



Severin Sea Lodge (EA) Limited v Baracuda Kenya Limited (Environment and Land Appeal E042 of 2024) [2025] KEELC 3002 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KEELC 3002 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E042 OF 2024
LL NAIKUNI, J
MARCH 28, 2025**

BETWEEN

SEVERIN SEA LODGE (EA) LIMITED APPELLANT

AND

BARACUDA KENYA LIMITED RESPONDENT

JUDGMENT

I. Preliminaries

1. The Judgement of this Honourable Court pertains to an Appeal lodged by the Appellant, Severin Sea Lodge (EA) Limited against the Respondent herein, Baracuda Kenya Limited. The Appellant preferred the appeal being aggrieved by the decision [a ruling] of the Business Premises Rent Tribunal (Hereinafter referred to as “The BPRT”) at Mombasa delivered by the Vice – Chair, the Honorable A. Muma on 5th June 2023 and other related relevant issues emanating from the proceedings in the BTRT Cause No. 12 of 2023. From the Court record there was filed a Memorandum of Appeal dated 19th November 2024 and the 222 pages Record of Appeal dated 27th November, 2024 herein.

II. The Appellant’s case

2. The appeal lodged by the Appellant was premised on the following eighteen (18) grounds in a summarised form thus: -
 - a. That the tribunal misdirected itself by finding that it had jurisdiction to hear and determine a dispute between a licensor and a licensee pursuant to the license to use agreement dated 20th September 2021 and holding that the relationship between the licensor and the licensee had converted into a periodic tenancy despite the fact that the relationship is not governed by the Landlord and Tenant [Shops, Hotels and Catering Establishments] Act.
 - b. That the tribunal erred in fact and in law by disregarding judicial precedents.



- c. established in the case of Agnes Wambui Maina T/A Anes Pharmaceuticals - Versus - Ola Energy [K] Limited [2021] KEBPRT 28 [KLR] where in both cases the tribunal relied on the case of Nairobi HCC No 3424 of 1982 BP Nairobi Services Station Limited – Versus - BP Kenya Limited where Justice Muthoga found that on the basis of the evidence it was clear that the document duly executed by the parties is binding and by the documentary evidence parties intended to create a license therefore the relationship of the Plaintiff and the Defendant in the aforementioned matter is one of licensor and licensee and not of landlord and tenant and is accordingly not governed by the Landlord and Tenant [Shops, Hotels and Catering Establishments] Act.
- d. That the tribunal misdirected itself by finding that the Appellant’s preliminary objection dated 21/2/2023 lacked merit without considering that the Appellant and the Respondent entered into a valid license to use agreement dated 20th September 2021, therefore the tribunal had no jurisdiction to hear and entertain the dispute between the parties
- e. That the Appellant and the Respondent entered into a license to use agreement dated 20th September 2021 for a period of one [1] year commencing 1st October 2021 ending on 30th September 2022 which was duly executed by the parties a fact not challenged by the licensee at all material times
- f. That the tribunal misdirected itself by failing to appreciate that the Appellant and the Respondent had every intention to be bound by the terms of the said use of license agreement dated 20th September 2021 and misdirected itself by finding the relationship between the parties to be a periodic tenancy consequently re writing the terms of the said agreement
- g. That furthermore the tribunal erred in fact and the law and misdirected itself on its own volition by varying the license fee from Kshs. 40,000/- per month to Kshs. 10,000/- per month vide the interim orders granted on 23rd February 2023 thus creating a new license and licensee relationship contrary to the terms of the use of license agreement dated 20th September 2021 without appreciating that whilst there was a relationship the Respondent had agreed to pay a license fee of Kshs. 40,000/- per month during the pendency of the agreement which has since expired.
- h. That the tribunal erred in fact and in law by varying, rewriting and/or vacating the terms of the use of the license agreement dated 20th September 2021 in respect to - the licensee fee and creating a new relationship with terms set by the tribunal despite the fact that the tribunal has no jurisdiction to hear and entertain the dispute between the two parties because the relationship was not governed by the and Tenant [Shops, Hotels and Catering Establishments] Act.
- i. That the tribunal erred in fact and in law by failing to appreciate that the use of license agreement dated 20th September 2021 expired on 30th September 2022 automatically terminating the relationship between the Respondent and the Appellant
- j. That the tribunal erred in fact and in law by failing to recognise that towards the expiry of the license to use agreement dated 20th September 2021 the appellant notified the respondent with a notice dated 14th September 2022 reminding them of the expiry date and further notifying the Respondent that the license to use agreement shall not be renewed after expiration, consequently expressing clear intentions to terminate the relationship and take over possession of the premises situated at Severin Sea Lodge, ground floor room 180 to room 184 erected on LR No 1/MN/883



- k. That the tribunal erred in law and fact by failing to consider and take note that the only reason the respondent did not vacate the premises situated at Severin Sea Lodge, ground floor room 180 to room 184 erected on LR No 1/MN/883 on 30th September 2022 as expected was because on 13th October 2022 as expected was because on 13th October 2022 the respondent requested in writing to be given an opportunity to vacate the premises by the end of January 2023 and the Appellant in allowing the request did not convert the license to a periodic tenancy and did not charge the Respondent any license fee rather exercised good faith to pave way for the handover of vacant possession of the premises situated at Severin Sea Lodge, ground floor room 180 to room 184 erected on LR No 1/MN/883
- l. That moreover the tribunal erred in fact and in law by ignoring the express intentions of the Appellant to terminate the license to use agreement dated 20th September 2021 and take possession of the premises situated at Severin Sea Lodge, ground floor room 180 to room 184 erected on LR No 1/MN/883
- m. That the tribunal erred in fact and in law by failing to consider that through the letter dated 13th October 2022 the respondent expressly stated that should it fail to vacate the premises by January 2023 then the Appellant was at liberty to evict them at their own peril , the tribunal did not appreciate that the Respondent acceded to the termination of the use agreement dated 20th September 2021 by expressing legitimate expectation to hand over vacant possession of the premises to the licensor.
- n. That the tribunal erred in law and in fact by failing to take into consideration that the continued occupation by the licensee after the lapse of license to use agreement dated 20th September 2021 beyond January 2023 is pursuant to the ex - parte orders obtained by the licensee dated 31st January 2023 and issued by the tribunal on 26th January 2023
- o. That the tribunal erred in fact and in law by failing to recognise that from November 2022 the Respondent has not paid any licensee fee to the Appellant nor did the appellant agree to any payment of license fee which was intentional so as to avoid any creation of a right over the premises or to renew the relationship.
- p. That the tribunal erred in fact and in law by failing to recognise that the license to use agreement dated 20th September 2021 has expired; the Respondent continues to forcefully occupy the premises and continues to trade and benefit from the forceful occupation to the detriment of the appellant of the premises situated at Severin Sea Lodge, ground floor room 180 to room 184 erected on LR No 1/MN/883 all the more reason why the appellant prays that the honourable court grant orders to evict the licensee from the premises situated at Severin Sea Lodge, ground floor room 180 to room 184 erected on LR No 1/MN/883
- q. That the tribunal erred in fact and in law failing to consider that the act and/or omission by the Respondent forcefully occupying the premises is inflicting continued loss, injury and damages in form of revenue loss to the Appellant over the premises situated at Severin Sea Lodge, ground floor room 180 to room 184 erected on LR No 1/MN/883 and denying the appellant possession/use and occupation of the said premises therefore infringing on the Appellant's right to property entrenched under Article 40 of *the constitution* of Kenya despite the fact that the provisions of the license to use agreement dated 20th September 2021 expired by effluxion of time.



