenancy. The law applicable was the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act (the Act). Section 4 provided that any termination of a controlled tenancy, and or alteration of its terms and conditions shall only be done in compliance with the Act. The alteration of terms included the notice of enhancement of rent as well as the notice of re-assessment of rent, since either of them had the effect of altering the terms of the tenancy.
2. Section 4(5) of the Act provided that a tenancy notice shall not be effective for any of the purposes of the Act unless it specified the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and required the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice, whether or not he agreed to comply with the notice.
3. The respondent's notice was in compliance to section 4 of the Act. The next step was prescribed under section 6 of the Act. Upon service of a notice touching on rent, the party served had certain options under section 6(1) to oppose the tenancy notice vial referring the matter to the Tribunal. The

appellant opted to file a case before the Business Premises Rent Tribunal to challenge the notice. It did not respond to the respondent before filing the case at the Tribunal. The effect of filing the case was twofold:

1. challenge the action by the respondent to issue notice of increase in rent; and
2. suspension of the notice, so that on March 1, 2016, the new rent did not take effect.

4. The appellant filed the case before the Tribunal after the date the notice was to take effect. The respondent's notice did not take effect until the ruling of the Tribunal on October 7, 2016.
5. The appellant could not choose to exercise another option under section 6(1) of the Act. The appellant could not change options midstream. The notice could have no effect as the quest in that notice was to bring the rent down. The issue of the rent was before the Tribunal, which had power to make a determination.
6. The Tribunal approved the respondent's terms of tenancy as per its notice, and ordered the appellant to pay enhanced rent in the sum of 544,654/80, plus 16% VAT, effective November 1, 2016. Section 9(3) of the Act provide that where a Tribunal had made a determination upon a reference, no further tenancy notice shall be given in respect of the premises concerned, in the case of an assessment of rent, until after the expiry of two years.
7. The test of determining whether the appellant's tenancy notice was valid was spelt out under section 9(3) of the Act:
    1. Had the Tribunal made a determination upon a reference?
    2. Did the determination concern or affect an assessment of rent?
    3. Had there been a lapse of two years since the determination of the Tribunal?
8. If the answer to the first two questions was in the positive and the third question was answered in the negative, then no tenancy notice could issue, and if one was issued, then it would be invalid for all practical purposes. Until after the expiration of two years, no [further] tenancy notice shall be given in respect of the premises concerned, which was based on any of the matters affected by the determination in the case of an assessment of rent. until after the expiration of two years.
9. The issue of whether the appellant filed a reference or complaint before the Tribunal was not a matter raised before the High Court. No new issue that was not before the Superior Courts could be raised on appeal before a second appellate court.
10. However the record showed that the appellant filed a reference to the Tribunal over the notice to increase rent.
11. The appellant could not give the notice of reduction of rent months later while the Tribunal was yet to make a determination of the reference it filed before it, as against the respondent's notice. Once the matter of the rent was pending before the Tribunal, and after the rent issue determination was given by the Tribunal, the appellant could not validly issue or serve any notice touching on the tenancy until after expiry of 12 months from the date of the determination.
12. The notice given by the appellant had no place under the Act. Having referred the respondent's notice to increase rent to the Tribunal, the appellant's options under section 6(1) of the Act were determined and or exhausted upon filing the reference.
13. The notice of re-assessment of rent that the appellant served upon the respondent was a not a valid notice, being in contravention of section 9(3). The respondent was not obligated to respond to it whether in opposition or in agreement to it. Furthermore, the appellant could not invoke section 10 to argue that once the respondent did not respond to the notice or file a reference, its notice to reduce rent came into effect by default. Section 10 related to the effect of notice where tenant failed to refer to Tribunal, could only be invoked by the Landlord and not the tenant. The Tribunal was the best forum for the determination of the issue pertaining to the rent payable.
14. After paying the enhanced rent for one year from November 2016 to November 2018, the Appellant was estopped by conduct or waiver from claiming any rights it may have had, even though it had none,

to reduce the rent payable downwards as it did. Consequently, the Appellant owed rent in arrears for period between December 2017 to April 2018, when he paid the reduced rent form Kshs.469,530/= to Kshs.356,600/=. The appellant by his conduct of paying the enhanced rent in compliance to the order of the Tribunal demonstrated an intentional relinquishment or abandonment of its quest for rent reduction, which in any event was not available to it until after 12 months under section 9(3) of the Act. Consequently, the appellant was in arrears of rent for the period of five months.

15. Whether a notice was issued or not is a question of fact. It ought to have been raised and determined before the High Court and the Chief Magistrates Court.

16. A special damages claim must be specifically pleaded and specifically proved. Special damages in material damages claim needed not be shown to have been incurred, and therefore there was no need to produce payment receipts to support the claim. The claimant was only required to show the extent of the damage and what it would cost to restore the damaged item. The respondent's claim for cost of repairs was a special damages claim in the form of material damage. The general principle in assessing of damages was restitution in *integrum*. All the respondent was required to prove was the extent of the damage to the suit premises and what it would cost to repair it without necessarily proving that, the repairs were actually done and paid for. The High Court was therefore right to find that the receipts of payment for the repairs was not required as proof of expenses incurred for repair works, and that the Assessors Report by Dejfloc Investment coupled with the invoices was sufficient proof of its claim.

