



Nyaboke & another v Ondieki (Environment and Land Appeal E011 of 2023) [2024] KEELC 5790 (KLR) (30 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5790 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL E011 OF 2023**

**M SILA, J
JULY 30, 2024**

BETWEEN

ANNA NYABOKE 1ST APPELLANT

ELIJAH NYAKUNDI MOINDI 2ND APPELLANT

AND

ANNE ONDIEKI RESPONDENT

JUDGMENT

(Respondent purchasing a 1/3rd share of one of the proprietors in common which share comprised of five shops; 1st appellant and other persons being in occupation; respondent issuing a tenancy notice on grounds that she wished to have the premises; occupants filing references to the Business Premises Rent Tribunal and contending that the respondent is not the landlord as she does not own the premises; other occupants vacating the premises and leaving only the 1st appellant who was for all intents and purposes in charge of the premises and was putting her own tenants in the premises; 1st appellant completely refusing to recognise the respondent as landlord despite the issue of her ownership of the premises being settled by the Environment and Land Court; whether in those circumstances a tenancy could be inferred; tribunal holding that there was a tenancy relationship and making orders on payment of rent; appeal by the occupant contending that she was never a tenant; appeal allowed on the basis that on the facts there was no tenancy relationship and none could be implied; an occupant who denounces the title of the property owner and insists on remaining in possession without paying rent to the property owner cannot be regarded a tenant but a trespasser; correct position was that the 1st appellant was a trespasser and the tribunal did not have jurisdiction to entertain the dispute as there was no tenancy; appeal allowed on that basis)

1. Who is a tenant ? Who is a landlord ? When can you say that there is a tenancy ? These questions are pertinent to this case as will shortly be seen.



2. The premises in dispute is comprised in the land parcel Kisii Municipality/Block II/66. This parcel of land was owned by three persons, each holding a 1/3rd share, namely Paul Siro Mogaka, Sospeter Moindi, and Johnson Matundura Abuta, who are now all deceased. The initial tenure was leasehold for 33 years from 1 June 1953 for a period of 33 years which expired in 1986. On expiry, the lease was renewed but only in the names of Johnson Matundura and Sospeter Moindi each holding half share. This ignited litigation vide the suit Kisii ELC No. 1200 of 2016 resulting in a judgment delivered on 24 May 2019 affirming that the leasehold is to be held by the three original persons and/or their estates. There is therefore no dispute regarding ownership of the premises. It is a leasehold interest held in common with each proprietor holding a 1/3rd share of it.
3. Through a sale agreement entered into on 13 January 2013, the respondent purchased the share that originally belonged to Johnson Matundura Abuta (deceased). The vendor was Julius Moracha Matundura a son of the senior Mr. Matundura. There was controversy as to whether he could enter into this sale, but this was again settled through separate litigation in the suit Kisii ELC No. 93 of 2014 (OS) Sarah Moraa Moracha & Another vs Julius Moracha Matundura and Anne Ondieki. Judgment in the matter was delivered on 9 October 2019 with the court declining to impeach the sale to the respondent herein. It was said that there is an appeal pending, but until it is decided, this court must take it that the respondent now owns the 1/3rd share of the property that originally belonged to Johnson Matundura (deceased). This share comprises of five shops in the property.
4. After she purchased the 1/3rd share of Mr. Matundura, the respondent issued a notice dated 10 May 2013 to the occupants to vacate the premises. This notice was said to be issued pursuant to the provisions of Section 4 (2) of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#), Cap 301, Laws of Kenya (hereinafter simply referred to as Cap 301 or the Act). It read that it was a Notice to Terminate or Alter Terms of Tenancy. The five shops were said to be occupied by Ammon Okeri Maranga, Musa Abase, David Onsomu, and the 1st appellant who occupied two rooms. In the notice the proprietor mentioned that she was issuing the notice to tenants to vacate because she intended to carry out extensive renovations which could not be undertaken when the tenants were in occupation, and that upon completion of the renovations she wished to occupy her share of the premises for personal use. The occupants filed references to the Business Premises Land Tribunal (the Tribunal) to contest the notices. These cases were registered as Kisii BPRT Case Numbers 043- 050 of 2013. Save for the 1st appellant, all other occupants abandoned their cases and moved out of the premises. However, after they moved out of the premises, the shops that they were occupying were taken over by the 1st appellant who put other persons in possession and proceeded to collect rent from them. This was not done with the permission of the respondent as owner of the premises. While the dispute was proceeding, the Tribunal made orders that the rent that the 1st appellant was collecting be deposited in a joint interest earning account held by counsel for the appellants and respondent. The 1st appellant has thus been depositing what she claims to be the rent that she collects from the other three occupants which she has put at Kshs. 5,000/= per month per tenant. For three persons that would be Kshs. 15,000/=. It will be recalled that she occupied two rooms. She used to deposit a total of Kshs. 20,000/= on the reasoning that she only pays rent for one room and does not pay rent for the second room. This was until an order was made on 17 August 2022 that she also contributes Kshs. 5,000/- per month for this second room/shop.
5. The 1st appellant opposed the Landlord's tenancy notice by asserting that the respondent was never landlady to her and that she has all along been paying rent to Sospeter Moindi as landlord. In essence she refuted having a landlord/tenant relationship with the respondent and she considered the respondent as a stranger in the premises.