3. The Appellant has gone further to particularise the loss and injured suffered, special damages, general damages and trespass and forceful occupation. Nonetheless, the Honourable Court will not reproduce the same as they have been espoused upon in the grounds of appeal listed above herein.
4. The Appellant prayed for the following orders before court; -
 - a. the appeal is allowed and the ruling dated 5th June 2023 and the order dated 4th September 2023 be set aside and vacated in place the court finds that the Business Premises Rent Tribunal has no jurisdiction to hear and determine a dispute between a licensor and licensee as envisaged from the Landlord and Tenant [Shops, Hotels and Catering Establishments] Act, Cap. 301 (Hereinafter referred as “The Act”).
 - b. the Honourable Court do hereby grant an order evicting the Respondent whether by themselves or their agents, employees, servants or otherwise from the premises situated at Severin Sea Lodge, ground floor room 180 to room 184 erected on LR No 1/MN/883.
 - c. a declaration that the Appellant is entitled to exclusive and unimpeded right of possession and occupation of the premises situated at Severin Sea Lodge Ground Floor Room No 180 to 184 erected on LR No 1/MN/883
 - d. a declaration that the Respondent, whether by themselves or their servants or agents or otherwise, are wrongfully in occupation and possession of the premises situated at Severin Sea Lodge, ground floor room 180 to room 184 erected on LR No 1/MN/883
 - e. this Honourable Court do issue an order granting the appellant vacant possession of the premises situated at Severin Sea Lodge, ground floor room 180 to room 184 erected on LR No 1/MN/883
 - f. the Honourable Court do hereby declare the continued occupation and/or possession of the premises situated at Severin Sea Lodge, ground floor room 180 to 184 erected on LR No 1/MN/883 after 30th September 2022 by the Respondent whether by themselves or their agents, employees, servants or otherwise is illegal and/or unlawfully and/or forceful occupation of the said premises situated at Severin Sea Lodge, ground floor room 180 to 184 erected on LR No 1/MN/883 and is tantamount to trespass and consequently grant an order to evict the Respondent from the premises situated at Severin Sea Lodge, ground floor room 180 to 184 erected on LR No 1/MN/883.
 - g. the Honourable Court do hereby set aside and vacate business premises rent tribunal order dated 23rd February 2023 for payment by the Respondent of the license fee of a sum of Kenya Shillings Ten Thousand (Kshs. 10,000.00/-) per month to the Appellant
 - h. the Honourable Court do hereby grant a permanent injunction prohibiting, preventing and/or restraining the Respondents whether by themselves or their agents, employees, servants or otherwise from trespassing, wasting, alienating and/or otherwise interfering or dealing with the premises situated at Severin Sea Lodge, ground floor room 180 to 184 erected on LR No 1/MN/883
 - i. the Honourable Court do hereby grant a permanent injunction restraining the Respondent whether by themselves or their agents, employees, servants or otherwise from entering, remaining and/or continuing to remain on the premises situated at Severin Sea Lodge, ground floor room 180 to 184 erected on LR No 1/MN/883 and for the unconditional surrender,



handover and/or return of the premises Severin Sea Lodge, ground floor rooms 180 to 184 erected on LR No 1/MN/883.

- j. the Honourable Court do hereby grant an order granting the Appellant access, entry and/or right to continue to use and/or take possession and remain in quite occupation of the premises situated at Severin Sea Lodge, ground floor room 180 to 184 erected on LR No 1/MN/883.
- k. an order to the Officer Commanding Station (OCS) Bamburi Police Station to enforce compliance of the order[s] granted.
- l. this Honourable Court grants an award of special damages to the Appellant.
- m. this Honourable Court grants an award of general damages to the Appellant for trespass, loss of use and forceful occupation by the Respondent
- n. the costs of this appeal be paid to the Appellant
- o. the court award interest on [13] [14] and [15] above at the court rates as such rates the court deem fit
- p. Any other such relief as this Honourable Court may deem fit

III. Submissions

- 5. On 16th December, 2024, in the presence of all the parties the appeal was admitted and directions were taken on how to dispose off the appeal pursuant to the provision of Section 79B of the Civil Procedure Act, Cap. 21 and Order 42 Rules 11, 13 & 16 of the Civil Procedure Rules, 2010. Additionally, it was directed that the Appeal be canvassed by way of written submissions. Pursuant to that, all parties fully complied and Judgement was delivered on 28th March, 2025 accordingly.

A. The Written Submissions by the Appellant.

- 6. The Appellant through the Law firm of Messrs. Anne Wamithi & Company Advocates filed their written Submissions dated 27th February, 2025. M/s. Wamithi Advocates commenced by stating that for Court's consideration was the Appellant's appeal dated 19th November 2024. It was an appeal against the entire Ruling of the Vice - Chairman of the BPRT in Tribunal Case Number E012 of 2023 Mombasa delivered on 5th June 2023. From the face value, the appeal was based on the afore - stated 18 grounds.
- 7. The Learned Counsel submitted on the following two (2) broad issues for the determination of this Court. Firstly, whether the Appeal should be allowed as prayed. The Learned Counsel averred that it was now settled in law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and facts and come up with its own findings and conclusions as was highlighted by in the case of:- "Ndungu Dennis – Versus - Ann Wangari Ndirangu & another [2018] eKLR. The appropriate standard of review established in cases of appeal could be stated in three complementary principles:-
 - “i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - ii. In reconsidering and re - evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and iii. It is not open to the first appellate court to review the findings of a trial court simply



because it would have reached different results if it were hearing the matter for the first time."