Appeal dismissed.

Orders

Costs of the Court of Appeal and High Court proceedings to the appellant.

Citations

Cases

1. Bagine ,David v Martin Bundi Civil Application 283 of 1996; [1997] KECA 201 (KLR) — (Explained)
2. Great Lakes Transport Co. (U) Ltd v Kenya Revenue Authority Civil Appeal 106 of 2006; [2009] KECA 461 (KLR) — (Explained)
3. Kingfisher Properties Limited v Nandlal Jivraj Shah, Vimal Nandlal Shah & Mehul Nandlal Shah (all Trading As Jivaco Agencies) Civil Case 6 of 2011; [2013] KEHC 2579 (KLR) — (Explained)
4. Mbangu ,Josephat Malondo v Alexander Kaluyu Mwove Civil Appeal 37 of 2019; [2019] KEHC 10022 (KLR) — (Explained)
5. Mburu ,John v Consolidated Bank of Kenya Civil Appeal 162 of 2015; [2018] KECA 796 (KLR) — (Explained)
6. Motrex Limited v Nduruhu Julius & Nyeri Motor Services Limited Civil Case 84 of 2010; [2018] KEHC 7998 (KLR) — (Explained)
7. Muriithi , Stanley N & Joseph M Stanley v Bernard Munene Ithiga Civil Appeal 12 of 2014; [2016] KECA 821 (KLR) — (Explained)
8. National Social Security Fund Board of Trustees v Sifa International Limited Civil Appeal 50 of 2015; [2016] KECA 550 (KLR) — (Explained)
9. Ngowa ,Mary Kitsao & 36 others v Krystalline Limited Civil Appeal 21 of 2015; [2015] KECA 286 (KLR) — (Applied)
10. Nkuene Dairy Farmers Co-op Society Ltd & another v Ngacha Ndeiya Civil Appeal 154 of 2005; [2010] KECA 20 (KLR) — (Explained)
11. Nkuene Dairy Farmers Co-op Society Ltd & another v Ngacha Ndeiya Civil Appeal 154 of 2005; [2010] KECA 20 (KLR) — (Explained)
12. Rubangura Rose v Petrocom S.A. (Rwanda) Civil Appeal 92 of 2012; [2015] KECA 220 (KLR) — (Explained)
13. Sita Steel Rolling Mills Ltd v Jubilee Insurance Co. Limited Civil Suit 86 of 2000; [2007] KEHC 2192 (KLR) — (Explained)

14. Speaker of the National Assembly v Karume Civil Application 92 of 1992; [1992] KECA 42 (KLR); [1992] KLR 22 — (Explained)

Statutes

1. Employment Act — (Cited) In general
2. Landlord And Tenant (Shops, Hotels And Catering Establishments) Act (cap 301) — sections 4(1) (3) (4)(5);6(1);9(1)(a)(3);10; 12(1)(b)(4)— (Interpreted)

Texts & Journals

Rogers, WVH., (Ed)(2006) Winfield and Jolowicz on Tort London ; Sweet & Maxwell Edn 17th

Advocates

None mentioned

JUDGMENT

1. This is a second appeal arising from the judgment of the High Court (D. Chepkwony, J), sitting on a first appeal against the judgment of the Chief Magistrate, Mombasa. The High Court upheld the judgment of the Chief Magistrate and varied one of the final orders the court.

Background

2. The appellant was the respondent's tenant of demised premises situated on Plot No Mom/Block 1/241, used as a warehouse for storage of tea and other products, in the period of January 2001 to April 2018. The respondent's complaint was that the Appellant owed it rent in arrears, that it vacated the premises without giving notice of termination of tenancy and before putting them in a reasonable acceptable, tenantable state and condition.

3. By a plaint dated 23 July 2018, the respondent filed a claim against the appellant before the Magistrates Court at Mombasa, being CMCC No 1489 of 2018, seeking:

    1. Rent arrears for December 2017 to April 2018 inclusive of VAT @ 544, 654/80 total 2,723,274

    2. 2 months' rental in lieu of notice for termination total 1,089,309/60

    3. Costs of repair and/or renovation of demised premises Kshs 182,385/2. Total 3,994,968/60. Costs of and incidental to the suit; and interests on (a) and (b) at court rates.

4. In its statement of defence dated 6th August, 2018 the appellant contended that as the respondent did not file a reference against the appellant's notice seeking a reduction in the rental sum payable, the appellant was entitled to a refund of the excess sums paid effective from the date of the notice. That in the circumstances, no rental arrears was due as demanded in the plaint. The appellant further stated that there was no requirement for issuance of 2 months' notice to vacate the premises. Further, that there were no costs of repairs or renovations incurred in respect of the demised premises.

