



REPUBLIC OF KENYA



KENYA LAW
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**Kimani v Kiarie (Environment and Land Appeal E004 of 2024)
[2024] KEELC 7015 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7015 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E004 OF 2024**

JO MBOYA, J

OCTOBER 24, 2024

BETWEEN

THOMAS KIMANI APPELLANT

AND

SAMUEL KIARIE RESPONDENT

*(Being an Appeal from the Judgment and decision of the Business
Premises Rent Tribunal at Nairobi delivered on the 7th December 2023
by Hon. Ndegwa Wahome [Member] in BPRT Cause No. E829 of 2023)*

JUDGMENT

Introduction And Background:

1. The Appellant herein filed a reference pursuant to Section 12[4] of the Landlord and Tenants [Shops, Hotels and Catering Establishment] Act before the business premises rent tribunal dated the 24th August 2023. In addition, the Appellant also filed an application dated the 24th August 2023. Suffice it to point out that both the reference and the application touched on and concerned the question of interference with the Appellant's tenancy by the Respondent herein.
2. Upon being served with the reference and the application by the Appellant, the Respondent herein filed [sic] grounds of opposition and counterclaim dated the 22nd September 2023. For good measure, the Respondent opposed the reference and the application by the Appellant.
3. The reference dated the 24th August 2023; the application dated the 24th August 2023 and [sic] the counterclaim dated the 22nd September 2023, came up before the tribunal on the 31st October 2023.
4. When the reference, application and the counterclaim came up on the 31st October 2023, the parties, namely, the Appellant and the Respondent covenanted to have the reference, application and the



counterclaim canvassed simultaneously. Furthermore, the parties also agreed to file and exchange written submissions.

5. Arising from the consent by the parties [details in terms of the preceding paragraphs], the tribunal proceeded to and circumscribed the timelines for the filing and exchange of the written submissions. In this regard, the Appellant filed written submissions dated the 9th November 2023. Besides, the Appellant also filed a further affidavit sworn on the 3rd October 2023.
6. On the other hand, the Respondent filed written submissions dated the 8th August 2023. Besides, the parties also undertook to highlight their respective submissions. However, come the 16th November 2023, the Respondent herein intimated to the tribunal that same was not keen to highlight submissions and thereafter same sought to be granted a date for Judgment.
7. On the 7th December 2023, the tribunal delivered a judgment wherein same [tribunal] ordered as hereunder;

The reference and the notice of motion application dated the 24th August 2023 on one part and the counterclaim dated the 24th August 2023 on the other part are determines as hereunder;

- i. The tenant will pay rents as and when they fall due effective the 5th October 2023 and on the same date of each succeeding month until when otherwise determined by law.
 - ii. The tenant to pay the rents for October, November and December 2023 at Kes.15, 000/= only on or before the 10th December 2023.
 - iii. That in the event that the landlord would decide to terminate or alter the terms of the tenancy, the due process of the law to be strictly followed.
 - iv. Each party to bear own costs.
8. Flowing from the judgment of the tribunal, the Appellant herein felt aggrieved and same proceeded to and filed a memorandum of appeal dated the 5th January 2024. Suffice it to point out that the memorandum of appeal has raised various grounds. However, it is imperative to posit that the grounds are extremely prolix and argumentative to the extent that it is difficult to extricate the crux of the Appellant's complaints.
 9. Nevertheless, it is still the duty of this court to endeavour to and discern the gist of the Appellant's complaint. In this regard, I shall endeavour to make head and tail out of the argumentative grounds of appeal.

