



**Mutura v Kagombe (Environment and Land Appeal E010 of 2023)
[2024] KEELC 5089 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5089 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E010 OF 2023**

LN GACHERU, J

JULY 4, 2024

BETWEEN

JAMES KAMAU MUTURA APPELLANT

AND

DR. MAINA DAVID KAGOMBE RESPONDENT

(Being an Appeal from the Judgement of Hon. Andrew Muma (Vice-Chairperson) at the Business Premises Rent Tribunal Nairobi in BPRT No. E571 of 2023 delivered on the 31st July 2023)

JUDGMENT

1. The Appellant herein, James Kamau Mutura, filed this Appeal vide a Memo of Appeal dated 30th August, 2023, against decision of the Business Premises Rent Tribunal (BPRT), issued on 31st July, 2023. The Appellant has sought for the following Orders:
 1. That the Appeal be allowed and the orders of the tribunal be set aside.
 2. That the Appellant be awarded costs in the lower court and for the appeal.
 3. Any other relief that this Honourable Court may deem fit to grant.”
2. The genesis of the dispute between the parties herein is that the Appellant executed a tenancy agreement on 7th June, 2018, in respect of the suit premises referred to as Plots No.2222 and Plot No.2221, located in Gitweku, Murang’a County wherein, the Appellant was the tenant and the Respondent the Landlord.
3. It is the Appellant’s contention that the Respondent issued a notice to terminate the tenancy to the Appellant dated 12th March, 2023, directing the Appellant to vacate the said premises by 30th June, 2023. The Appellant challenged the aforesaid eviction notice before the Business Premises



Rent Tribunal (BPRT) on 6th June, 2023, by instituting BPRT No. E571 of 2023, seeking for orders restraining the Respondent from evicting him from the premises.

4. The BPRT in a ruling delivered on 31st July, 2023, dismissed the Appellant's application and further directed the Appellant to deliver vacant possession of the suit premises to the Respondent, failure to which the Respondent was declared to be at liberty to break in and assume possession of the same.
5. The BPRT further directed the Officer Commanding Station (OCS) Kirogo Police Station to assist the Respondent in compliance with the above directives.
6. Thereafter, the Appellant approached this Court through a Notice of Motion Application dated 11th September, 2023, seeking a stay of execution of the BPRT's ruling dated 31st July, 2023, which was dismissed with costs to the Respondent on 5th October, 2023. It was contended that the Respondent evicted the Appellant from the suit premises on 21st September, 2023.
7. The Appellant was aggrieved by the entire decision of the Business Premises Rent Tribunal delivered on 31st July, 2023, in respect of case number BPRT No. E571 of 2023. The appeal is anchored on eleven (11) grounds enumerated on the face thereof and reproduced below:
 1. That the learned Honourable Vice-Chairman of the Business Premises Rent Tribunal erred in law and in fact in failing to appreciate that the notice of termination issued by the landlord to the tenant on 12th March 2023 was defective and could not be made effective.
 2. That the learned Honourable Vice-Chairman of the Tribunal erred in law and in fact in failing to consider the submissions by the appellant's counsel.
 3. That the learned Honourable Vice-Chairman of the Tribunal erred in law and in fact in failing to consider the relevant law relating to termination of the tenancies under Section 4(2) of Cap 301 Laws of Kenya and therefore arriving at a wrong determination of the matter.
 4. That the learned Honourable Vice-Chairman of the Tribunal erred in law and in fact by considering irrelevant matters thereby arriving at a wrong determination on the matter.
 5. That the learned Honourable Vice-Chairman of the Tribunal erred in law in dismissing the appellant's/tenant's application dated 6th June, 2023 in a summary manner without taking evidence from the parties.
 6. That the learned Honourable Vice-Chairman of the Tribunal erred in law to appreciate that the landlord's notice dated 12th March, 2023 which was at the core of the dispute between the parties was incurably defective and was not in the prescribed form as set out in Section 4(2) of the *Landlord and Tenant (Shops, Hotel and Catering Establishments Act* (Cap 301).
 7. That the learned Honourable Vice-Chairman of the Tribunal erred in law by granting the landlord/respondent orders of vacant possession when the landlord had not filed a complaint in the tribunal under Section 12(4) of Cap 301.
 8. That the learned Honourable Vice-Chairman of the Tribunal erred in law in deliberately ignoring the court of Appeal authority which had settled the issues of jurisdiction of the tribunal.
 9. That the learned Honourable Vice-Chairman of the Tribunal erred in law in deliberately ignoring the Court of Appeal's authority which had settled the issues of jurisdiction of the tribunal.