5. The Chief Magistrate (Hon E Makori) (as he then was) heard the case and on the 26 June 2019 proceeded to enter judgment in favour of the respondent. The court ordered the appellant to pay the respondent rent arrears of Kshs 2,723,274/= being rent arrears for December 2017 to April 2018 inclusive of VAT, and Kshs 182,385/= being costs of repair. The court declined the claim for two months' rental in lieu of notice to terminate tenancy.

Grounds of Appeal before the High Court

6. The appellant was aggrieved by the judgment of the trial court and filed an appeal before the High Court in which the trial Magistrate's was faulted for:

    1. Awarding 2,723 274/2 in rent arrears;

    2. Awarding 182,385/2 cost of repairs;

    3. Awarding 2,905,659/2 to the plaintiff plus costs and interest; and,

    4. Failing to consider all the evidence adduced and the submissions made before him as well as the applicable law.

7. The appellant sought to have the judgment of the trial court dated June 26, 2019 varied and or set aside; and the appellant's appeal allowed.

Cross Appeal and Grounds by the Respondent

8. There was a cross appeal by the respondent in which the learned trail Magistrate was faulted for:

    1. Failing to award 2 month's rental in lieu of notice to terminate tenancy;

    2. Failing to consider submissions and authorities relied upon by the respondent on the issue of notice to terminate tenancy;

    3. Failing to give reasons as to why the 2 months' rental in lieu of notice to terminate was not payable;

    4. Failing to consider the evidence by respondent and appellant was to the effect that the tenancy between them was a Controlled Tenancy. That as such the law applicable was the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act cap 301, that provides for 2 months' notice of intention to alter or terminate a controlled tenancy.

9. The respondent sought to have the appeal by the appellant dismissed, and its cross appeal allowed by finding that the respondent was entitled to 2 months rental in lieu of notice to terminate tenancy in the sum of Kshs 1,089,309.60.

10. The High Court identified the following issues for determination:

    1. Whether the trial court erred by awarding the respondent Kshs 2,723,274 in rent arrears between December 2017 and April 2018.

    2. Whether the respondent is entitled to 2 months' rental in lieu of notice.

    3. Whether the trial court erred by awarding the respondent costs of repairs of 182,385/2.

The Decision of the High Court.

11. On the issue of rent arrears, the learned judge found that the appellant filed two cases before the Business Premises Rent Tribunal (hereinafter BPRT). Tribunal Case No 79 of 2016 instituted on 2June 4, 2016, and Tribunal Case No 14 of 2018 instituted on January 26, 2018. That the two cases were anchored on the same facts, triggered by the increase of monthly rental sum from Kshs 399,970/= to Kshs.469,530/= plus 16% VAT with effect from 1st March 2016. The learned Judge found that on the one hand, the respondent's position was that the rental increase was consensual, and on the other hand, the appellant maintained that the monthly rent payable was Kshs 463,935/=.

12. On the issue of rent payable, the learned Judge found that the appellant filed the Tribunal Case No 79 of 2016 to challenge the increase in the rental amounts payable; that therefore as the issue of the rent payable was already before the Tribunal, there was no need for the appellant to file the notice of reassessment of rent, which it did days to the determination of Tribunal Case No 79 of 2016. That in the circumstances the notice could not form the basis for reduction of rent payable, as the appellant did. That the Tribunal's order directed the appellant to pay the enhanced rent of Kshs 544,654.80/= per month with effect from November 2016. That as the Appellant paid the enhanced rent from November 2016 to November 2017, it had, by conduct abandoned its notice for reassessment of rent.

13. After considering the appeal, the High Court found that the learned trial Magistrate did not err in awarding the respondent rent arrears in the sum of Kshs 2,723,274/= for the period between December 2017 and April 2018, informed by the difference created in rental payments when the appellant stopped paying the enhanced rent of Kshs 544,654.80/= per month, reducing it to Kshs.413,656/=. The learned Judge found that as the enhancement of rent order was made after the appellant's notice of reassessment of rent, the order of the Tribunal enhancing rent payable settled the issue of rent payable.

    The Judge found that as the tenancy was a controlled tenancy, it was subject to the Landlord and Tenants (Shops, Hotels & Catering Establishments) Act, cap 301, (hereinafter the Act). Further that as the Tribunal ruled, it had the jurisdiction to determine or vary the rent payable in pursuant to section 12(1)(b) of the Act and in that regard; it was the best forum for the Appellant to ventilate all concerns it had with the new rent.

14. Regarding the issue of the award for the costs of repair, the learned Judge found that the learned trial Magistrate was right to find the respondent entitled to the award of Kshs 182,385.20/= based on the Assessment Report by Dejfloc Investments. She found that being a material damages claim, the Respondent was not required to specifically prove that the costs for repair were incurred, but rather that it was only required to show the extent of the damage and what it could cost to restore the damaged items. She relied on the case of *Josephat Malondo Mbangu v Alexander Kaluyu Mwove* [2019] eKLR and of *Nkuene Dairy Co-operative Society Limited v Ngacha Ndeiya* [2010] eKLR.