8. It follows that, it was the duty of this court as a first appellate court to re-evaluate, the evidence and arrive at its own conclusions. It was not in dispute that the parties to the suit entered into a binding agreement being a License to Use Agreement dated 20th September 2021 for a period of one (1) year commencing 1st October 2021 and ending on 30th September 2022 for a consideration of a sum of Kenya Shillings Fourty Thousand (Kshs. 40,000/=) per month, which was duly executed by the parties. Towards the expiry of the License to Use Agreement dated 20th September 2021, the Appellant notified the Respondent with a Notice dated 14th September 2022 reminding them of the expiry date and further notifying the Respondent that the License to Use Agreement shall not be renewed after expiration, consequently expressing clear intentions to terminate the relationship and take over possession of the Premises situated at Severin Sea Lodge, Ground Floor Room No.180 to Room 184 erected on LR No.I/MN/883 (hereinafter referred to as the suit premises)
9. Subsequently, the Respondent filed an application dated 20th January 2023 barring its eviction from the suit premises. On 26th January 2023, it obtained ex - parte interim injunctive orders barring the Appellant from evicting the Respondent from the suit premises. Further more, directing the Respondent to pay the monthly rent of a sum of Kenya Shillings Ten Thousand (Kshs. 10,000/=), contrary to the License to Use Agreement dated 20th September 2021. As a result, the Appellant filed a Preliminary Objection dated 21st February 2023 in response to the Respondent's application, that was based on, inter alia, the ground that the tribunal lacked jurisdiction to deal with the claim raised by the Respondent herein. On 5th June 2023, the tribunal delivered its ruling dismissing the Appellant's Preliminary Objection. Thus, that was the substance of this appeal herein. It is trite law that jurisdiction is everything. In "the locus classicus' case of "Owners of Motor Vessel "Lilians" – Versus - Caltex Oil (Kenya) Limited 19891" the Court held that:-

"Jurisdiction is everything. Without it a Court has no power to make one more step. Where a Court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

10. The Learned Counsel reiterated that the binding agreement between the parties was the license to use agreement. It was indicated in the Respondent's Supporting Affidavit sworn on 19th January 2023 and marked as annexure 'D'. The document contained terms which clearly suggested that it intended to create a licence rather than a contractual tenancy.
11. To buttress on that point, the Counsel cited the case of: "Nairobi HCCC No 3424 of 1982, BP Nairobi Service Station Limited - Versus - BP Kenya Limited ", where the Court stated:-

"I have carefully examined the transaction the subject of this litigation and the relationship of the parties as it emerges from oral testimony given in court and the documentary evidence submitted and come to the conclusion that the Plaintiff did not enjoy exclusive possession of the premises and that such possession as it enjoyed was limited by the substantial degree of control that the grantor continued to exercise on the operations at the station and on the premises themselves. I have carefully examined the agreement dated 24th June 1968 which I have determined to be the document evidencing the relationship between the parties and governing their conduct terms which clearly suggests that it is intended to create a licence rather than a contractual tenancy."



12. The Counsel submitted that based on the aforementioned dictum, and the agreement between the parties, that from the tenor of the clauses of the license, the parties intended that their relationship be a Licencee - Licensor relationship. The parties clearly signed a licence agreement, and the provisions that clearly bound the parties did not grant the Applicant exclusive possession and control of the premises.
13. Additionally, the Counsel referred Court to the case of:- “Kingorani EPZ Limited – Versus - Twaweza Kenya Apparel (EPZ) Limited [2024] KEELC 13750 (KLR)” Hon. Matheka in recognizing the existence of a licence between the parties expressed as follows:

“It is my view since no lease has been executed, the Defendant remained a licensee of the Plaintiff and the said licence could be terminated at any time. There was no binding lease between the parties, the letter of offer only offered a contractual licence that could be terminated by the Plaintiff at will. The Court in Mt. Kenya Safari Club Ltd – Versus - Mukawa (Hotels) Holdings Ltd (1989) eKLR was of the view that a licence confers no special rights and in common law can be terminated at will.

It was held, “The substance of the above passage is echoed in the Judgments of other Law Lords in the case. Halsbury’s Laws of England, 4th Edition Vol 9 paragraph 530 on p 365 strengthens the above statement of the rule of law of contractual licences “which at common law be effectively revoked at any time whether or not it contained provisions regarding the duration ...” It goes on to prescribe the remedies available to the licensee but none to the licensor. In this case the Plaintiff is not entitled to any remedy because there was no breach on the part of the Defendant, even if those remedies were available to it under the law.

It is therefore clear even though the parties chose to continue with the tenancy in the absence of a formal lease, and even though the Defendant has demonstrated that they paid the annual rent, service charge and deposit as stipulated in the letter of offer i.e. 16th December 2022 they paid the Plaintiff USD 182,763/= and 23rd December 2022 paid USD 182,763 as rent payment for the year 2023; Plaintiff was entitled to evict the Defendant from the suit premises at will subject to a one month notice to evict was done on 20th December 2022. Because the letter of offer was nothing more than an offer to lease, no matter how long it stretched the Defendant could not consider himself a tenant once the lease was executed until then he was a mere licensee. As the case may be, the Plaintiff was entitled to get into the suit premises and make it ready for the business it intended to undertake, which included making it ready for a potential lessee.”

14. The Learned Counsel argued that the Learned Vice - Chairman in his ruling never disputed this. However, he went on to conclude that the relationship that ensued between the parties beyond the expiration of the license to use agreement and by dint of the Appellant’s continued receipt of rent subsequent to the expiry, amounted to periodic tenancy.

15. Further, the Counsel cited the case of “Shah – Versus - Shah {1988} KLR” which also held that:

“the Court must give effect only to the intention of the parties.”

16. Similarly, Justice R. Nyakundi in the case of:- “Omar Gorhan – Versus - Municipal Council of Malindi (Council Government of Kilifi; Overlook Management Kenya Ltd [2020] eKLR quoted the case of



”Garvey – Versus - Richards {2011} JMCA 16” where Harris JA stated that the essential components of a contract ought to ordinarily reflect the following principles:

“It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence.”