6. The matter proceeded for hearing and part (or probably the whole) of the evidence was actually taken on site on 8 December 2022. The evidence as taken down by the Vice Chair is rather sketchy I must say. I think the Vice Chair should do better with his taking down of evidence. But from what I can decipher, the 1st appellant testified that all the units belong to Sospeter Moindi (Sospeter) and now that he is dead it all belongs to one Elijah. Elijah is the 2nd appellant and son of Sospeter. Sospeter had been joined to the suit as interested party and upon his demise Elijah took over thus his presence in the suit. She also testified that Sarah Moraa (wife to Matundura) had contested the sale to the respondent and had filed an appeal against the judgment that upheld the sale of the premises to the respondent. She stated that she collects rent from all shops and that she is Elijah's caretaker. She claimed to be paying the rent collected to Elijah. There was a statement that she made which would infer that she does not pay rent on the one unit because it was given to her by Sospeter Moindi. She curiously did state that she did not know about the case where the 1/3rd share was litigated though in the same breath she said that 'we are on appeal.' She averred that Julius Moracha (the vendor) was not to sell the property as he was holding it in trust under the confirmed grant of the estate of the late Matundura. I have also seen in various of her affidavits filed before the Tribunal, that the appellant was adamant that Julius Moracha was never landlord to any of the tenants therein, that rents were paid to Sospeter, and that the property has never been distinctively identified on who owns what (see for example paragraph 11 of the affidavit sworn on 27 November 2015). There was mention in the course of hearing that the appellant is sister to Julius Moracha who sold the premises to the respondent, though this was never really confirmed. It is not clear whether it is a true sister or maybe a cousin or some sort of relative. It was however disclosed that Matundura and Peter Siro Mogaka were married to sisters. Sospeter Moindi was also their relative. Vincent Tumbo, the administrator of Siro Mogaka, testified that he collects rent from his 1/3 share.
7. I need to elaborate a little on the application by Sospeter Moindi seeking to be joined as interested party. The application was dated 2 December 2014 and in the supporting affidavit he deposed that the tenants in the premises have been paying rent to him. I have not seen the ruling relating to this application but he must have been joined for upon his death on 22 September 2015, Elijah, the 2nd appellant, applied to substitute him, which application for substitution was allowed by consent. Elijah however never testified.
8. In his judgment, the learned Vice Chairman of the Tribunal appreciated that the defence of the appellant was that she was not a tenant of the respondent. Indeed, the Vice Chairman distilled two issues for determination being :-
 - a. Whether there exists a tenancy relationship between the parties; and
 - b. Whether the notice to terminate tenancy issued by the landlord is valid.
9. On whether there exists a tenancy relationship, the Vice Chairman found that the respondent had purchased the 1/3 share of the property where the disputed shops fell and was owner thereof. He also found that the business of the 1st appellant is within the portion sold to the respondent. He pronounced himself as follows :-
 24. It is also my observation that the tenant's business indeed falls within the portion of land that belongs to the landlady herein. As such the landlady is entitled to all the proceeds from the property as well as has the right to terminate the tenancy while following due procedure.
 25. Having established that the landlady is indeed the owner of the property and further that the tenant had been paying rent to the previous landlord, I find that there indeed exists a tenancy relationship between the parties and that the notice to terminate tenancy was rightfully issued and was indeed valid since it accorded the tenant the required statutory two months period.