15. In addition, the High Court entered judgment as prayed in the cross appeal and awarded 2 months' rental in lieu of notice to terminate tenancy in the sum of Kshs 1,089,309.60/=. The Judge found that the respondent was entitled to 2 months' rental in lieu of notice by virtue of section 4(4) of the Act that provided for issuance of a notice of tenancy termination of two months' before termination of tenancy. That as the appellant had not issued any notice, it was obligated to pay two months' rental in lieu of such notice. The learned judge therefore upheld the judgment of the trial court, and in addition ordered the appellant to pay two months' rent in lieu of the notice for termination of tenancy.

16. The appellant was aggrieved by the judgment of the High Court and so filed this second appeal to this court, faulting the High Court of erring in law for:

    1. Finding that the question of the rent payable was already pending before the Tribunal and hence, the appellant acted in bad faith when it issued the notice for reassessment of rent;

    2. Finding Tribunal No 79 of 2016 was the best forum for the appellant to deal with the new rent and that it had power to determine the rent payable;

    3. Finding that the appellant had no business to issue notice for reassessment of rent, and that the respondent was not obligated to reply to the notice for reassessment for rent payable as that issue was already before the Tribunal;

    4. Finding that the notice for reassessment of rent could not apply retroactively;

5. Finding the appellant was in rent arrears in the months of December 2017 to April 2015;

6. Finding appellant did not give 2 months' notice to terminate tenancy hence the respondent was entitled to 2 months' rental in lieu of notice;

7. Finding there was an Assessment Report by Messrs Dejfloc, whereas the documents referred were invoices and that therefore there was no basis in awarding the respondent material damage in the amount of Kshs189,385/=.

Virtual Hearing.

17. We heard the appeal through this court's virtual platform on the 29 November 2022. Learned Counsel present at the hearing were Mr Omwenga for the appellant and Ms Talla holding brief for Mr Mutubia for the respondent. Mr Omwenga relied on his written submissions and list of authorities dated 31 December 2021. Ms Talla relied on the submissions dated 13 August 2021 together with the digest and copies of authorities filed by Mr. Mutubia. Counsel highlighted their submissions before us.

18. This being a second appeal from the decision of the High Court Civil Appeal No 135 of 2019 sitting on a first appeal against the judgment of the Chief Magistrates' Court in Mombasa CMCC No 1723 of 2007, we are restricted to determining points of law and not of fact. This court's decision in the case of *Stanley N Muriithi & another v Bernard Munene Ithiga* [2016] eKLR (Waki, Karanja & Kiage JJA) underscored the mandate of this court on a second appeal as follows:

> "...In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.
>
> We hasten to observe, however, that failure on the part of the first appellate court to re-evaluate the evidence tendered before the trial court and as a result, arriving at the wrong conclusion is a point of law."

Submissions by Counsel

19. Mr Omwenga arguing grounds 1and 2 of the appeal together urged that the appellant issued a notice for reassessment of rent to the respondent in the prescribed form pursuant to section 4(3) of the Act. Counsel relied on this court's decision in *Speaker of National Assembly v Njenga Karume* [2008] eKLR 425 for the proposition that where an Act prescribes a procedure for redress of any grievance, such procedure ought to be followed. He urged that section 4(3) prescribed the procedure for reduction of rent, that Tribunal Case No 79 of 2016 had nothing to do with rent reduction and thus the High Court erred to find that the Tribunal could have resolved the issue of rent payable.

20. Counsel urged that the appellant served notice to reduce rent from Kshs 469,530/= to Kshs 356,600/= with effect from November 1, 2016. That as the respondent did not object or file a reference under section 6(1), then under section 10 of Act the notice took effect from the date of the notice. Counsel urged that for that reason the High Court Judge was wrong to find that the Respondent was not obliged to respond to the notice of reassessment of rent.

21. In response to the respondent's submissions that it is the respondent that first served the appellant with a notice of intention to increase rent effective March 1, 2016, and that the appellant filed the reference challenging the notice before the BPRT in Tribunal Case No 79 of 2016. Mr Omwenga submitted

that what the appellant filed in the BPRT was a complaint, not a reference, and that the issue of rent could not be determined in a complaint.

22. As to whether a notice for reassessment of the rent could have retroactive application, referring to the definition of retroactive in the *Oxford Dictionary* ("with effect from a date in the past") counsel urged that the effective date was the one given in the notice, which was 1 November 2016, which was not past at the time it was issued.

23. As to whether the appellant was in arrears for the months of December 2017 to April 2018, counsel urged that as per the notice of reassessment of rent, the appellant over paid from November 2016 to November 2017. He urged that thus, the respondent should have offset the overpaid sum of Kshs 1,702,987.40/=.