Parties' Submissions:

Appellant's Submissions:

10. The Appellant herein filed written submissions and in respect of which same has repeated the argumentative grounds of appeal. Nevertheless, I have endeavoured to extricate five [5] salient arguments that have been canvassed by the Appellant. In this regard, I shall proceed to highlight the arguments which have been propagated by and on behalf of the Appellant.
11. Firstly, the Appellant herein has submitted that the tribunal erred in law and in fact in failing to find and hold that the Respondent [landlord] was responsible for disconnection of electric power supply to the Appellant's premises even though the Appellant had paid the electricity bill. In this regard, the



- Appellant contended that his [Appellant's] contribution towards electricity bill was kes.1, 500/= per month.
12. To the extent that the Appellant had paid his share of electricity bill, the Appellant therefore had contended that it was therefore inappropriate and irresponsible for the Respondent to disconnect the Appellant's electricity supply.
 13. Secondly, the Appellant herein contended that as a result of the offensive disconnection of electricity supply to the Appellant's demised premises, the Appellant suffered loss of business and loss of profit amounting to Kes.834, 200/= only as at December 2023, which the tribunal failed to award. In this regard, it has been contended that by failing to award unto the Appellant the sum of Kes.834, 200/= only, the tribunal committed an error of law.
 14. Thirdly, the Appellant submitted that at the time when same [Appellant] took up the demised premises, the premises in question had fallen into a state of disrepair. In this regard, the Appellant submitted that same [Appellant] was therefore called upon to undertake extensive repairs and renovations to uplift the standards of the demised premises.
 15. Further and at any rate, the Appellant has submitted that the repairs and renovations that were undertaken were necessary to enable the Appellant to procure the requisite business premises license and the approvals to enable same [Appellant] to commence his butchery business.
 16. Towards and in respect of the repairs and the improvements, the Appellant has submitted that same incurred the sum of kes.142, 000/= only, which monies ought to have been deducted from the rent's payable to and in favour of the Respondent. However, the Appellant has submitted that the tribunal failed to direct the recovery of the monies that were spent on account of repairs and renovations.
 17. Fourthly, the Appellant has submitted that the tribunal erred in law in denying and depriving the Appellant of an opportunity to heard in court. In fact, the Appellant has contended that had the tribunal afforded same the opportunity to be heard, same [Appellant] would have tendered evidence and called witnesses to demonstrate that he [Appellant] suffered loss of business in the sum of kes.834, 200/= only.
 18. Furthermore, the Appellant has contended that on the date when the matter was scheduled for hearing on the 16th November 2023, same [Appellant] was denied access to the meeting due to online connection problems and that when the Appellant finally managed to join the meeting, the matter had a date for judgment given. In this regard, the Appellant has contended that the listing of the matter for judgment constituted a violation of his right of access to justice.
 19. Fifthly, the Appellant has submitted that the tribunal erred in law in failing to address and adjudicate upon his [Appellant's] claim for reconnection of the electricity supply to the demised premises. To this end, the Appellant contended that same had tendered credible evidence before the tribunal to warrant an order for reconnection.
 20. Finally, the Appellant has submitted that the tribunal also erred in law in granting the Respondent the authority and/or liberty to terminate the tenancy without due regard to the investment [read, repairs, improvements and renovations] that the Appellant had made in the demised premises.
 21. Arising from the foregoing submission, the Appellant has implored the court to find and hold that the appeal beforehand is meritorious and thus same ought to be allowed. In addition, the Appellant has also invited the court to proceed and award unto him [the Appellant] the sum of kes834, 200/= only on account of loss of profit.



Respondent's Submissions:

22. The Respondent herein was duly represented before the court on the 28th May 2024 when directions were taken as pertains to the manner in which the appeal was to be canvassed. In particular, the Respondent was privy to and knowledgeable of the fact that the appeal was to be canvassed by way of written submissions.
23. Despite the fact that the Respondent was knowledgeable of the directions of the court, the Respondent herein has neither filed any written submissions or otherwise. For good measure, the only submissions which are on record are the submissions by the Appellant. Consequently, the court shall proceed to determine the appeal on the basis of the submissions on record.

Issues For Determination:

24. Having reviewed the record of appeal, the judgment of the tribunal and the written submissions filed by the Appellant herein, the following issues crystallize [emerge] for determination by the court;
 - i. Whether the appeal beforehand is competent taking into account the provisions of Section 15 of the Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301 Laws of Kenya.
 - ii. Whether the tribunal erred in not awarding the Appellant Kes.834, 200/= only on account of loss of profit or otherwise.
 - iii. Whether the tribunal erred in failing to award the Appellant the sum of Kes.142, 000/= only on account of repairs; renovations and improvements made on the demised premises.
 - iv. Whether the tribunal denied or deprived the Appellant of a right to fair hearing or otherwise.
 - v. Whether the tribunal committed an error of law in authorizing the Respondent to terminate tenancy without due consideration to the investment made by the Appellant in the demised premises or otherwise.