26. The Tribunal had previously given orders on 19th October 2021 that rent be deposited in a joint interest account opened between the two advocates representing the parties herein. The same shall now be released to the landlady and the tenant shall continue paying directly to her as and when it falls due.
27. Owing to the foregoing I hereby proceed to order as follows :
- (a) The upshot is that the Tenant's Reference dated 1st July 2013 is partially dismissed in the following terms :
 - (b) The Tenant shall pay rent to the Landlady as and when it falls due failure to which the landlady shall be at liberty to distress and evict in the event that they fail to agree with the tenant on the terms of her continuous stay in the next 30 days i.e on or before 30th April 2023.
 - (c) All the amounts held under the joint interest account as from 19th October 2021 shall be released to the landlady Anne Nyaboke (sic) immediately.
 - (d) OCS Kisii Central Police Station to assist in maintaining peace.
 - (e) The landlady shall have costs.
10. It is this decision that has provoked this appeal. The appeal is on grounds inter alia that the Vice Chairman erred in failing to take into account the contention regarding ownership of the property and exceeded the jurisdiction of the tribunal; that the Vice Chairman failed to appreciate the interest of the 2nd appellant (the interested party before the Tribunal) who is a co-tenant in the suit premises; that he erred in failing to appreciate that the Tribunal has no capacity to determine issues to do with apportionment of property; and that he erred in failing to appreciate that the notices to terminate tenancy were irregularly issued since there was no tenant landlord relationship. The appellants seek to have the judgment set aside and substituted with an order allowing the reference and striking out the notices.
11. The respondent filed a cross-appeal. It is contended that having correctly held that there existed a tenancy relationship and that the Landlord's tenancy notice was validly issued, the Vice Chairman erred by making an order for the 1st appellant to continue paying rent as it fell due and instead should have made an order for the 1st appellant to vacate the premises; that he contradicted himself; that he erred in directing the parties to agree on the terms of the tenant's continuous stay despite the hostility displayed by the 1st appellant and that the proper order ought to have been made was an order to vacate the premises. The respondent wants an order setting aside the judgment and for the same to be substituted with an order upholding the Landlord's notice and to be allowed to evict the 1st appellant.
12. I invited counsel to file submissions and I have taken note of the submissions filed.
13. I think the Vice Chairman of the tribunal properly identified the issues before him. He was right in identifying the first issue to be whether there existed a tenancy relationship given the contention by the appellants that the respondent is not a landlady and that there does not exist a landlord/tenant relationship between the 1st appellant and the respondent. In fact, the position of the 1st appellant was that she had all along been paying rent to the late Sospeter Moindi whom she recognized as her landlord and after his death to his son Elijah, the 2nd appellant. The 1st appellant also raised issues regarding how the respondent acquired the premises and insisted that the respondent could not have properly purchased the property because the vendor only had an interest as trustee.



14. Though he correctly identified the issue of tenancy as being contested, I am however of opinion that the Vice Chairman did not properly interrogate whether there existed a landlord/tenant relationship. His approach as I appreciate it, was that because it had been confirmed that the respondent owned the premises, then she was landlord, and because the 1st appellant was in occupation of the premises, then she was tenant. I started this judgment by asking the question, who is landlord ? who is tenant ? and; what is a tenancy relationship ?