17. The Learned Counsel delving into the situation at hand, it could not be conclusively said that even though the Appellant received rent from the Respondent beyond the expiration of the license to use agreement, its intention was to create a periodic tenancy between the parties. On Paragraph 7 of the Respondent's Supporting Affidavit sworn on 19th January 2023 and marked as annexure 'E' showed that the Appellant issued a notice to terminate the agreement. Furthermore, on Paragraphs 8 and 9 of the Respondent's aforementioned affidavit, it was also clear that the Respondent's efforts to enter into a new agreement with the Appellant bore no fruits and their request to be granted an extension of time to vacate the premises elicited no response from the Appellant. The Respondent's case was only that by dint of continuing to pay rent they were reserved the protection provided under Section 60 (2) of the Land Act, No. 6 of 2012. In a nutshell the mere paying of rent, had no effect of a legal binding tenancy relationship between the parties. A similar view was highlighted in the case of “Universal Reliance Emporium Limited – Versus - Gloria Management [2022] eKLR” where the court held as follows:

'By a letter dated 20th March 2018, the Landlord notified the Tenant that its lease had expired and the Tenant did not exercise its right of renewal as per the lease agreement. The Landlord's counsel's letter aforesaid further demanded vacant possession of the premises by 1st April 2018.

19. Needless to say, the lease was not renewed. There is further evidence that the Landlord proposed new terms which were not agreeable to the Tenant. the conduct of the Landlord in demanding vacant possession of the premises and further demanding new terms clearly points to a Landlord who was determined to get new terms favourable to itself vacant possession of the premises, such a Landlord cannot be said to have consented to a tenancy which basically continued on the same terms as the expired lease.
20. The Landlord cannot in the circumstances of this case therefore be said to "have accepted" rent in the manner set forth under section 60 (2) of the Land Act. The mere depositing of rent in a Landlord's account without the express consent of the Landlord cannot be the basis of a binding legal tenancy relationship between the parties herein. If that were to be the case, Landlord's would find themselves forever bound in relationships they have no intention of creating in the first place.'



18. Furthermore, the Learned Counsel referred Court to the case of “National Oil Corporation of Kenya – Versus - Robert Ongegi Ongera and Vivo Energy Kenya Limited (Kisii ELC Case No. 94 of 2014)”, the Court observed as follows:-

“To be able to establish a periodic tenancy, the Plaintiff had to prove that upon the expiry of the lease that they had with the 1st Defendant on 1st January 2014 the Plaintiff remained in occupation of the suit property with the consent of the 1st Defendant. Consent can be express or implied. The Plaintiff has not placed any material before the court in proof of the fact that the Plaintiff remained in occupation of the suit property after 1st January 2014 with the consent of the 1st Defendant. The correspondences that were exchanged between the Plaintiff and the 1st Defendant prior to the expiry of the lease that have been exhibited by both parties were all concerned with the negotiations of the terms for the renewal of the lease. The negotiations ended before 1st January 2014 and as at that date, the parties had not agreed on the terms of the new lease as I will show hereunder.”

19. The Learned Counsel opined that based on the aforementioned dictum, it was quite notable that the Respondent remained in the Appellant's premises without its consent. The notice to terminate the agreement after the expiry of the license to use agreement expressly showed the Appellant's intention of not creating a periodic tenancy. This finding was also highlighted in “Universal Reliance Emporium Limited (Supra) where the court in its findings concluded as follows:

‘The demand that the Tenant vacates the suit premises after the expiry of the lease negates the Landlord's alleged consent to the Tenants occupation of the suit premises. I therefore do find that no periodic tenancy was created between the parties herein after the expiry of the lease. The Tenant herein is therefore not in a controlled tenancy relationship with the Landlord/Respondent. The Tribunal therefore lacks jurisdiction to hear and determine this dispute and consequently, the Tenant's reference to the Tribunal dated 1st October 2018 is dismissed with costs to the Landlord/Respondent.’

20. In light of the aforementioned, the Counsel asserted that this court finds that there was no periodic tenancy between the parties as it was never their intention to enter into one after the lapse of the license to use agreement. Thus, the upshot of this was that the Tribunal lacked jurisdiction to entertain the Respondent's claim. In the case of:- “Michael t/a Nairobi Grill Market Limited & 2 others – Versus - Kifam Enterprises Limited & another (Tribunal Case E107 of 2022)[2022]KEBPRT 885 (KLR) (Civ) (7 October 2022)(Ruling)” the court concluded as follows in support of the aforementioned assertion:

“Going by the letter of offer, it is clear that the parties herein intended to create an uncontrolled tenancy and even after it terminated by effluxion of time, they did not contemplate to create a periodic tenancy under its terms. I am therefore unable to find how this Tribunal would have jurisdiction to determine any dispute arising therefrom.

25. In the premises, I find and hold that this Tribunal has no jurisdiction to entertain the instant proceedings between the tenant and the Respondents herein.’

21. In the long run, the Counsel urged Court to allow the Appellant's appeal as prayed and upholds its preliminary objection dated 21st February 2023

22. Secondly, according to the Learned Counsel the Appellant was entitled to the costs of the Appeal. To support this argument, the Counsel referred Court to the case of “Cecilia Karuru Ngayu – Versus -



Barclays Bank of Kenya & another [2016] eKLR” Justice John Mativo (as he then was) quoted the case of “Republic – Versus - Rosemary Wairimu Munene, Ex - Parte Applicant – Versus - Ihururu Dairy Farmers Co-operative Society Limited Judicial Review application no 6 of 2014 in which the court held as follows:-

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event.....It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

23. The Counsel cited the general rule which in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap.21), costs follow the event. As such, a successful party should normally be awarded costs of an action unless, for good reason, the court directs otherwise.
24. In conclusion, the Counsel urged the Court to allow the appeal and award costs to the Appellant who was entitled to it taking that the Respondent's suit was improperly filed before a court that lacked the requisite jurisdiction to handle such a suit.