10. That the learned Honourable Vice-Chairman of the Tribunal erred in law in issuing eviction orders when he had no jurisdiction to do so in an exercise of judicial impunity.
 11. That the learned Honourable Vice-Chairman of the Tribunal erred in law in issuing orders in favour of the landlord/respondent who had withdrawn the preliminary objection challenging the jurisdiction of the tribunal and who has not filed a counter-claim in the reference”.
8. The Court admitted the Appeal and directed that the same be canvassed by way of written submissions.
 9. The Appellant filed his written submissions on 15th February, 2024, through the Law Firm of Mbichi Mboroki & Kinyua Advocates, and submitted that the Notice to Vacate issued by the Respondent on 12th March, 2023, was defective as it did not comply with the requirements of Section 4(2) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, which requires that controlled tenancies can only be terminated by using the prescribed Form A, which is contained in the aforesaid Act.
 10. The Appellant cited the decision of the Court in *Khalif Jele Mohamed & Another vs Republic and the Chairman Business Premises Rent Tribunal* for the definition of a “controlled tenancy”.
 11. It was further submitted that the Respondent’s Notice to Vacate dated 12th March, 2023, contravened Section 4(5) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, as it failed to state the reasons for termination of the tenancy in question, and also did not inform the Appellant that he should notify the Respondent within one month of receipt of the aforesaid notice whether or not he intends to comply with the notice.
 12. Reliance was placed on the holding of the Court in the case of ELC Appeal No.26 of 2016: *Fredrick Mutua Mulinge t/a Kitui Uniform vs Kitui Teachers Housing Cooperative Society Ltd* in support of the preceding proposition. It was further submitted that the Respondent’s Notice dated 12th March, 2023, only notified the Appellant of the expiry of the tenancy without stating the reasons for termination of the same rendering the aforesaid notice illegal.
 13. The Appellant further submitted that the BPRT was misdirected in granting the Respondent the order of vacant possession in respect of the suit premises, whereas the Respondent had not filed a complaint before the BPRT seeking for orders of vacant possession as contemplated under Section 12(4) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*.
 14. The Appellant relied on the holding of the Court in the cases of *Jobakim Abayo vs Damacline Nyamoita* (2021) eKLR; and *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Ltd & 2 others* in support of the proposition that the BPRT acted in excess of its statutory jurisdiction in granting the Respondent an order for vacant possession without a complaint being brought under Section 12(4) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, by the Respondent.
 15. It was further submitted that the BPRT in its decision delivered on 31st July, 2023, did not address itself to the Respondent’s preliminary objection dated 13th June, 2023, and proceeded to issue orders favourable to the Respondent in the absence of a Counter-claim being filed by the Respondent.

Respondent’s Submissions

16. The Respondent filed written submissions on 8th March, 2024, through the Law Firm of J. K. Kibicho & Company Advocates. He submitted that the present Appeal being a first appeal, the Court is bound to re-evaluate and re-analyze the evidence tendered before the BPRT to arrive at its own conclusion.