24. As to whether special damages can be awarded on the strength of invoices, it was the appellant's submission that the respondent produced invoices in support of its claim for the costs of the repairs undertaken on the premises. While placing reliance on the case of *Rubangaura Rose v Petrocom SA (Rwanda)* [2015] eKLR, Mr Omwenga urged that the cost of repairs of vehicles "such a claim would come under the heading of special damages." That in the circumstances the High Court erred in law in failing to treat the claim for cost of repair as a special damages claim.

25. The respondent opposed the appeal. Mr Mutubia in his written submissions urged that the respondent issued the appellant with a tenancy notice in which the respondent sought to increase the monthly rental payable from Kshs 399,970/= to Kshs 469,530/= plus 16% VAT effective 1 March 2016. The Appellant, upon receiving the notice filed a reference before Tribunal under section 6 of the Act. The respondent filed a preliminary objection to the reference challenging the jurisdiction of the Tribunal to determine the reference on the basis the tenancy enjoyed by the appellant was not a controlled tenancy falling within the Act.

26. On 7 October 2016, the Tribunal gave a ruling dismissing the preliminary objection and approving the respondent's terms of tenancy as per its notice, and ordered the appellant to pay enhanced rent in the sum of Kshs 544,654/80, plus 16% VAT, effective 7 October 2016.

27. Counsel urged that on 31 August 2016, during pendency of the delivery of the ruling the appellant issued a notice of intention to reduce the amount of monthly rental payable for the demised premises from Kshs 469,530/= to Kshs 356,600/= exclusive of VAT effective October 1, 2016. That as the Tribunal gave its ruling affirming the enhanced rent on the 7 October 2016, the respondent did not respond to the notice because pursuant to section 9(3) of Act, no tenancy notice could be given in respect of the premises of which a determination on rent had been made before the expiry of two (2) years.

28. Mr Mutubia submitted that as the appellant paid the enhanced rent from November 2016 to November 2017, it abandoned its notice for enhancement of rent and is estopped by conduct or election from relying on it. For that proposition he relied on this Court's case of *John Mburu v Consolidated Bank of Kenya [*2018] eKLR and of *Sifa International Limited v National Social Security Fund Board of Trustees* [2011] eKLR.

29. Regarding the award on the cost of repairs, it was Mr Mutubia's submission that the appellant occupied the premises between 2001 and 2018. That the respondent prepared an Assessment Report on extent of repair required through Dejfloc Investments. Placing reliance on the case of *Josephat Malondo Mbangu v Alex Kaluyu Mwove* [2019] eKLR and of *Nkuene Dairy Farmers Co-operation Ltd v Ngacha Ndeiya* [2016] eKLR, counsel urged that in a material damages claim it was not necessary to

demonstrate that indeed costs were incurred, that the report was sufficient to support the claim, as it was proof of what it would cost the Respondent to repair the damage to the premises.

Analysis and Determination

30. We have considered the appeal, submissions by counsel and the cases cited by the parties. The appellant has challenged the award and decree of the High Court entered in favour of the respondent. In the first four grounds of appeal, the appellant raises issues around the process of altering the terms of the tenancy through increase/decrease of the rent payable under a controlled tenancy. Just to restate them here for ease of reference, the issues raised are whether the notice of re-assessment of rent that the appellant served upon the respondent was a valid notice, and whether the respondent was obligated to respond to it whether in opposition or in agreement to it. Further, whether the Tribunal Case No 79 of 2016 was the best forum for the determination of the issue of the rent payable and if the notice could lead to the reduction of the rent payable by the appellant over the demised premises. The last two grounds challenges the learned Judge of finding there was no notice for termination of tenancy by the appellant, and of confirming an award of repair costs on the basis of invoices based on an Assessment Report.

31. There is no contention that the terms of tenancy the appellant enjoyed over the respondent's demised premises was a controlled tenancy and that the law applicable was the *Landlord and Tenant (Shops, Hotels & Catering Establishments) Act* cap 301, Laws of Kenya. Section 4 of the *Act* provides for Termination of, and alteration of terms and conditions in, controlled tenancy as follows:

> "(1) Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall 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 the following provisions of this Act.
>
> 2. 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.
>
> 3. A tenant who wishes to obtain a reassessment of the rent of a controlled tenancy or the alteration of any term or condition in, or of any right or service enjoyed by him under, such a tenancy, shall give notice in that behalf to the landlord in the prescribed form.
>
> 4. No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, as shall be specified therein:
>
> Provided that-
>
> i. where notice is given of the termination of a controlled tenancy, the date of termination shall not be earlier than the earliest date on which, but for the provisions of this Act, the tenancy would have, or could have been, terminated;
>
> ii. where the terms and conditions of a controlled tenancy provide for a period of notice exceeding two months, that period shall be substituted for the said period of two months after the receipt of the tenancy notice;

iii. the parties to the tenancy may agree in writing to any lesser period of notice."

32. Subsection 4(1) clearly provides that any termination of a controlled tenancy, and or alteration of its terms and conditions shall only be done in compliance with the *Act*. The alteration of terms includes the notice of enhancement of rent as well as the notice of re-assessment of rent, since either of them have the effect of altering the terms of the tenancy.