Analysis And Determination:

Issue Number 1 Whether the appeal beforehand is competent taking into account the provisions of Section 15 of the Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301 Laws of Kenya.

25. The Appellant herein had approached the business premises rent tribunal vide a reference dated the 24th August 2023. Pursuant to the reference, the Appellant herein complained about the actions and omissions of the Respondent as pertains to the tenancy between the Appellant and the Respondent.
26. Even though the Appellant approached the tribunal vide a reference, it is imperative to underscore that the reference which was filed by the Appellant was informed by the provisions of Section 12[4] of the Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301 Laws of Kenya and not by Section 6 of the Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301 Laws of Kenya.
27. Instructively, a reference by dint of Section 6 of the Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301 Laws of Kenya, would only arise if the Appellant had been served with a notice to terminate or alter tenancy in terms of Section 4[2] of the Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301 Laws of Kenya.



28. Nevertheless, it is common ground that the Respondent herein did not issue and/or serve any notice of intention to terminate or alter tenancy. Consequently, no reference by dint of Section 6 of the Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301 Laws of Kenya could have arisen.
29. Be that as it may, there is no gainsaying that what was filed before the business premises rent tribunal was essentially a complaint underpinned by the provisions of Section 12[4] of the Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301 Laws of Kenya. To this end, it is instructive to take cognizance of paragraphs 5 and 6 of the judgment of the tribunal.
30. Same states and provide as hereunder;
5. In his reference dated the 24th August 2023, the tenant complained that the landlord has disconnected electricity up to date leading to loss of business and increased rent contrary to Cap 301 Laws of Kenya.
 6. The complaint was alleged to be founded under Section 12[4] of the Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301 Laws of Kenya [hereinafter referred to as the Act]
31. From the body of the judgment, it is apparent that what was placed before the tribunal was a reference underpinned by the provisions of Section 12 [4] of the Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301 Laws of Kenya. Essentially, Section 12[4] of the Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301 Laws of Kenya relates to complaints, even though same [complaint] is filed vide a reference in terms of the form prescribed in the schedule of the Act.
32. To the extent that what was before the tribunal was a complaint as opposed to a reference underpinned by Section 6 of the Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301 Laws of Kenya, the question that does arise is whether the Appellant herein accrued an automatic right of appeal or otherwise.
33. To start with, the right of appeal to the Environment and Land court [ELC] is provided for and stipulated vide the provisions of Section 15 of the Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301 Laws of Kenya. For ease of appreciation, it suffices to reproduce the said provisions.
34. Section 15 of the Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301 Laws of Kenya states as hereunder;
- (1) Any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within thirty days after the date of such determination or order, appeal to the Environment and Land Court:

Provided that the Environment and Land Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.
 - (2) In hearing appeals under subsection (1) of this section the Court shall have all the powers conferred on a Tribunal by or under this Act, in addition to any other powers conferred on it by or under any written law.
 - (3) Deleted by *Act No. 2 of 1970*, s. 13.



- (4) The procedure in and relating to appeals in civil matters from subordinate courts to the Environment and Land Court shall govern appeals under this Act:

Provided that the decision of the Environment and Land Court on any appeal under this Act shall be final and shall not be subject to further appeal.