B. The Written Submissions by the Respondent.

25. The Law firm of Messrs. N. A Ali & Company Advocates acting under the instructions of the Respondent filed their written submissions dated 6th March, 2025. Mr. Hassan Advocate stated that the subject appeal was against a ruling rendered by the BPRT on the 5th of June 2023. The Tribunal through its said impugned ruling dismissed the Appellant's preliminary objection dated the 21st February 2023 and proceeded to fix the Respondent's complaint for hearing. The proceedings before the BPRT were originated vide a reference dated the 19th of January 2023 which in the main sought for orders that the Appellant be restrained from unlawfully terminating the Appellant's tenancy and from evicting the Appellant from the premises situated at Severin sea lodge at the ground floor rooms Numbers 180-184. The Appellant sought for further orders that the Respondent be restrained from interfering with the Appellant's quiet and peaceful possession of the subject premises. The Respondent filed a preliminary objection dated the 21st February 2023, which despite containing a total of six grounds, basically challenges the Business premises rent tribunal's jurisdiction to deal with the subject proceedings.
26. The Learned Counsel contention was that despite containing 18 grounds in total, the appeal could be deduced to a single ground - whether the Tribunal was clothed with jurisdiction to preside over the subject proceedings before it in light of the issues of fact and evidence presented and contended by the Appellant and objected by the Respondent. This formed the gravamen of the dispute which the subject appeal was based on.
27. It was the Appellant's contention that the relationship between the Appellant and Respondent was one of a Licensor and Licensee and not a controlled tenancy within the meaning of the Act. In saying so, the Appellant relied on a License agreement dated the 20th of September 2021 whose term expired on 30th September 2022. The Appellant further argued that upon the expiry of that agreement, the same was never renewed. The Appellant relied on its letter dated the 30th September 2022 wherein it informed the Appellant's Advocates that the Tenancy was not a protected tenancy. The Appellant further claimed that the Respondent sought to be allowed to continue to occupy the premises until the end of January 2023. On the above basis, the Appellant denied that there had ever been a Landlord - Tenant relationship between the parties hence the basis of the objection.



28. The Learned Counsel, on the other hand through the Respondent's complaint admitted that the parties were governed by a License to use agreement which expired at the end of the month of September 2022. Thereafter, the Respondent requested to have an extension period and would therefore vacate from the premises. The Respondent stated that Appellant did not respond to the Appellant's request. The Respondent instead after the expiry of the license, continued to receive rent from the Respondent. The Appellant received rent for the months of October 2022, November 2022, December 2022 and January 2023. Therefore, the Respondent argued that on the basis of receipt of the said rent, a periodic tenancy was created. In those circumstances, it was the Respondent case that it was a Tenant under the definition ascribed to a Tenant under Section 2 of the Act. This in effect created a Controlled Tenancy pursuant to the definition ascribed under the provision of Section 2 of the Act.
29. The Learned Counsel opined that the Honorable Tribunal at Paragraph 19 of its ruling held that the preliminary objection raised by the Appellant herein never raised any pure points of law. The Objections were based on facts which were disputed by the parties. The Tribunal further held that for it to determine whether the relationship between the parties was one of a Licensor-Licensee or whether the same was a tenancy, then the same could not be done without conducting a full trial whereby the parties could tender their evidence to support their differing positions. The Learned Counsel submitted at the outset that the said decision was the correct analysis of the law on preliminary objection vis-a-vis the facts and basis of the preliminary objection as seen above. As was stated in the case of "Oraro – Versus - Mbaja [2005] eKLR" that:
- “A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.”
30. Hence, the moment the Honorable Court was required to look into the evidence on record as adduced by the parties, that disqualified an objection as being a point of preliminary objection. Even without analyzing the said respective assertions of the parties, it emerged that there was a serious dispute of facts pertaining to whether the relationship between the parties was a Licensee - Licensor relationship or the same was a Tenancy. That could not be determined without considering and analyzing the evidence under which each party bases their respective claims. The Appellant heavily relied on documents and letters and so did the Respondent on the other hand. In order for the Tribunal to determine the correct position, it called for examination of evidence between the parties which are clearly in dispute.
31. It was also held by the Court of Appeal in the case of: "Johnson Githaiga Nderitu & 4 Others – Versus - Nicholsa Nderitu Muita & 3 others [2013] eKLR that:-
- “A cursory glance at the pleadings indicates that triable issues of fact have been raised by both parties..... it must be borne in mind that for a preliminary point to succeed, the facts as alleged in the plaint are deemed to be correct. In the instant case, the facts as alleged in the Plaint and Defence are disputed and prima facie the claim in this suit cannot be deemed to be incontestably hopeless and be summarily dismissed by way of preliminary objection.”
32. In the instant matter, the averments in the Respondent's complaint were disputed by the Appellant through its submissions. The main point of contention being that the Respondent claims that it made a proposal to the Appellant, and the Appellant never responded to the said proposal. The Respondent contended that the Appellant continued to receive rent after expiry of the license for four months



and duly issued rent receipts. The Appellant however denied this and argued that it did not have any agreement with the Appellant to extend its stay. This clearly showed triable issues that needed to be tested through evidence in order for the Tribunal to come to a definite informed conclusion.

33. On the above basis, the Learned Counsel submitted that the Objections raised never met the threshold of a preliminary objection as the same was an impure point of law. It was purely based not only on facts but disputed facts. Therefore, the Honorable Tribunal was correct in holding that the said dispute could only be determined through a trial and not through a preliminary objection. In the said premises, the Counsel submitted that the Appellant's preliminary objection was accordingly misplaced and the points of objection were premature.
34. This position was also supported the provision of Section 12 of the Act which outlines the powers and jurisdiction of the Tribunal. Amongst those powers and jurisdiction is one under Section 12 (1) (a) which provides that the Tribunal shall have the power to "determine whether or not any tenancy is a controlled tenancy." Therefore, amongst the original jurisdiction of the Tribunal is to determine whether matters before it pertain to controlled tenancy. The Tribunal already determined that parties need to litigate their positions through a trial in order for this issue to be determined. The Honorable Tribunal having yet to consider the evidence of the parties through trial, this Honorable Court sitting in its appellate capacity in an interlocutory appeal, the Court cannot delve into the factual merits of the case as that is an exclusive remit of the Trial Tribunal.
35. On the next issue as to whether the said Objection was merited. In substance on prima facie basis, the evidence on record showed that the Appellant had been a Tenant at the subject premises since the year 1982. He stated that he recently had a License agreement with the Appellant. The term of the said agreement expired on the 30th September 2022. Prior to its expiry, the Appellant informed the Respondent that the License shall not be renewed and that the Respondent should vacate from the subject premises. The Respondent then vide a letter of 13th October 2022 asked to be allowed time until the end of the month of January 2023.
36. The Appellant never responded to the said Respondent's letter regarding the request. The Respondent then continued to pay rent for the months of October 2022, November 2022, December 2022 and January 2023 which were duly accepted by the Appellant and receipts duly issued. Therefore, it was the Respondent's case that the act of continuing receiving rent formed a new periodic tenancy.
37. From the foregoing, it could be seen that upon the expiry of the License, that specific relationship ceased to exist. The Appellant then received rent for four months thereafter. This essentially created a monthly tenancy by operation of the law. It was held in the case of "Mupekori Pere – Versus - Samuel Gicheru & Another [2017] eKLR that:

“On the first issue as to whether there exists any form of lease agreement between the Plaintiff and Defendants, it is trite law that contracts can either be express or implied. Express when there is a written agreement while implied when the owner of a premise continues to receive consideration for the demised premises even if there is no written agreement.”
38. Thus, the said act receipt of rent created the said tenancy. This position is further statutory undergirded. This is at Section 57 of the Land Act No. 6 of 2012 which provides that:

“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."

39. In the instant case, a monthly tenancy was formed by virtue of acceptance of rent on the part of the Landlord. Furthermore, under Section 60 (2) of the Act, it is provided that:

"A lessor who accepts rent in respect of any period after the lease has been terminated or the term of the lease has expired, shall not, by reason of that fact, be deemed to have consented to the lessee remaining in possession of the land, or as having given up on any of the rights or remedies of the lessor against the lessee for breach of a covenant or condition of the lease, and if the lessor continues to accept rent from a tenant who remains in possession for two months, after the termination of the lease, a periodic lease from month to month shall be deemed to have come into force."

40. According to the Learned Counsel, a new tenancy came into force which was a monthly tenancy. Given that the same is without a written agreement and that the premises was being utilized for commercial purposes, it accordingly fell under the definition. A tenancy is defined under Section 2 (1) as follows:

"...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..."

A controlled tenancy is defined at Section 2 (1) of the Act as:

"a tenancy of a shop, hotel or catering establishment-a tenancy of a shop, hotel or catering establishment-

- (a) which has not been reduced into writing."

41. In conclusion, given that the said tenancy was created by operation of law as explained above and taking that it was in writing, it was clearly a controlled tenancy. Hence, it was governed by the Act. It was the Counsel's submission that Honourable Tribunal is accordingly vested with jurisdiction. In a nutshell, the Counsel held that the subject appeal lacked merit and prayed that it be dismissed with costs.

IV. Analysis & Determination

42. I have keenly considered the pleadings in form of the Memorandum of Appeal and the 222 pages Records of Appeal, the written submissions and the cited authorities by the parties, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.

43. For the Honourable Court to arrive at an informed, fair and reasonable decision, it has frame three (3) issues emanating from the lodged Appeal for its determination. These are:-

- a. Whether or not the tribunal had the jurisdiction to hear the dispute between Appellant and Respondent pursuant to the License to use agreement dated 20th September, 2021
- b. Whether the appeal preferred by the Appellant has merit.
- c. Who will bear the costs of the Appeal.



ISSUE No. a). Whether or not the tribunal had the jurisdiction to hear the dispute between Appellant and Respondent pursuant to the License to use agreement dated 20th September, 2021

44. Under this Sub – heading the Honourable Court will be examining the main substratum of this Appeal being whether the tribunal was devoid of jurisdiction to deal with the complaint presented before it. Basically, this issue was brought about from the Ruling of the BPRT delivered on 5th June, 2023 dismissing the Preliminary Objection raised by the Appellant. The Appellant argued that the dispute was between a Licensor and Licensee as per the terms and conditions stipulated in the duly executed Licence for use agreement duly executed between the parties herein. Accordingly, therefore, the BPRT which is solely governed by the dictum of the Act, was deprived of jurisdiction to determine the subject matter herein. On the other hand, this issue was vigorously countered by the Respondent. The Respondent and the Tribunal fully admit that initially the relationship that existed between the Appellant and the Respondent was that of a Licensor – Licensee for a specific period of time. However, to the Respondent, by effluxion of time, upon the expiry of the License use agreement and the Appellant accepting to receive rent for a while from the Respondent a new legal relationship was created of a Periodic Lease thence a controlled tenancy which was purely governed under the premises of the Act. For that reason, the Respondent was of the view that the BPRT were right in its Ruling of 5th June, 2023 dismissing the Objection as what were before it were not matters of pure law but which could only be determined through a full trial. Basically, that forms the pith and substance of this appeal.

45. To begin with, I need not belabour the point on the legal significance of jurisdiction. The Honourable Court wishes to echo the strong submissions made out by the Learned Counsel for the Appellant on the subject matter and while citing several relevant authorities including “the classicus locus” case of “Owners of Motor Vessel “Lilians” – Versus - Caltex Oil (Kenya) Limited (Supra). Suffice it to say, Nonetheless, the jurisdiction of this Tribunal was aptly discussed in the case of “Republic – Versus - Business Premises Rent Tribunal & Another Ex- Parte Albert Kigera Karume [2015] eKLR which cited with approval the case of “Re - Hebtulla Properties Limited [1979] KLR 96; [1976-80] 1 KLR 1195” where the Court dealt with the provisions of Section 12 of the Act and stated as follows:

“The Tribunal is a creature of statute and derives its powers from the statute that creates it. Its jurisdiction being limited by statute it can only do those things, which the statute has empowered it to do since its powers are expressed and cannot be implied. The powers of the Tribunal are contained in section 12 (1) of the Act and anything not spelled out to be done by the Tribunal is outside its area of jurisdiction. It has no jurisdiction except for the additional matters listed under Section 12 (1) (a) to (n). The Act was passed so as to protect tenants of certain premises from eviction and exploitation by the landlords and with that in mind the area of jurisdiction of the Tribunal is to hear and determine references made to it under Section 6 of the Act. Section 9 of the Act does not give any powers to the Tribunal, but merely states what the Tribunal may do within its area of jurisdiction. It would be erroneous to think that Section 12 (4) confers on the Tribunal any extra jurisdiction to that given by and under the Act elsewhere. Section 12 (4) of the Act must be read together with the rest of the Act and, when this is done it becomes apparent that the complaint must be about a matter the Tribunal has jurisdiction to deal with under the Act and that is why the complaint has to relate to a controlled tenancy. The Act uses the words “any complaint” and the only qualification is that it must be “relating to a controlled tenancy”.