33. The two notices herein were conflicting in terms and effect. While the one served by the respondent stated clearly that the intention was to increase rent from Kshs 399,970/= to Kshs 469,530/= plus 16% VAT, effective 1st March 2016, that from the Appellant served notice to reduce rent form Kshs 469,530/= to Kshs 356,600 with effect from 1st November 2016.

34. What is before us as a second appellate court is whether the notice of re-assessment of rent issued by the appellant to the respondent was a proper notice, and what effect it had to the appellant's tenancy over the suit premises. Put differently, as there were two notices served by one party to the other, what effect did these two notices have in the matter, or over the suit premises, and whether both were valid. Section 4(5) of the Act provides *inter alia*:

> " A tenancy notice shall not be effective for any of the purposes of this Act unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and requires the receiving party to notify the requesting party in writing, within one month after the date of receipt of the notice, whether or not he agrees to comply with the notice."

35. The respondent's counsel pointed out that it was the respondent that issued the appellant with a tenancy notice in which it sought to increase the monthly rental payable from Kshs 399,970/= to Kshs 469,530/= plus 16% VAT, effective 1 March 2016. That upon receiving the notice, the appellant filed a reference before the BPRT under section 6 of the Act. That the respondent then filed a preliminary objection to the reference, challenging the jurisdiction of the tribunal to determine the reference on the basis the tenancy enjoyed by the appellant was not a controlled tenancy falling within the Act. That in a ruling delivered on the 7 October 2016, the Tribunal dismissed the preliminary objection, but approved the terms of the tenancy notice, and granted the respondent an enhanced monthly rental of Kshs 544,654.80/=, inclusive of VAT.

36. The respondent's notice was the first in place. It was in compliance to section 4 of the Act. The next step that required to be taken in the case was the one prescribed under section 6 of the Act.

37. The Act provides that upon service of a notice touching on rent, the party served has certain options under 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 (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:
>
> Provided that a Tribunal may, for sufficient reason and on such conditions as it may think fit, permit such a reference notwithstanding that the receiving party has not complied with any of the requirements of this section."

38. We invoke this court's decision in *Nandlal Jivray Shah & 2 others v Kingfisher Properties Ltd* [2015] eKLR where the court considered the options a recipient of a tenancy notice may elect to do as follows:

a. Do nothing;

b. Serve an objection upon the requesting party voicing his disagreement with the changes proposed in the tenancy notice then do nothing further or;

c. Send an objection and lodge a reference before the tribunal for a formal determination of the dispute or;

d. Fail to send an objection but proceed to lodge a reference in the tribunal.

The court continued to state

> "Where a reference is lodged, as in (c) and (d) above, the tenancy notice is suspended from taking effect pending the hearing and determination of the reference by the tribunal. Conversely, where an objection has been served but no reference is filed, time in respect of the notice continues to run and upon the lapse of the stipulated notice period, the changes envisioned in the notice take effect by default. Section 6(1) above makes this abundantly clear. It is only the filing of a reference which suspends time with regard to the tenancy notice."

39. In the present case, the appellant opted to file a case before the BPRT to challenge the notice, which from the above case is option (d). It did not respond to the respondent before filing the case at the Tribunal. The effect of filing the case was twofold; one, challenge the action by the respondent to issue notice of increase in rent; and two, suspend the notice, so that on March 1, 2016, the new rent did not take effect. We note that the appellant filed the case before the Tribunal after the date the notice was to take effect. However, it is clear that the notice by the respondent did not take effect until the ruling of the Tribunal on 7 October 2016.

40. The question is, having filed the case to challenge the notice, could the appellant choose to exercise another option under section 6(1) of the *Act*. We do not think that the appellant could change options midstream. The notice it issued on 31 August 2016 could have no effect as the quest in that notice was to bring the rent down. The issue of the rent was before the Tribunal, which had power to make a determination by taking the following options under section 9 of the Act, as follows:

> "9. Decision of Tribunal and effect thereof
>
> 1. Upon a reference a Tribunal may, after such inquiry as may be required by or under this Act, or as it deems necessary-
>
> a. approve the terms of the tenancy notice concerned, either in its entirety or subject to such amendment or alteration as the Tribunal thinks just having regard to all the circumstances of the case; or
>
> b. order that the tenancy notice shall be of no effect;
>
> c. and in either case make such further or other order as it thinks appropriate."

41. In its determination of 7 October 2016, in compliance to section 9(1)(a), the tribunal' approved the respondent's terms of tenancy as per its notice, and ordered the appellant to pay enhanced rent in the sum of 544,654/80, plus 16% VAT, effective November 1, 2016. This determination came after the Appellant's notice. The issue is whether the appellant's notice of reassessment of rent had any effect. We think that the answer can be found under section 9(3) of the Act which provides thus:

> " Section 9(3)
>
> Where a Tribunal has made a determination upon a reference, no further tenancy notice shall be given in respect of the premises concerned, which is based on any of the matters affected by the determination-
>
> a. in the case of an assessment of rent, until after the expiration of two years; or
>
> b. in any other case, until after the expiration of twelve months, after the date of the determination, unless the Tribunal, at the time of the determination, specifies some shorter period."