35. The provisions of Section 15, [whose details have been reproduced in the proceedings paragraph] underscore that the only party who has a right of appeal to the environment and land court are parties to a reference and not a complaint. In particular, what constitutes a reference is defined vide Section 2 of the Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301 Laws of Kenya.
36. To be able to understand the dichotomy between a reference and a complaint, it suffices to reproduce the provisions of Section 2 of the Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301 Laws of Kenya and in particular, the aspect that defines what constitutes a reference.
37. To this end, the provisions of Section 2 relative to the definition of a reference are reproduced as hereunder;

section 6 of this Act;

“reference” means a reference to a Tribunal under

38. To my mind, a party to a complaint underpinned vide Section 12 [4] of the Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301 Laws of Kenya is not conferred with a right of appeal. For good measure, the only party who accrues an automatic right of appeal is a party to a reference. In any event, a reference is well defined vide Section 2 of Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301 Laws of Kenya.
39. Arising from the foregoing, it is my finding and holding that the Appellant herein did not accrue a right of appeal. In any event, if the Appellant was desirous to appeal, then same [Appellant] was obligated to seek for and obtain leave to appeal taking into account the provisions of Sections 75 of the Civil Procedure Act as read together with Order 43 Rule 1 of the Civil Procedure Rules, 2010.
40. For the avoidance of doubt, the leave to appeal ought to have been sought for in the first instance before the tribunal, immediately upon the delivery of the impugned judgment. Besides, the Appellant was also at liberty to seek for the leave within 14 days from the delivery of the judgment. Instructively, the tribunal herein constitutes and comprises of a subordinate court and thus same is bestowed with the jurisdiction to grant leave to appeal. [See Article 169 of the Constitution 2010 that clusters tribunals as subordinate courts].
41. Having not sought for nor obtained leave to appeal, it is my finding and holding that the appeal beforehand which challenges the decision underpinned on a complaint vide Section 12[4] of the Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301 Laws of Kenya, is incompetent and thus void.
42. Notably, a party can only appeal directly to a court where same is conferred with a right of appeal and not otherwise. Furthermore, where the law provides a right of appeal, same [right of appeal] is expressly stipulated and provided for. For good measure, a right of appeal cannot be inferred and/or implied. It either exists and is provided for expressly or it does not exist and cannot be implied.
43. To buttress the foregoing exposition of the law, it suffices to reference the holding of the Court of Appeal in the case of Ferdinand Ndung'u Waititu v Independent Electoral & Boundaries Commission



(IEBC), Isaac Hassan (Returning Officer of the National Tallying Centre), Nairobi County Returning Officer, Evans Odhiambo Kidero, Jonathan Mueke, Attorney General, Divisional Commanding Officer (DCIO) Gigiri Police Station Nairobi, Divisional Commanding Officer (DCIO) Kayole Police Station Nairobi & Inspector General of the National Police Service (Civil Appeal 324 of 2013) [2014] KECA 615 (KLR) (Civ) (13 May 2014) (Judgment).

44. Before departing from this issue and more particularly that a compliant under Section 12[4] of the Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301 Laws of Kenya does not accrue an automatic right of appeal, it suffices to adopt and reiterate the time honoured dictum in the case *Hebtulla Properties Ltd v Business Premises Rent Tribunal, Nairobi & Electro Service & Equipment Ltd (Interested Party) (Miscellaneous Case 336 of 1978)* [1979] KEHC 39 (KLR) (Civ) (21 March 1979) (Judgment).

A party to a reference has a right of appeal to the High Court against any determination or order made therein, but the maker of a mere complaint has no such right. Mr Gautama argued that, in this context, “reference” must be given a wider meaning and must include a complaint; but in a provision conferring a right of appeal I have no doubt that word “reference” was used in its technical meaning as defined in section 2.

For this view I derive some support from the wording of the appeal provisions before they were amended by *Act No 2 of 1970*. Appeal then lay to the Court of a Senior Resident Magistrate or Resident Magistrate, with a further and final appeal to the High Court. Section 15(1) then commenced, “any party aggrieved by the determination or order of a tribunal may within fourteen days appeal against the same ...”.

Subsections (1) and (4) of section 12 as quoted above have remained unchanged.

Thus, until 1970, there was a right of appeal against an order made, not only on a reference, but also on a complaint. In inserting the words “to a reference” after the words “any party” and “made therein” after “tribunal” the Legislature must have had some object in mind; and that object could only have been to restrict the right of appeal to the High Court to determinations and orders made on a reference. The Legislature would not have removed the right of appeal to the High Court against orders made on a complaint if the term “complaint” had been intended to include such matters as forcible dispossession by the landlord, an act which amounts to the tort of trespass.

In my opinion the word “complaint” is referable only to minor matters, such as the examples I mentioned in *Choitram v Mystery Model Hair Saloon* [1972] EA 525. I cannot accept Mr Wekesa’s argument that the complaint in this case is merely one of obstruction of access. It is alleged that the landlord “has forcibly taken possession of the tenant’s premises”.

45. Flowing from the foregoing discussion, my answer to issue number one [1] is to the effect that the appeal beforehand is premature and misconceived insofar as no leave to appeal was ever sought for and or obtained. Furthermore, the appeal herein cannot be anchored and or propagated on the basis of Section 15 Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301 Laws of Kenya insofar as same arises out a complaint and not a reference.



Issue Number 2 Whether the tribunal erred in not awarding the Appellant kes.834, 200/= only on account of loss of profit or otherwise.

46. The Appellant herein has complained that the Respondent disconnected electricity supply to his [Appellant's premises] and as a result of the offensive disconnection, same [Appellant] suffered loss of business culminating into loss of profit in the sum of Kes.834, 200/= only.
47. Furthermore, the Appellant has contended that even though same raised the issue of loss of profit before the tribunal, the tribunal failed to adjudicate upon the claim for loss of profit. In this regard, the Appellant now contends that the failure by the tribunal to adjudicate upon and to award the claim on account of loss of profits, constituted an error of law.
48. Arising from the foregoing, the Appellant now beseeches the court to interfere with the judgment and decision of the tribunal and to proceed and decree that same [Appellant] is entitled to the sum of kes.834, 200/= only.
49. Despite the contention by and on behalf of the Appellant, it is imperative to underscore that the claim for loss of profit is a claim for special damages. Consequently, and in this regard, it was incumbent upon the Appellant to plead his claim with the requisite particularity and specificity and thereafter to tender credible evidence to vindicate the claim.
50. Nevertheless, it is not lost on this court that at the foot of the reference underpinned by Section 12 [4] of the Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301 Laws of Kenya, the Appellant only threw on the face of the tribunal a claim for loss of business. However, no particulars were tendered and/or substantiated.
51. To this end, I am afraid that the tribunal did not have the requisite pleadings to warrant engagement of the claim for loss of profit. Suffice it to point out, that the obligation to implead the claim for loss of income was on the Appellant and not otherwise.
52. To this end, I can do no better than to cite and reference the holding in the case of *Superior Homes (Kenya) PLC v Water Resources Authority & 9 others (Civil Appeal E330 of 2020)* [2024] KECA 1102 (KLR) (19 August 2024) (Judgment), where the court held as hereunder;

It is for this reason that in *Coast Bus Services Ltd v. Murunga Danyi & 2 Others*, CA No. 192 of 1992, this Court held: "We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the plaint as was done in this case, that the particulars of special damages were to be supplied at the time of trial. If at the time of filling suit, the particulars of special damages were not known, then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of the special damages are pleaded in the plaint that a claimant will be allowed to proceed to strict proof of those particulars.

53. Secondly, the Appellant and the Respondent appeared before the tribunal on the 31st October 2023; and both agreed to canvass the reference; the application and the counterclaim by way of written submissions. Having agreed to canvass the reference, the application and the counterclaim by way of written submissions, the Appellant herein was taken to have forfeited the right to tender and produce documents.
54. On the other hand, the Appellant was taken to rely on the documents which same had filed before the tribunal. The question that now arises is whether the Appellant tendered and produced any evidence



to demonstrate loss of income. Suffice it to point out, that after pleading special damages with the requisite particularity, the Claimant must thereafter tender credible evidence to prove the claim.

55. Sadly, the Appellant herein did not specifically prove the claim as pertains to loss of profit. To this end, the Appellant's complaint against the tribunal for not awarding the claim is certainly without any basis.
56. As pertains to the necessity to specifically prove special damages, it suffices to cite and reference the decision in the case of *Peter Mark Gershom Ouma v Nairobi City Council (Civil Case 2149 of 1974)* [1976] KEHC 3 (KLR) (Civ) (24 November 1976) (Judgment), where the court stated thus;

The terms "general" and "special" damages are used with different meanings. They refer, firstly, to liability; secondly, to proof; thirdly, to pleading; and, fourthly, to the meaning of special damage only. We are here concerned with proof and pleading and I shall make no attempt to be philosophical about these two. Here it simply means that for special damages to be awarded they must be pleaded and proved. The English case of *Stroms Bruks Aktie Bolag v John & Peter Hutchison* [1905] AC 515 sums up the position, which is applicable in this country, at pages 525, 526 where Lord Macnaghten said:

'General damages', as I understand the term, are such as the law will presume to be the direct natural or probable consequence of the act complained of. 'Special damages', on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character, and, therefore, they must be claimed specially and proved strictly.

Thus for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage the court's view is as laid down in the English leading case on pleading and proof of damage, *Ratcliffe v Evans* (1892) 2 QB 524 where Bowen LJ said at pages 532, 533:

57. Thirdly, the claim for loss of profit is a claim that can only be pursued before a conventional court and not before a tribunal. To my mind, the tribunal is creature of statute which proceeds to circumscribe its jurisdiction. In any event, the jurisdiction and mandate of the tribunal is well articulated vide Section 12 [1] of the Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301 Laws of Kenya.

Issue Number 3 Whether the tribunal erred in failing to award the Appellant the sum of Kes.142, 000/= only on account of repairs; renovations and improvements made on the demised premises.

58. The Appellant herein has also faulted the tribunal for not awarding the sum of kes.142, 000/= only which was expended on account of repairs, renovations and improvements on the demised premises. For good measure, the Appellant contended that the demised premises were in a state of disrepair and thus same undertook massive repairs to uplift the face thereof.
59. Additionally, the Appellant contended that the repairs which were undertaken were carried out and undertaken with the authority and concurrence of the Respondent. However, there is no gainsaying that the Appellant did not tender and/or produce any authority and/or agreement by the Respondent which authorized the Appellant to undertake repairs.
60. Suffice it to point out that repairs fall within the mandate of the landlord by dint of Section 12[g] of the Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301 Laws of Kenya. For good measure, the provisions of Section 12[g] states as hereunder;



- (g) where the landlord fails to carry out any repairs for which he is liable—
- (i) to have the required repairs carried out at the cost of the landlord and, if the landlord fails to pay the cost of such repairs, to recover the cost thereof by requiring the tenant to pay rent to the Tribunal for such period as may be required to defray the cost of such repairs, and so that the receipt of the Tribunal shall be a good discharge for any rent so paid;
 - (ii) to authorize the tenant to carry out the required repairs, and to deduct the cost of such repairs from the rent payable to the landlord;
61. Be that as it may, where a tenant, the Appellant not excepted, is desirous to undertake repairs and renovations then same is obligated to procure and obtain the consent of the landlord beforehand. In this respect, the provisions of Section 12[L] of the Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301 Laws of Kenya are instructive.
62. For ease of appreciation, the provisions of Section 12[L] are reproduced as hereunder;
- (l) to award compensation for any loss incurred by a tenant on termination of a controlled tenancy in respect of goodwill, and improvements carried out by the tenant with the landlord's consent;
63. There being no evidence that was placed before the tribunal pertaining to the consent and/or authority of the landlord to carry out and/or undertake repairs, renovations and/or improvements, the compliant by the Appellant herein is hollow and misconceived.
64. Pertinently, it was the obligation of the Appellant to tender and place before the court plausible and cogent evidence to prove his claim. However, same failed to do so. In this regard, it is not lost on the court that the Appellant was chargeable with the burden of proof in accordance with the provision of Section 107, 108 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya.
65. To underscore the obligation of the Appellant to prove his claim[s], it is apposite to take cognizance of the holding in the case of Agnes Nyambura Munga (suing as the Executrix of the Estate of the late William Earl Nelson) v Lita Violet Shepard (sued in her capacity as the Executrix of the Estate of the Late Bryan Walter Shepard) [2018] eKLR, where the court held thus;

The burden of proving the existence of any fact lies with the person who makes the assertion. That much is clear from Sections 107 and 109 of the *Evidence Act*. The standard of proof is on a balance of probabilities which Lord Denning in the case of Miller vs Minister of Pensions (1947) ALL ER explained as follows:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

See D. T. Dobie & Company (K) Ltd vs Wanyonyi Wafula Chebukati [2014] eKLR.



Issue Number 4 Whether the tribunal denied or deprived the Appellant of a right to fair hearing or otherwise.

66. The Appellant herein has also complaint that the tribunal denied and/or deprived him of an opportunity to be heard in court. However, the Appellant ventures forward and states that when the matter was listed before the tribunal on the 16th November 2023 same was unable to access the court/tribunal because of online connection problems.
67. Instructively, the inability of the Appellant to access the court and to make representation, if any, was not caused and/or occasioned by the tribunal. To the contrary, the inability if any was caused by the Appellant who lacked stable internet and connectivity.
68. Surely, the Appellant herein cannot lay a blame on the tribunal. In any event, it is not lost on this court that the Appellant did not make any application before the tribunal seeking to review and/or reopen the matter before the tribunal or otherwise. Notably, the tribunal is seized of such jurisdiction to vary and/or review its decision, subject to proof of sufficient cause.
69. Notwithstanding the foregoing, the Appellant cannot also be heard to complain that the tribunal did not afford same an opportunity to make representation and call witnesses and yet on the 31st October 2023, the Appellant was party to a consent wherein both himself [Appellant] and the Respondent agreed to prosecute the reference; the application and the counterclaim by way of written submissions.
70. To my mind, the complaint by the Appellant that same was denied and deprived of a right to fair hearing and access to justice by the tribunal amounts to a cry in the wilderness. Nevertheless, I wish to add that the Appellant is being economical with the truth. Further, the complaint pertaining to denial of the right to fair hearing is laced with dishonesty.
71. Suffice it to underscore that having entered into the consent to have the matter before the Tribunal disposed of by way of Written submissions, the Appellant herein cannot now turn round and state that same [Appellant] was denied the requisite opportunity to tender and call evidence. This Complaint is an idle Complaint devoid of basis.

Issue Number 5 Whether the tribunal committed an error of law in authorizing the Respondent to terminate tenancy without due consideration of the investment made by the Appellant in the demised premises or otherwise.

72. Finally, the Appellant herein has also accused the tribunal of sanctioning and authorizing the Respondent to terminate the tenancy without due regard and consideration of the improvements that were undertaken by the Appellant in the premises.
73. Despite the contention by and on behalf of the Appellant that the tribunal decreed termination without due regard and consideration to the investments made by the Appellant, it is evident that the tribunal did not decree termination of the tenancy. For ease of reference, it suffices to reproduce clause [iii] of the judgment.
74. Same states as hereunder;
- iii. That in the event that the landlord would decide to terminate or alter the terms of the tenancy, the due process of the law to be strictly followed.
75. Yet again, the Appellant herein is being less than candid. Indeed, the Appellant is being dishonest with the court. Suffice it to posit that the tribunal did not authorize the termination of the tenancy, either in the manner contended or at all.



Final Disposition:

76. Flowing from the discussion [details in terms of the judgment], there is no gainsaying that the appeal beforehand is premature and misconceived. For good measure, the appeal does not fall within the purview of Section 15 of the Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301 Laws of Kenya.
77. On other hand, even assuming that I am wrong on the issue of the import and tenor of Section 15 of the Landlord & Tenants [Shops, Hotels & Catering Establishment] Act, Chapter 301 Laws of Kenya, there is the other perspective that the Appellant has neither proved nor vindicated the grounds adverted to at the foot of the memorandum of appeal.
78. Consequently and in the premises, the final orders that commend themselves to the court are as hereunder;
- i. The Appeal is incompetent and misconceived.
 - ii. The Appeal be and is hereby struck out.
 - iii. Each party shall bear own costs.
79. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER 2024.

OGUTTU MBOYA

JUDGE.

In the Presence of:

Benson - Court Assistant.

Mr. Thomas Kimani - the Appellant [in person].

N/A for the Respondent