46. For ease of reference, a brief recap of what transpired before the tribunal is necessary at this point. The Respondent filed a complaint dated 19th January 2023 before the tribunal under Form C. The complaints raised were against the Appellant herein and was as follows:-



- a. The Landlord had threatened to illegally and forcefully evict the tenant from the subject premises.
 - b. The tenant had been operating its business at the business premises for the past 41 years
47. The Tenant sought for the following orders; -
- i. The Landlord and/or its employees and/or its servants and/or agents be restrained from unlawfully terminating the tenant's tenancy and from evicting, the tenant from the business premises where the tenant is operating its business situated at Severin Sea Lodge at the ground floor from room 180 to 184
 - ii. The Landlord and/or its employees and/or its servants and/or agents be restrained from harassing or threatening the tenant and from interfering with the tenants quiet and peaceful possession of premises situated at Severin Sea Lodge at ground floor room 180 to 184.
 - iii. The Landlord be ordered to pay the costs of this complaint and the costs be deducted from rent.
48. The complaint was accompanied with a Notice of Motion application seeking restraining orders against the landlord, from evicting the tenant and the Bamburi Police Station be ordered to enforce the order pending the hearing and determination of the complaint.
49. While opposing the application and complaint, the landlord (the Appellant herein) raised an objection through filing a Notice of Preliminary Objection dated 21st February, 2023 under the following grounds:-
- a. The complaint dated 19th January 2023 as filed and canvassed was fatally and incurably defective in law and as such cannot stand or be ventilated before this honourable tribunal.
 - b. The Honourable Tribunal lacked jurisdiction to proceed to hear or entertain the instant claim dated 19th January 2023 in its entirety as it offended the provisions of Section 2 [1] of the Act.
 - c. The Honourable Tribunal lacked jurisdiction to invoke the provisions of Section 12 [4] of the Act as the relationship between the Landlord and Tenant is not a controlled tenancy.
 - d. The complaint dated 19th January 2023 was frivolous within the meaning of Section 12 [1][k] of the Act.
 - e. That the Honourable Tribunal was vested with the jurisdiction to make necessary orders to safeguard its integrity and prevent an abuse of the process
 - f. The Land -Lord prayed that the complaint dated 19th January 2023 be struck out and costs be awarded to them.
50. In its ruling on the preliminary objection and which is the subject of the instant appeal, the Honourable Andrew Muma, Vice - Chair of the tribunal while dismissing the objection altogether, made a finding that after expiry of the License for Use agreement, the landlord continued to receive rent from the tenant turning their relationship from that of a Licensor - Licensee to a Periodic Tenancy. Reliance was placed on the findings of the courts in:-
- i. Nancy Njeri Gitau & Another – Versus - James Muchone Njuga & Another [2021] eKLR
 - ii. Ukwala Supermarket[Eldoret] Limited – Versus - Amitral Sojpar Shah Wholesalers Limited [2017] eKLR



51. Based on this finding the preliminary objection was found to be lacking in merit and dismissed with costs. Aggrieved by the said ruling, the landlord preferred the instant appeal. The evidence that has been put forward by the Appellant heavily relied on the License to Use agreement made on 20th September, 2021. Clause 2 of the said agreement provided that the agreement was to commence on 1st October, 2021 and end on 30th September, 2022. From the record, there is a notice to terminate the agreement dated 14th September, 2022 and which informed the Respondent herein that the license agreement was to automatically terminate at the end of 30th September, 2022 and the same was not to be renewed. In response to the notice to terminate the license, the Respondent wrote a letter to the Appellant requesting to continue with his business until the end of January 2023.
52. A further letter was written on 11th October, 2022 where the Respondent expressed his dismay over the intended termination as there had been no accident or complain over the water sports activities he was offering the Appellant's clientele. The Respondent sought for payment of a sum of Kenya Shillings One Million (Kshs. 1,000,000/-) for the services he had rendered the hotel for 42 years, a 2-year notice before vacating the hotel. Lastly, that he would be available to negotiate a new contract for scuba diving as he was an expert in the field.
53. From the pleadings on record, I have not come across any response to the letters authored by the Respondent from the Appellant. The Respondent has stated that he continued with the occupation of the premises and payment of rent as before. No license agreement was signed thereafter. The tribunal in its ruling made a finding that the failure to have a written agreement over the Respondents use of the premises and the continued payment of rent resulted in a periodic tenancy. This Honourable Court fully agrees with both the BRPT and the submissions by the Learned Counsel, that that is the rightful legal position – the old agreement expired and new one taken up - as shall be demonstrated herein below.
54. It is trite that where there is no written agreement between parties as is in this case, the provision Section 57 of the Land Act, No. 6 of 2012 provides for a periodic tenancy. The provision stipulates:-
- 57(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 sub-paragraph (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.

55. It would follow that the agreement between the Appellant and Respondent being not reduced in writing is a periodic tenancy and therefore, is a controlled tenancy under the provision of Section 2(1) (a) of the Act. Under the Section “A Controlled tenancy” is defined as:-

SBPARA 2(1)

a tenancy for a shop, hotel or catering establishment (a) Which has not been reduced into writing; or (b) Which has been reduced into writing and which (i) is for a period not exceeding five years (ii) contain provision for termination, otherwise than for breach of covenant, within five years from commencement thereof; or (iii) relates to premises specified by the Minister in a Gazette Notice to be a controlled tenancy....

56. Having established that the tenancy that arose after expiry of the License to use agreement was a periodic tenancy, the court will then address the issue of the jurisdiction of the tribunal to entertain the dispute. Before then, I reiterate and point out that the Licensor - Licensee relationship was terminated with the expiry of the license to use agreement. What emanated thereafter was a new Landlord - Tenant relationship based on a Periodic tenancy. Specifically, on jurisdiction I am guided by the holding in the case of: “Republic – Versus - Chairperson - Business Premises Rent Tribunal at Nairobi & another Ex-Parte Suraj Housing & Properties Limited & 2 others [2016] eKLR, where the Judge cited with approval the case of “Pritam – Versus - Ratilal and Another Nairobi HCCC No. 1499 of 1970 [1972] EA 560 “where it was stated as follows:-

“Therefore the existence of the relationship of landlord and tenant is a pre-requisite to the application of the Act and where such 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 a Tribunal; otherwise the Tribunal will have no jurisdiction. There must be a controlled tenancy as defined in section 2 to which the provisions of the Act can be made to apply. Outside it, the Tribunal has no jurisdiction.”

57. In view of the fore - going, I hold that the issue of the tribunals jurisdiction is settled. It has been graphically demonstrated that the nature of the agreement between the Appellant and the Respondent their relationship mutated from that of a Licensor – Licensee to that of landlord and tenant.

ISSUE No. b). Whether the Appeal preferred by the Appellant is merited.

58. Under this Sub – heading, the Appellant seeks amongst the other prayers which have been addressed above herein that the findings of the tribunal over the application dated 20th January, 2023 contained in the order of 23rd February, 2023 be set aside and/or vacated. The Appellant’s main issue was the tribunal did not have the jurisdiction to vary the rent as was ordered. In all fairness, the Honourable Court has keenly perused the Notice of Motion application dated 20th January, 2023 by the Respondent as the tenant whereby the prayers sought were as follows:-

- a). That pending the hearing and determination of the Application, the landlord and/or the Employees and/or its servants and/or agents be restrained from unlawfully terminating the Tenant’s tenancy, from harassing, threatening or evicting the tenant, and from interfering with



the Tenant's quiet and peaceful possession of Tenant of premises situated at Severin Sea Lodge at the ground floor of room 180 to Room 184; and Bamburi Police Station be ordered to enforce the order.

- b). That pending the hearing and determination of this Complaint/Reference, the landlord and/or the Employees and/or its servants and/or agents be restrained from unlawfully terminating the Tenant's tenancy, from harassing, threatening or evicting the tenant, and from interfering with the Tenant's quiet and peaceful possession of Tenant of premises situated at Severin Sea Lodge at the ground floor of room 180 to Room 184; and Bamburi Police Station be ordered to enforce the order.
- c). Costs of this application be granted to the Tenant.
59. Certainly, and here I fully concur with the submissions by the Learned Counsel for the Appellant, that from the face value of the afore said application, there was no prayer seeking for the rent to be varied as had been ordered in the order of 26th January, 2023 for them to restrain from increasing rent. Further, that the old rate of a sum of Kenya Shillings Ten Thousand (Kshs. 10,000/-) to be accepted failure to which the rent was to be deposited with the tribunal. Thus, on this aspect, this Honourable Court finds that the Learned Vice – Chair of the tribunal clearly misdirected itself by over stepping on its bounds and tackling a prayer that was never sought by the Respondent herein. That aspect of the decision must be outrightly vacated.
60. Further, based on the set of receipts attached by the Respondent ranging from October 2022 when the License to use agreement expired, the new rent paid was for a sum of Kenya Shillings Fourty Thousand (Kshs. 40,000/-). Although how the amount was reached has not been explained, this Honourable Court will not vary it. This is because, in so doing, it will amount to rewriting a contract for the parties. It is a longstanding principle of law, that parties to a contract are bound by the terms and conditions thereof, and that it is not the business of courts to rewrite such contracts. In the case of “National Bank of Kenya Limited – Versus - Pipe Plastic Samkolit (K) Ltd [2002] 2 EA 503 [2011] eKLR at 507”, this Court stated:
- “A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved.” Also See also Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR.
61. The court opines that it is proper for the Respondent to continue with the amount that was paid after expiry of the license to use agreement. Thus, the appeal succeeds on this one limb.
62. Consequently, having established that the tribunal is clothed with the requisite jurisdiction to resolve this dispute, the ruling on the preliminary objection by the Appellant is upheld. The parties are referred back to the tribunal for purposes of hearing and determination of the issues that have been raised before it in accordance with the provisions of the Act. This court will only get the avenue to determine the dispute and grant the orders sought in the appeal in the event that parties are dissatisfied with the determination of the tribunal and that will be similarly at an appeal stage.

ISSUE No. c). Who will bear the costs of the Appeal

63. It is now well established that the issue of Costs is at the discretion of the Court. Costs mean the award that is granted to a party at the conclusion of the legal action or proceedings. The Proviso of Section 21 of the *Civil procedure Act*, Cap 21 holds that costs follow the event. By the event it means the results or outcome of the legal action or proceedings.



64. In the instant case, having found that the Tribunal has jurisdiction to hear the complaint filed herein and further being aware that this matter has been referred back to the Tribunal for full hearing, it is not necessary to impose costs on either party. In view of the foregoing, I direct each party to bear own costs of this Appeal.

VII. Conclusion & disposition

65. The upshot of this and after causing an indepth analysis of the framed issues herein, the Honourable Court based on the Preponderance of probabilities and the balance of convenience reaches at the following findings:-

- a. THAT based on the provisions of Sections 2 (1) and 12 of the Act, the BPRT has Jurisdiction to hear and determine this matter.
- b. THAT Judgement be and is hereby entered that the instant appeal be partially found to have merit.
- c. THAT the interim order granted by the BPRT on 23rd February, 2023 varying rent from a sum of Kenya Shillings Forty Thousand (Kshs. 40,000/-) to a sum of Kenya Shillings Ten Thousand (Kshs. 10,000/=) be and is hereby set aside and/or vacated.
- d. THAT in essence an order made hereby that the Respondent to continue paying a sum of Kenya Shillings Forty Thousand (Kshs. 40,000/-) on monthly basis as was commenced from the month of October 2022.
- e. THAT the suit is referred back to the Business Premises Rent Tribunal for hearing and determination of the other pending issues emanating from this dispute.
- f. THAT for expediency sake, the matter to be mentioned on 4th April, 2025 in the presence of all parties before the Executive Officer for purposes of taking direction on the disposal off the matter.
- g. THAT each party to bear own costs of the Appeal.

IT IS SO ORDERED ACCORDINGLY.

CNCLUSIONS

JUDGEMENT DELIVERED THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS THIS 28TH DAY OF MARCH 2025

.....

HON. MR. JUSTICE L. L. NAIKUNI,

ENVIRONMENT & LAND COURT AT MOMBASA

Ruling delivered in the presence of:-

- a. M/s. Firdaus, the Court Assistant.
- b. Mr. Gathu Advocate holding brief for M/s. Wamithi Advocate for the Appellant.
- c. Mr. Hassan Advocate for the Respondent.