42. The test of determining whether the appellant's tenancy notice was valid is spelt out under section 9(3) of the Act, and cam be summarizes in the form of the following questions:

i. Has a Tribunal made a determination upon a reference;

ii. Did the determination concern or affect an assessment of rent;

iii). Has there been a lapse of two years since the determination of the Tribunal.

43. If the answer to the first two questions is in the positive and the third question is answered in the negative, then no tenancy notice could issue, and if one was issued, then it would be invalid for all practical purposes. The Act is clear that until after the expiration of two years, no [further] tenancy notice shall be given in respect of the premises concerned, which is based on any of the matters affected by the determination in the case of an assessment of rent. until after the expiration of two years.

44. Mr Omwenga for the appellant admitted that indeed the respondent served the notice for enhancement of the rent. He however contended that what the appellant filed in the BPRT was a complaint under section 12(4) of the Act, and not a reference, that the issue affecting rent could not be determined in a complaint. To quote the learned counsel for the appellant verbatim, he urged that "The appellant filed a complaint under section 12 [41 of the Act, to wit, Tribunal Case No. 79 of 2016 as per page 142 of the record of appeal herein complaining about the respondent's act of increasing rent without issuing the requisite notices required under section 4 of the Act."

45. We note that the issue of whether the appellant filed a reference or complaint before the Tribunal Case No 79 of 2016 was not a matter raised before the learned Judge of the High Court. We are also aware that no new issue that was not before the superior courts on be raised on appeal before us. In the case of *Mary Kitsao Ngowa & 36 others v Krystalline Limited* [2015] eKLR, this court has previously dealt with such as issue and pronounced itself thus;

> "...we must also appreciate the fact that, this is not even an issue that was canvassed before the trial court. The issue regarding the interpretation, meaning and application of section 90 of the Employment Act was never placed or canvassed before the trial court for determination. The jurisdiction of the appellate court is to look into issues that were presented before the trial court. A court cannot be said to have erred on an issue that was never argued before it. This is what the appellants have sought to do in respect of this ground of appeal.

Accordingly, the learned Judge cannot be faulted for not considering or appreciating the concept of continuing injury."

46. Even though not an issue before the High Court, we have perused the record of appeal. At page 142 of the record of appeal is Form C (rule 5) and is titled 'Reference by Landlord or Tenant to the Tribunal.' It is signed by 'Mogaka, Omwenga & Mabeya advocates for the tenant. That settles the issue that indeed the appellant filed a reference to the Tribunal; it also over the notice to increase rent. Mr Omwenga's argument that the Tribunal No 79 of 2016 was filed under section 12(4) cannot be correct as the whole of section 12 of the Act deals with the 'Powers of Tribunals'. Any reference to is filed under section 6 of the Act.

47. We find that the appellant could not 'add a spanner in the works' so to speak by giving the notice of reduction of rent months later while the Tribunal was yet to make a determination of the reference it filed before it, as against the respondent's notice. This is because, once the matter of the rent was pending before the Tribunal, and after the rent issue determination was given by the Tribunal, the appellant could not validly issue or serve any notice touching on the tenancy until after expiry of 12 months from the date of the determination.

48. The notice given by the appellant, pursuant to the letter dated 31 August 2016 had no place under the Act. Having referred the respondent's notice to increase rent to the Tribunal, the appellant's options under section 6(1) of the Act were determined and or exhausted upon filing the reference.

49. We find that the notice of re-assessment of rent that the appellant served upon the respondent was a not a valid notice, being in contravention of section 9(3). As such, being an invalid notice, the respondent was not obligated to respond to it whether in opposition or in agreement to it. Furthermore, the appellant cannot invoke section 10 of the act to argue that once the respondent did not respond to the notice or file a reference, its notice to reduce rent came into effect by default. Section 10 relates to; 'Effect of notice where tenant fails to refer to Tribunal', can only be invoked by the Landlord and not the tenant. We agree with the learned Judge of the High Court that the Tribunal Case No. 79 of 2016 was the best forum for the determination of the issue pertaining to the rent payable.

50. As to whether the appellant owed any arrears to the respondent, by operation of section section 9(3) of the Act, the appellant was precluded from issuing any other notice touching on rent. We agree with the respondent's counsel that after paying the enhanced rent for one year from November 2016 to November 2018, the appellant was estopped by conduct or waiver from claiming any rights it may have had, even though it had none, to reduce the rent payable downwards as it did. Consequently, the Appellant owed rent in arrears for period between December 2017 to April 2018, when he paid the reduced rent form Kshs 469,530/= to Kshs.356,600/=. See *John Mburu v Consolidated bank of Kenya* [2018] eKLR.