17. The Respondent cited the decision of the Court in the case of *Abok James Odera t/a A.J. Odera & Associates vs John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR, in support of the foregoing submission.
18. The Respondent identified the following two issues for determination by this Court, namely:
 - a. Whether the Tribunal erred in failing to appreciate that the notice of termination issued by the landlord was defective and could not be made effective.
 - b. Whether the Tribunal failed to consider the relevant law relating to termination of tenancies under Section 4(2) of Cap 301 Laws of Kenya.
19. It was submitted that the Respondent's Notices to the Appellant dated 1st March, 2023, and 12th March 2023, stated that he would not renew the lease in question upon expiry and further, required the Appellant to vacate the suit property on 30th June, 2023.
20. That by virtue of the aforesaid notice, the Respondent had exercised his right not to renew the lease, which constitutes sufficient reason to terminate the same. It was further submitted that the lease expired due to effluxion of time, since it automatically came to an end on 30th June, 2023; and, no tenancy relationship between the parties could be supported by either principles of law or of equity after that date.
21. . Further, that at the expiration date of the said lease on 30th June, 2023, the Appellant was required to render vacant possession of the suit premises. The Respondent cited the decision of the Court in the case of *Katsuri Limited vs Nyeri Wholesalers Limited* (2014) eKLR, to anchor the preceding proposition.
22. It was further submitted that by virtue of the notice of non-renewal of lease issued by the Respondent on 1st March, 2023, and 12th March 2023, the Appellant was required to comply with the terms of the lease agreement and surrender the property on 30th June, 2023; thereby, obviating any need for eviction.
23. The Respondent was categorical that the notices which he issued to the Appellant were in the nature of notices of non-renewal of lease, and not termination notices, as alleged by the Appellant. Further, that the Respondent had not expressed to the Appellant any interest in renewing the tenancy prior to the issuance of the aforesaid notices of non-renewal of lease.
24. The Respondent argued that the duty of the courts is to give effect to the terms of the agreements/ contracts agreed to by the parties and not to rewrite contracts for the parties. For this he cited the holding of the court in the cases of *DI Koisagat Tea Estate Ltd vs Eritrea Orthodox Twabido Church Ltd* [2015] eKLR; and, *National Bank of Kenya vs Pipe Plastic Sanskolit (K)* in support of the foregoing submission.
25. The above are the Pleadings of the parties, their respective written submissions, the cited authorities and the relevant provisions of law, which this court has carefully read and considered. The court finds and holds the issues for determination are as follows:
 - i). Did the Respondent issue a proper notice to the Appellant to Vacate the suit property?
 - ii). Is the Appellant entitled to the Orders sought?

i). Did the Respondent Issue a Proper Notice to the Appellant to Vacate the Suit Property?

26. In the case of *Kurian Chacko vs Varkey Ouseph* AIH 1969 Kerala 16, which was cited with approval in the case of *Bwire vs Wayo and Saloki* (Civil Appeal 032 of 2021 [2022]), the Court held that a first



- appellate court is the final court of fact ordinarily, and therefore, a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage, and that anything less than a full re-evaluation of the entire evidence by the appellate court would amount to visiting an injustice upon a litigant.
27. This Court will also consider that the trial court has discretion too, as set out by *the Constitution* and Statutes just like this court, and its decision cannot be interfered with simply because this is an Appeal. See the case of *Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others* [2019] eKLR, where the Supreme Court of Kenya stated as follows about interfering with the appellate powers;
- “In reiterating the above position, we affirm that we would only interfere with the Appellate Court’s exercise of discretion if we reach the conclusion that in exercise of such discretion, the Appellate Court acted arbitrary or capriciously or ignored relevant facts or completely disregarded the principles of the governing law leading to an unjust order. Conversely, if we find that the discretion has been exercised reasonably and judiciously, then the fact that we would have arrived at a different conclusion than the Court of Appeal is not a reason to interfere with the Court’s exercise of discretion.”
28. Further in the case of *Mbogo & Another vs Shah*, [1968] EA, at p.15; the Court held that;
- “An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”
29. Similarly, in the case of *Abok James Odera t/a A.J. Odera & Associates vs John Patrick Machira- & Co. Advocates* [2013] eKLR, the duty of the first appellate Court was set out as follows:
- “This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusion reached by the learned trial Judge are to stand or not and give reasons either way.”
30. Further, in the case of *Mwanasokoni vs Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and in the case of *Kiruga vs Kiruga & Another* (1988) KLR 348, the court held that the appellate Court will not ordinarily interfere with findings of fact by the trial Court, unless they were based on no evidence at all, or on a misapprehension of it, or the trial Court is shown demonstrably to have acted on wrong principles in reaching its findings.
31. This was also echoed by the Court in the case of *Peter M. Kariuki vs Attorney General* [2014] eKLR, where it was held that:
- “We have also, as we are duty bound to do as a first appellate court, reconsider the evidence adduced before the trial court, and re-evaluate it to draw our own independent conclusions, and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.
32. Being guided as above, the court will now turn to the instant Appeal, then re-evaluate and reconsider the evidence tendered before the BPRT, and then comes up with its own independent conclusion. The



Appellant herein has alleged that he was issued with a defective and illegal Termination Notice, while the Respondent, in response, contends that what he issued was a Notice for non-renewal of lease and not a termination notice.

33. Section 4(2) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* states as follows:

“A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form”.

34. Further, Section 4(4) of the same *Act* states as follows:

“No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, as shall be specified therein”.

35. Referring to the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, the Court in the case of *Manaver N. Alibhai t/a Diani Boutique vs South Coast Fitness & Sports Centre Ltd*, Civil Appeal No. 203 of 1994, held as follows:

“The *Act* lays down clearly and in detail, the procedure for the termination of a controlled tenancy. Section 4(1) of the *Act* states in very clear language that a controlled tenancy shall not terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with the specified provisions of the Act. These provisions include the giving of a notice in the prescribed form. The notice shall not take effect earlier than 2 months from the date of receipt thereof by the tenant. The notice must also specify the ground upon which termination is sought. The prescribed notice in Form A also requires the landlord to ask the tenant to notify him in writing whether or not the tenant agrees to comply with the notice.”

36. In the case of *Lall vs Jeyppee Investments Ltd* Nairobi HCCA No.120 of 1971 (1972) EA 512, the Court held as follows:

“The *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* is an especially enacted piece of legislation which creates a privileged class of tenants for the purpose of affording them the protection specified by its provisions against ravages of predatory landlords. Such protection can only be fully enjoyed if the provisions of the *Act* are observed to the letter otherwise the clearly indicated intention of the legislature would be defeated. In order to be effective in this fashion, the Act must be construed strictly no matter how harsh the result”.

37. In the Reference made before the BPRT, it is evident that the Notice issued by the Respondent to the Appellant was dated 12th March, 2023. This court reproduces it verbatim, as below:

“Dear James, First is to appreciate you for coming and having a meeting with us on Thursday 9th March 2023. For sure over the five years we have walked a good journey with you which is making it very difficult for us to let go.

Unfortunately, your request was further discussed among the family members, to extend your lease for only one year, but it ended to the same point to Terminate The Lease.



It is hereby noted the lease will not be renewed for property located at LR. No. Kahuti 2222 and 2221, Gitweku, Kiharu-murang'a. Furthermore, the last day of tenancy will be June 30th, 2023.”

38. In its decision delivered on 31st July, 2023, which decision dismissed the Appellant’s Reference dated 6th June, 2023, the Business Premises Rent Tribunal (BPRT) held as follows:
23. In the present case, having perused the file, I take note of the fact that the reference by the tenant opposing the Notice was filed on 6th June 2023. This is after the notice was issued in March 2023. By virtue of this, the tenant did not comply with the requirements of the above cited provision. [i.e., Section 4(5) of the Landlord and Tenant (Shops, Hotels and Catering Establishments Act).]
24. They did not respond to the notice within a month and additionally, they did not file an application seeking for extension of time or that they be allowed to file the reference out of time.
25. I take note that they did write a letter to the Landlord’s advocate informing them that they did not intend to comply with the notice. The same was however dated 17th May 2023, which is still more than one month after receipt of the notice from the landlord”.
39. From the above holding, it is evident that the BPRT held that the Appellant’s Reference dated 6th June, 2023, was incompetent having been filed more than a month following the Appellant’s receipt of the Respondent’s notice of non-renewal dated 12th March, 2023.
40. The BPRT in its decision of 31st July, 2023, upon examining the Respondent’s notice of renewal of lease dated 12th March, 2023, in view of the requirements set out under Section 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments Act), entered the following finding:
- “ 21. The notice issued by the landlord satisfied these requirements. The Notice was issued on 12th March 2023, and was to take effect on 30th June, 2023. The notice also provided reasons for termination being that the agreement was coming to an end and the landlord did not intend to renew the same and the tenant had defaulted in paying rent”.
41. The Appellant’s main contention in this Appeal concerns the validity of the Respondent’s Notice of non-renewal of lease date 12th March, 2023, which Notice the BPRT determined was valid. The Appellant appears to subscribe to the view that a Notice for termination of tenancy which does not reproduce the wording contained in Form A verbatim is, by definition, invalid.
42. If the Court were to adopt the above approach, the outcome would be to privilege technicalities over the merits of a case, contrary to the provisions of Article 159(2)(d) of the Constitution. In the case of *Abeid v Badbes* [1968] EA 598, the Court held as follows:
- “Nor can I agree that Form A in its original form was ultra vires the Act. In my view, provided the notice given under the Act contains all that is required by the Act and the regulations made thereunder there has been a sufficient compliance with both the Act and such regulations. This in my view is the position in the instant case. I hold regulation 4 of the regulations to be directory and not imperative. To hold otherwise would entail enslavement



to technicality from which the public began to be freed by the Common Law Procedure Act 1852 and from which they have been made progressively free ever since.”

43. Further, in the case of *Sabeb v Hassanally* [1981] eKLR, the Court interpreted the meaning and import of Section 72 of the *Interpretation and General Clauses Act* (Cap 2) as follows:

“In so far as there is any departure, the appellant may rely upon section 72 of the *Interpretation and General Clauses Act* (cap 2), which provides that any document which purports to be in a prescribed form shall not be void by reason of any deviation therefrom which does not affect the substance of the document, or which is not calculated to mislead.”

44. The Respondent expressly stated in the Notice of non-renewal of lease dated 12th March, 2023, that the lease agreement executed with the Appellant was coming to an end, and would not be renewed; Therefore, the Respondent cannot be faulted for non-disclosure of the reason for terminating the tenancy agreement with the Appellant.
45. Furthermore, the Notice of non-renewal of lease issued by the Respondent on 12th March, 2023, stated that the tenancy agreement with the Appellant would lapse on 30th June, 2023; meaning that the Appellant was given two (2) months’ notice to vacate the Respondent’s premises as contemplated under Section 4(4) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*.
46. Having carefully considered the holding of BPRT, and the reasoning therein and the provisions of the relevant law, this Court holds and finds that is no substantial or misleading departure from the wording in the prescribed Form A, that would render invalid the Respondent’s Notice of non-renewal of lease dated 12th March, 2023.
47. In the said tenancy agreement herein, the tenancy is stated to be for five years. A Notice was issued to the Appellant to the effect that the lease shall not be renewed, and the Appellant acknowledges both the existence of the tenancy agreement with the Respondent and receipt of notice of non-renewal of lease.
48. The tenancy agreement between the parties expired on June 30th 2023, and the Respondent expressly communicated that the lease would not be renewed. In the case of *Kasturi Limited v Nyeri Wholesalers Limited* Civil Appeal No. 248 of 2012, the court held that a lease cannot be extended by implication where an express Notice for non-renewal has been given.
49. Consequently, this Court is satisfied that the Respondent’s Notice of non-renewal of lease dated 12th March, 2023, fulfills the requirements of Section 4(4) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments Act)*.
50. For the above reasons, this Court finds no reasons to disturb the BPRT’s findings contained in its decision of 31st July 2023, to the effect that the Respondent’s notice of non-renewal of lease dated 12th March, 2023, was valid and in conformity with Section 4(4) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*.
51. Accordingly, this Court finds and holds that the Appeal herein is not merited, and the same is dismissed entirely with costs to the Respondent. Further, the court upholds the decision of the BPRT issued on 31st July, 2023.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 4TH DAY OF JULY 2024.

L. GACHERU



JUDGE

Delivered online in the presence of:

Joel Njonjo - Court Assistant.

Mr. Kinyua for the Appellant.

Ms. Njari for the Respondent.