15. A landlord is defined in the text, Adkins, Landlord and Tenant, 17th Edition, at page 1, as follows :

“The word landlord implies not merely a lordship over or the ownership of an estate in land, but the person between whom and another the relationship of landlord and tenant exists.

This relationship usually arises when the owner of an estate in land grants, by means of a contract between the parties, the right to the possession of his land, or part of it, to another person to hold under the grantor for a period of years. In such case the grant is called a lease, demise or tenancy; the grantor is the landlord or lessor; the grantee is the tenant or lessee; the period granted is called the term or term of years; and the interest which the landlord retains, and which includes his right to possession of the land at the end of the term which is granted to the tenant, is called the reversion. If the interest of the grantor is itself leasehold the lease is a sub-lease or under-lease; the landlord is a sub-lessor or under-lessor; the tenant is a sub-lessee or under-lessee; and the reversion may be called a leasehold reversion. Whatever may be the nature of the landlord's interest in the land, the tenant's interest is always leasehold and the retention of a reversion by the landlord is essential, for if the landlord conveyed the whole of his interest the transaction would amount to an assignment and the relationship of landlord and tenant would not come into existence.

Although the relationship of landlord and tenant generally arises by express grant it is possible for it to arise by implication; for instance, by a person occupying the land with the landlord's consent, or by entry and payment and acceptance of rent, or by a tenant remaining after his term has ended and paying rent which is accepted. It is also possible for the relation to arise where there is merely a contract to grant and take a lease. The relationship may also arise by attornment, i.e., the acknowledgment by the tenant of a new landlord...

A “landlord,” therefore, may be defined as a person of whom lands or tenements are held by a tenant in leasehold tenure under contract of tenancy”

16. The Blacks law, Dictionary, Eighth edition, page 895 has two definitions of landlord as follows :-

1. at common law, the feudal lord who retained the fee of the land-sometimes shortened as to lord and
2. One who leases real property to another also termed (in sense 2) as lessor”

17. What about a tenant ? Who exactly is a tenant ? Adkins (supra) at page 17 defines tenant as follows :

“In the Law of Landlord and Tenant, a tenant is a person or body of persons holding land under a landlord in leasehold tenure. Usually a tenant holds under a contractual tenancy for a certain period and pays to the landlord an annual rent as a consideration for the right of the exclusive possession, use and enjoyment of lands and tenements which belong to the landlord, but a tenancy at will may be created by the mere occupation or temporary



possession of the land of another with his consent and a rent is not essential in this case or in the case of any letting if the lease is by deed.”

18. What about a tenancy or lease ? Adkins, (supra) at page 29 defines a lease as follows :

“A Lease is a letting of lands or tenements by a landlord to a tenant. It is a contract for the exclusive possession of the premises by the tenant for a period of the lease, usually in consideration of the payment of a rent. It is also a conveyance by which the landlord transfers a portion of his interest in the land to a tenant for a period of years.

19. At page 37, Adkins (supra) elaborates the requisites for a valid lease are as follows :

“The various things necessary to constitute the making of a good or valid lease have been stated in Sheppard’s Touchstone as follows :-

1. There must be a lessor who is able to make the lease.
2. There must be a lessee who is capable of taking the thing demised.
3. There must be a thing demised which is demisable.
4. If the thing demised or the term expressed to be granted, be not grantable without a deed; or the party demising be not able to grant without a deed; the lease must be made by deed, containing a sufficient description of the lessor, the lessee, the thing demised, the term granted, and the rent and covenants; and all necessary requirements, such as sealing, delivery, etc., must be observed.
5. If it be a lease for years, it must have a certain commencement and a certain determination.
6. On the part of the lessor there must be expressed an intention to demise, and on the part of the lessee there must be an acceptance of the thing demised and of the estate.

(underlined emphasis mine)

20. The Halsbury’s Laws of England, 4th edition, volume 27, Page 9 paragraph 1, describes the landlord and tenant relationship as follows;

“The relationship of landlord and tenant arises as a rule when one person, the landlord, with the intent to create a tenancy confers on another, the tenant, the right to the exclusive possession of land, mines or buildings. The grant or demise must be either for a time which is subject to a definite limit originally, as in the case of a lease for a term of years certain, or for a time which, although originally indefinite, can be made subject to a definite limit by either party as of right by that party giving appropriate notice to the other, for example a tenancy from year to year. The interest in the property which remains in the landlord is called the reversion, and, as a rule, there is incident to it the right to receive from the tenant payment of rent for the use of the property. The relationship of landlord and tenant was originally one of contract only, but from early times the contract conferred an estate in the land on the tenant without losing all its contractual characteristics” (footers left out).

21. Under the *Land Act, Act No. 3 of 2012*, ‘lessee’ means a person to whom a lease is granted and includes a person who has accepted a transfer or assignment of a lease. ‘Lessor’ means a person by whom a lease is granted and includes a person who has accepted the transfer or assignment of the reversion of a lease.



22. Tenancy can arise under contract or by operation of law. There is no problem where the tenancy is under a contract, whether oral or written. The landlord is known and the tenant is known. The rent is appreciated by the parties and so too the term. But what about tenancies that are implied or arise from operation of law? These can arise under common law or statute. Under common law some tenancies can be implied, which would include a tenancy at will and a tenancy at sufferance.

23. Halsbury's, (supra) paragraph 168, page 126 defines an implied tenancy at will as follows :-

“A tenancy at will is implied where a person is in possession by the owner's consent, and his possession is not as employee or agent or as a licensee holding under an irrevocable licence, and is not held in virtue of any freehold estate or of any tenancy for a certain term. It is implied accordingly in cases of mere permissive occupation without payment of rent, for example the occupation of a house by a nonconformist minister under trustees in whom the property in the house is vested. It is also implied upon a mere general letting, unless there are circumstances showing an intention that the tenancy is to be from year to year as where a yearly rent, or a rent measured by reference to an aliquot part of a year, is agreed to be paid.”

24. On tenancy at Sufferance, Halsbury's (supra) at paragraph 175 page 130 elaborates that ;

“A person who enters on land by a lawful title, and after his title has ended continues in possession without statutory authority and without obtaining the consent of the person then entitled, is said to be a tenant at sufferance, as distinct from a tenant at will who is in possession with the landlord's consent. This is so whatever was the nature of the tenant's original estate, whether he was a tenant for years, or the sub-tenant of a tenant for years, or a tenant at will.”

25. The *Land Act, Act No. 3 of 2012*, does not provide for a tenancy at will or sufferance. What it implies is what it refers to as a periodic lease. It provides as follows :-

57. Periodic leases

(1) If in any lease—

- (a) the term of the lease is not specified and no provision is made for the giving of notice to terminate the tenancy, the lease shall be deemed to be a periodic lease;
- (b) the term is from week to week, month to month, year to year or any other periodic basis to which the rent is payable in relation to agricultural land the periodic lease shall be for six months;
- (c) the lessee remains in possession of land with the consent of the lessor after the term of the lease has expired, then—
 - (i) unless the lessor and lessee have agreed, expressly or by implication, that the continuing possession shall be for some other period, the lease shall be deemed to be a periodic one; and
 - (ii) all the terms and conditions of the lease that are consistent with the provisions of subparagraph (i)



shall continue in force until the lease is terminated in accordance with this section.

- (2) If the owner of land permits the exclusive occupation of the land or any part of it by any person at a rent but without any agreement in writing, that occupation shall be deemed to constitute a periodic tenancy.
- (3) The periodic tenancy contemplated in subsection (1)(a) shall be the period by reference to which the rent is payable.
- (4) A periodic tenancy may be terminated by either party giving notice to the other, the length of which shall be not less than the period of the tenancy and shall expire on one of the days on which rent is payable.

26. Under CAP 301 tenancy means a tenancy created by a lease or underlease, by an agreement for a lease or underlease by a tenancy agreement or by operation of law, and includes a sub-tenancy but does not include any relationship between a mortgagor and mortgagee in such.
27. The elements of a landlord/tenant relationship as can be noted above is that there is a landlord i.e the owner of the property; there is a tenant, that is that there is person ready to have exclusive use of the premises; that there is a premise, that is the property demised; that there is a term, that is the period given to the tenant; and that , there is consideration, which is the rent payable. It is a contractual relationship and as any other contract there must be consensus ad idem, i.e the parties need to be of the same mind and page. They must take each other to be tenant and landlord and they must pronounce that they have a tenancy relationship. Short of these elements one cannot claim to have a landlord/tenant relationship.
28. Now, what of a situation where there is a person who is possession of the land where there is no express contract of tenancy, and is not in possession because of permission or licence of the registered owner so that a tenancy at will or a periodic tenancy can be implied, and does not recognize the person demanding rent as owner of the premises, does not pay rent, and insists that he/she in possession on the strength of a lease or licence by a third party ? Can that person be considered a tenant ? Can there in fact be considered that there is any contractual tenancy relationship ?
29. In my opinion, in such a scenario there is no tenancy. The occupant of the premises is no more than a trespasser. Where occupation is hostile to that of the registered owner then the person in occupation can only be regarded as a trespasser. The trespasser can of course improve his status by acknowledging the title of the registered owner and paying rent, in which instance, if there are no agreed terms, a periodic lease can be implied. But where rent is demanded and the person in occupation declines to pay it, insisting that the person demanding the rent is not the owner of the premises, it cannot be asserted that the two persons have a landlord/tenant relationship. Indeed there cannot be such relationship for no consideration will ever be forthcoming, and neither can it be said that possession, in the face of denial of title, is with the consent of the property owner.
30. If we look at what we have in our case, upon issuance of the tenancy notice, the 1st appellant proceeded to the tribunal to contend that the tenancy notice is improper because the person issuing it is not landlord of the premises. There was nothing wrong with the reference by tenant because a tenancy notice was issued, and under Section 6 of CAP 301, a receiving party is at liberty to approach the tribunal to contest the notice. One of the powers that the Tribunal has under Section 12 (1) (a) of the Act is to determine whether or not any tenancy is a controlled tenancy, and I believe within that power, there is power to determine whether or not there is any tenancy at all. If the Tribunal finds that there is no tenancy, or no controlled tenancy, then it cannot make orders regarding rent or vacation



of premises, for it will essentially have determined that the matter is beyond its jurisdiction. If it holds that there is no tenancy or no controlled tenancy, that should be the end of the reference. The parties from the time of issuance of that order, now need to look for alternative remedies, for example, filing suit for eviction.

31. This was elaborated in the case of *Pritam vs Ratilal & Another* (1972) EA 560, where Madan J, stated as follows at page 562 :

“As stated in the Act itself, it is for an Act of Parliament to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto. The scheme of this special legislation is to provide extra and special protection for tenants. A special class of tenants is created. Therefore the existence of the relationship of landlord and tenant is a prerequisite to the application of the provisions of the Act. Where such a relationship does not exist or it has come to or been brought to an end, the provisions of the act will not apply. The applicability of the Act is a condition precedent to the exercise of jurisdiction by the tribunal; otherwise the tribunal will have no jurisdiction. There must be a controlled tenancy as defined in S.2 to which the provisions of the Act can be made to apply. Outside it the tribunal has no jurisdiction.”

32. It can happen that parties can be mistaken as to whether there is a tenancy and one may claim rights over the alleged tenancy. It will still remain the position that there is no tenancy. See for example the case of *Chalcots Developments Limited vs De Gray* (1967) 2 All ER 888. In that case the plaintiffs obtained a lease of the premises from the land owner. There had been a previous tenant who had a subtenant. The plaintiff issued notice to terminate the tenancy and the tenant moved out but the subtenant did not. The plaintiff wrote a letter directly to the subtenant to vacate, but she did not, claiming to have acquired the status of a protected tenant. The court held that the tenancy had properly been terminated and that the plaintiffs had in fact no claim for arrears of rent and that there was only a claim for damages for trespass.
33. In our case, I do not see how it could be urged that there was any tenancy or any controlled tenancy between the parties. There was no written or verbal agreement for a tenancy between them. There was no agreed or assessed rent between the parties. No rent was ever paid by the 1st appellant to the respondent and in fact the 1st respondent never recognized the respondent as owner of the premises. You also cannot imply a tenancy where the occupant does not wish to be the tenant of the owner or where the occupant denounces the title of the land owner. In essence, you cannot force a tenancy relationship when the occupant does not wish to be regarded as tenant.
34. In its judgment, the Tribunal did not interrogate the effect of the refusal by the 1st appellant to recognise the title of the respondent. It only held that because the respondent was owner of the premises then she was a landlord. She was only ‘landlord ‘ in the loose terminology of person entitled to demand rent but not ‘landlord’ in the context of a tenancy relationship. The tribunal was also wrong in holding that the previous occupants had been paying rent to the person who sold the premises to the respondent. There was no such evidence as all the other occupants did not pursue their cases before the tribunal. None of them testified to affirm that they were paying rent to Julius Moracha, the vendor of the premises. The only person who testified was the 1st appellant and her evidence was that she never paid rent to Julius Moracha. Clearly there was nothing upon which the tribunal could hold that the previous occupants were paying rent to the vendor.
35. The other error that is apparent is that if the tribunal found that the tenancy notice was proper, then it ought to have allowed it, meaning that the respondent was entitled to vacant possession. I agree with



- the respondent in her cross-appeal that it was a contradiction for the tribunal to say that the notice was properly issued, but again refuse to allow it, and instead direct that the parties continue with a tenancy relationship that for all intents and purposes was non-existent. But nothing turns on this because it is my finding that there was no tenancy between the parties.
36. From the facts the proper holding ought to be that there was no tenancy relationship between the two parties and upon that finding the tribunal ought to have downed its tools. That is the finding I will make on this appeal, that there is no tenancy relationship between the 1st appellant and the respondent.
37. The true position of the 1st appellant is that of trespasser. She is in fact the one in control of the premises and the one putting in different persons as tenants in the shops. These are her own tenants yet she holds no lease from the registered proprietor that would give her the title of a legitimate landlord. They are not in the premises as subtenants, i.e tenants on the basis that the 1st respondent holds a head lease, but actual tenants of the 1st appellant. She has not put these other persons in occupation with the permission of the owner of the premises but in total disregard to her ownership. She collects an amount of money which nobody knows, but which she claims out of her own word of mouth to be Kshs. 5,000/=. It could be anything. Moreover, the 1st appellant does not feel that she is obliged to pay rent in one of the rooms because according to her it was left for her. This is a classical trespasser as far as I can see. This was therefore not a matter for the tribunal. If the respondent wished to have her out of the premises she ought to have filed suit for her eviction alongside all persons in occupation under her title, for they would not be resident under the title of the rightful property owner.
38. I will set aside the orders of the tribunal and hold that the proper finding ought to have been that there is no tenancy relationship and parties ought to pursue their remedies elsewhere. The appeal therefore succeeds to the extent that I agree that there is no tenancy relationship. On the basis of that holding I cannot allow the cross-appeal.
39. I make no orders as to the costs of this appeal given that it is my finding that the 1st appellant is nothing more than a trespasser. The respondent however deserves the costs of the proceedings before the tribunal as against the 1st appellant for the correct order that the tribunal should have made was that it has no jurisdiction on the reference by the 1st appellant.
40. I am aware that some money has been deposited in a joint interest earning account. I will make no orders on that money. That will need separate litigation.
41. Judgment accordingly.

DATED AND DELIVERED THIS 30 DAY OF JULY 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the Presence of :

Mr. Nyambati for the appellants

Mr. Mulisa for the respondent

Court Assistant – David Ochieng’