51. To bolster the finding further, the appellant by his conduct of paying the enhanced rent in compliance to the order of the Tribunal demonstrated an intentional relinquishment or abandonment of its quest for rent reduction, which in any event was not available to it until after 12 months under section 9(3) of the Act. Consequently, the appellant was in arrears of rent for the period of five months. We cite with approval the sentiments of Maraga, J (as he then was) in the case of *Sita Steel Rolling Mills Ltd v Jubilee Insurance Company Ltd* [2003] eKLR, where he stated:

> "A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is in consistent with any other intention than waive it. It may be inferred from conduct or acts putting one off ones guard and leading one to behave that the other has waived his right."

52. The ground challenges the learned Judge of finding that there was no notice for termination of tenancy by the appellant to the respondent. Whether a notice was issued or not is a question of fact. It ought to have been raised and determined before the High Court and the Chief Magistrates Court. We say no more.

53. The other issue raised is whether material damages claim is a special damages claim, and whether it could be proved by way of invoices. It is a general rule or principle of law that a special damages claim must be specifically pleaded and specifically proved. Mr Omwenga urged that a claim for repair costs is a claim for special damages. He relied on the decision in *Rubangura Rose v Petrocom SA (Rwanda)* [2015] eKLR where the Court of Appeal held that: "In the prayers for damages, the appellant has claimed for the cost of the repairs of the motor vehicle registration no RAA 774 N of an amount of Kshs 1,234,430/-. Such a claim would come under the heading of special damages."

54. Counsel placed reliance on this court's decision in *Great Lakes Transport Co (U) Ltd v Kenya Revenue Authority* [2009] eKLR, where the court made the distinction between invoices and receipts. He urged that the court held that an invoice is not a receipt and that an invoice cannot be used to prove a claim for special damages. Paragraph 55.

Mr Mutubia placing reliance on the case of *Josephat Malondo Mbangu v Alex Kaluyu Mwove* [2019] eKLR and of *Nkuene Dairy Farmers Co-operation Ltd v Ngache Ndeiya* [2016] eKLR, urged that in a material damages claim it was not necessary to demonstrate that indeed costs were incurred, that the report was sufficient to support the claim, as it was proof of what it would cost the respondent to repair the damage to the premises. He urged that the award of Kshs 182,385/= on cost of repairs ought to be affirmed on the basis that this was a liquidated claim in the nature of material damages. That the same was specifically pleaded and invoices produced to the effect that the respondent was billed for the repairs to be done. In the evidence of the Respondent's witness, it was evident that the respondent was demanding cost of repairs at Kshs 182,385/= and produced invoices as plaintiff Exhibit 15 & 16 issued by Dejfloc Investments.

56. The issue is whether the respondent's claim was a material damages claim, and what kind of evidence was required to establish the claim. Cases abound that show that special damages in material damages claim need not be shown to have been incurred, and therefore there is no need to produce payment receipts to support the claim. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item. In *Motrex Ltd v Nduruhu Julius & another* [2018] eKLR, the court held that: 'in a material damage claim, a plaintiff does not have to produce receipts to prove the cost of repairs. A report by a motor vehicle Assessor indicating the cost of restoring a damaged vehicle to a condition close to what it used to be prior to the accident is sufficient.

57. In *Winfield on Tort* [17th Edition] it is posited thus:

> " Where property is damaged, the normal measure of damage is the amount by which its value has been diminished, and in the case of ships and other chattels, this will usually be ascertained by reference to the cost of repair. It does not matter that the repairs have not been carried out at the date of the trial, or even that they were never carried out at all."

58. In *Nkuene Dairy Farmers Co-operative Society & another v Ngacha Ndeiya* [2010] eKLR, this court held:

> " In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before

the damage complained of. An accident assessor gave details of the parts of the respondent's vehicle which were damaged. Against each item he assigned a value. We think the particulars of damage and the value of the repairs were given with some degree of certainty."

59. The same court in an earlier judgment in *David Bagine v Martin Bundi* [1996] eKLR, in asserting the probative value of an Assessor's Report reiterated that:

> " The Assessor's report was sufficient proof and the failure to provide receipts for any repairs done was not fatal to the respondent's claim."

60. It is clear that the respondent's claim for cost of repairs was a special damages claim in the form of material damage. The general principle in assessing of damages is restitution in integrum. All the respondent was required to prove was the extent of the damage to the suit premises and what it would cost to repair it without necessarily proving that, the repairs were actually done and paid for. The High Court was therefore right to find that the receipts of payment for the repairs was not required as proof of expenses incurred for repair works, and that the Assessors Report by Dejfloc Investment coupled with the invoices was sufficient proof of its claim.

61. Having considered this appeal, we find that the same has no merit and is for dismissal. Accordingly, we dismiss the appellant's appeal in its entirety and up hold the judgment of High Court. The appellant will pay the costs of this appeal and of the appeal before the High Court.

Those are our orders.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF OCTOBER, 2023.

P. NYAMWEYA

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL.

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR