



**Abeid v Salim (Environment and Land Appeal E016 of 2023)  
[2024] KEELC 3352 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3352 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL E016 OF 2023**

**NA MATHEKA, J**

**APRIL 24, 2024**

**BETWEEN**

**ABDULNASIR SAID ABEID ..... APPELLANT**

**AND**

**ABDULRAHIM ALI SALIM ..... RESPONDENT**

**JUDGMENT**

1. The Appellant, being dissatisfied with the Ruling of the Honourable Patricia May, Vice Chairperson Business Premises Rent Tribunal rendered virtually on the 7<sup>th</sup> of March 2023 appeals to this Honorable court against the whole Judgement on the following grounds;
  1. The Honorable Tribunal erred in law and fact in making a finding that the Appellant's notice seeking to terminate the Tenancy dated the 19<sup>th</sup> of January 2021 failed to comply with Section 4 (4) of the *Landlord and Tenant (Shops, hotels and Catering Establishments) CAP 301* as the duration thereof fell below Two months.
  2. The Honorable Tribunal erred in law and fact in wrongly appreciating and misapplying Article 159 (2) (c) of *Constitution of Kenya* in the case before it.
  3. The Honorable Tribunal erred in law and fact in failing to properly appreciate and apply the provisions of Section 7 (I) (b) of the *Landlord and Tenant (Shops, hotels and Catering Establishments) CAP 301* in the matter before it.
  4. The Honorable Tribunal erred in law and fact in failing to appreciate the evidence of record that showed then Respondent had defaulted in paying rent for a period of two months after such rent has become due or payable.



5. The Honorable Tribunal erred in law and fact in failing to appreciate the evidence of record that showed then Respondent had persistently delayed in paying rent when the same had become due or payable.
6. The Honorable Tribunal erred in law in failing to enforce and apply in the case before it, the terms and conditions implied in all controlled tenancies which are provided in the schedule to the *Landlord and Tenant (Shops, hotels and Catering Establishments)* CAP 301.
7. The Honorable Tribunal erred in law in disregarding and failing to apply the principle of stare decisis in the case before her.

The Appellant seeks orders that;

- a. The decision of the Honourable Tribunal made on the 7<sup>th</sup> of February 2023 be set aside and substituted with the following orders:
    - i. The Appellant/ Landlord's notice dated the 19<sup>th</sup> January 2021 be allowed.
    - ii. The Respondent/ Tenant's reference be dismissed.
    - iii. The Respondent to hand over vacant possession of Business Premises Situated on Plot No. 01-0860, Kongowea, Mombasa with immediate effect.
    - iv. Costs of the reference be granted to the Appellant.
  - b. Costs of this Appeal be awarded to the Appellant.
  - c. This Honourable Court be pleased to grant any further orders that it may deem just and fit to be issued.
2. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and make a determination as to whether the conclusion reached by the trial magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in *Mbogo and another v Shah* (1968) EA 93 where it was held that;

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do.”

3. I am also guided by the case of *Gitobu Imanyara & 2 Others v Attorney General* (2016) eKLR where the Court held that;

“this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a 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. Termination of a controlled tenancy is provided for under section 4 of the [Landlord and Tenant \(shops, Hotels and Catering Establishments\) Act](#). The Section provides that;

“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 provisions of this Act”
5. Section 4(2) of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) further provides that,

“A landlord who wished 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 to the tenant in the prescribed form.”
6. The Appellant stated that he is the proprietor of the suit premises and the Respondent is his tenant. That the Respondent was to pay a monthly rent of kshs.9000/=. That at the end of January 2021 the Respondent was in arrears of rent for four months of October to January of Kshs.36,000/=. That the Respondent was highly irregular at paying rent. That he issued a notice of termination dated 19<sup>th</sup> January 2021 for the Respondent to vacate by 1<sup>st</sup> April 2021. The Tribunal found that the Appellant's notice seeking to terminate the Tenancy dated the 19<sup>th</sup> of January 2021 failed to comply with Section 4 (4) of the [Landlord and Tenant \(Shops, hotels and Catering Establishments\) CAP 301](#) as the duration thereof fell below two months.
7. I have perused the record of appeal and find that the notice of termination was indeed dated 19<sup>th</sup> January 2021. The same was also stamped as received by the Tribunal on the said date. The effective date was indicated as 1<sup>st</sup> April 2024. I find this is a period in excess of 2 months' notice and was well within the law
8. The court in [Manaver N Alibhai t/a Diani Boutique v South Coast Fitness & Sports Centre Limited](#), Civil Appeal No 203 of 1994, stated that;

“The Act lays down clearly and in detail, the procedure for the termination of a controlled tenancy. Section 4(1) of the [Act](#) states in very clear language that a controlled tenancy shall not terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with specified provisions of the [Act](#). These provisions include the giving of a notice in the prescribed form. The notice shall not take effect earlier than 2 months from the date of receipt thereof by the tenant. The notice must also specify the ground upon which termination is sought. The prescribed notice in Form A also requires the landlord to ask the tenant to notify him in writing whether or not the tenant agrees to comply with the notice.”
9. It is evident that the notice of termination of the tenancy herein was as prescribed by the [Act](#). Further, the notice of termination of the tenancy was to take effect on April 1, 2021, being a period exceeding two months as required by the [Act](#). Having established that the notice of termination of the tenancy was in the prescribed form, I shall proceed to analyze the substance of the notice with regard to the grounds of termination of the tenancy on whether the landlord has met the requirements of section 7 (1)(b) of the Act. One of the grounds on which a landlord may seek to terminate a tenancy as specified in section 7 (1) (b) of the [Act](#) that the tenant has defaulted in paying rent for a period of two months



after such rent has become due or payable or has persistently delayed in paying rent which has become due or payable.

10. The Appellant stated that the tenant paid the rent for October 2021 to January 2021 in February 2021 only after getting the termination and that he was notorious in late payments. The tenant has admitted to being in rent arrears but has been quick to state that the landlord has refused to receive the rent. It is trite law that he who alleges must prove. The receipts produced by the Appellant clearly shows late payment and indeed the Airtel money statement and Safaricom statement do not show that any funds were returned to sender. The undeniable fact was that at the time the Landlord/Appellant served the Tenant the Notice to Terminate the Tenancy dated 19<sup>th</sup> January 2021, the tenant had not paid rent for a period exceeding two months. I find that the Honorable Tribunal erred in law and fact in failing to apply the provisions of Section 7 (I) (b) of the *Landlord and Tenant (Shops, hotels and Catering Establishments)* CAP 301. I find that this appeal is merited and I grant the following orders;

1. The decision of the Honourable Tribunal made on the 7<sup>th</sup> of February 2023 be set aside.
2. The Appellant/ Landlord's notice dated the 19<sup>th</sup> January 2021 be allowed.
3. The Respondent to hand over vacant possession of Business Premises Situated on Plot No. 010860, Kongowea, Mombasa within the next 60 days from the date of this judgement.
4. Costs of the Appeal is granted to the Appellant.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24<sup>TH</sup> DAY OF APRIL 2024.**

**N.A. MATHEKA**

**JUDGE**

