



REPUBLIC OF KENYA



**KENYA LAW**  
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**Toroom & another v Calyx Redlimited (Environment and Land Appeal  
11A of 2023) [2024] KEELC 6602 (KLR) (8 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6602 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND APPEAL 11A OF 2023  
MN GICHERU, J  
OCTOBER 8, 2024**

**BETWEEN**

**DR RAPHAEL TOROOM ..... 1<sup>ST</sup> APPELLANT**

**IDEAL AUCTIONEERS ..... 2<sup>ND</sup> APPELLANT**

**AND**

**CALYX REDLIMITED ..... RESPONDENT**

**JUDGMENT**

1. The appellants seeks the following orders in this appeal.
  - i. This appeal be allowed with costs.
  - ii. The judgment and decree of 25/5/2023 be set aside in its entirety.
  - iii. The respondent be ordered to pay rent due to the appellants from 1/8/2018 to 30/6/2013, being Kshs 6, 666, 200.00.
  - iv. The respondent be ordered to pay rent accruing from July 2023 until the determination of this appeal.
  - v. The court grants such other orders as it may deem necessary.
2. In the impugned judgment, the learned vice chair of the Business Premises Rent Tribunal Hon. P.May made three orders as follows.
  - a. The landlord shall refund the tenant a total sum of Kshs 13,55, 132 being the costs incurred in carrying out renovations. In default the same to be deducted from the rent.
  - b. The tenant shall pay any outstanding rent as per the terms of the undated lease executed on 23/2/2015 subject to the order (a) above.



- c. The tenant is awarded the costs of the reference assessed at Kshs 250, 000/-.
3. Dissatisfied with this verdict the appellants filed the memorandum of appeal dated 12/6/2023 which contains eight grounds of appeal as follows. The learned chair erred in law and on fact –
- i. in basing her decision on the validity of the tenancy agreement on only one issue, whether any renovations were done by the respondent,
  - ii. in holding that the bill of quantities contained final figures of what was spent by the respondent when the document itself terms the figures as estimates,
  - iii. by deliberately ignoring the fact that the receipts produced by the respondent only added up to Kshs 1, 794, 206. 55 and not Kshs 13, 555, 132.20 as held in the judgment.
  - iv. in deliberately ignoring the fact that none of the receipts produced in evidence bore the name of the respondent,
  - v. In holding that the Tribunal visited the site to confirm whether the construction work was carried out when no such application was made by any party and there was no site visit by the Tribunal for such a purpose as held,
  - vi. in allowing the reference without considering the evidence adduced during the hearing,
  - vii. in awarding and assessing costs at Kshs 250,000/- without stating any basis or the manner in which she arrived at the figure,
  - viii. in failing to consider the evidence, relevant authorities and submissions by the appellant thus arriving at a wrong conclusion.
4. In the written submissions dated 9/11/2023, the appellants’ counsel treated the grounds of appeal as the issues for determination. On the other hand, the respondent’s counsel identified five (5) issues in the written submissions dated 16/4/2024. Like the appellant’s counsel, I will treat the grounds of appeal as the issues for determination.
5. Before I make a determination on the grounds of appeal, I find it important to state the fact of the case very briefly. The 1<sup>st</sup> appellant is the registered owner of the suit premises, Plot No 4480/24 Ngong Township whereas the respondent has been a tenant since 23/2/2015 when the two entered into a lease agreement over the suit premises. The parties had a dispute over rent arrears and the costs of renovating/constructing the suit premises. The dispute reached the Tribunal on 9/8/2019 where the respondent complained that the appellants had threatened to attach its property and to evict it without refunding the costs of the renovations and improvements on the suit premises. The Tribunal heard the dispute and reached the verdict captured in paragraph (2) above of this judgment.
6. This being a first appeal, this court must do the following,
- a. Reconsider the evidence of the trial court,
  - b. Evaluate that evidence itself and draw its own conclusions bearing in mind that it did not see or hear the witnesses and make allowance for that,
  - c. Remember that it is not bound to follow the trial court’s findings,
  - d. Make its own independent findings.

See *Selle v Associated Motor Boat Company* 1968 EA 123.



7. I have carefully considered the appeal in its entirety including the record, grounds, submissions by both sides and the law cited therein and I make the following findings on the grounds of appeal. On the first ground, I find that the learned chair did not err. Confronted with the two disputed tenancy agreements the tribunal was bound to believe one party or the other. I cannot find any fault in believing the respondent over the 1<sup>st</sup> appellant because the presiding officer was able to observe the demeanor of the witnesses. I find no violation of Section 97 of the *Evidence Act*.
8. On the second ground, I find no error on the part of the Tribunal. When the respondent's witnesses testified on 18/2/2022 and 14/10/2022, this issue of the estimates was never raised to them so that they could respond as to why the costs are mere estimates and not actual money spent. Had it arisen at that stage, then the witnesses would have responded accordingly. The issue has been raised abruptly in the written submissions when there is no time to respond to it. The tribunal had no other evidence to rely on other than the one adduced by the respondents. The appellants had ample opportunity of finding their own evidence to counter the one by the respondent but they did not do so. The trial court reached the right decision. In the case of *Regnoil Kenya Limited v Winifred Njeri Karanja*, Civil Appeal No 534 of 2019, relied upon by the appellants' counsel the facts were different in that the bills of quantities were not particularized. In this case, the BQs are particularized and supported by receipts.
9. I find no error on the part of the Tribunal when it comes to the third ground of appeal. The reasons for this finding is the same as the one in the preceding paragraph. The difference in the figures 1, 794, 206.55 and Kshs 13, 555, 132.00 was never put to the witnesses when they testified on 17/2/2022 and 14/10/2022. It is not proper to raise it abruptly in the written submissions.
10. The second witness called by the tenant by the name of Oduor Henry John admitted in cross-examination that the receipts did not bear the name of the respondent. He was however quick to add that they are in the names of the directors. The receipts did not have to be in the names of the respondent to be valid. There is therefore no error on the part of the Tribunal in accepting them as good evidence. I find the fourth ground not proved.
11. The record does not show when the visit to the locus in quo took place and who requested for it. It could therefore have been suo moto. Whatever happened at the locus not having been documented, I have nothing to say about it. As per the principles set out in the case of *Selle v Associated Motor Boat Co. Limited (supra)*, I have borne in mind that I did not participate in the trial and I trust that the one who did made good observations which are incorporated in the judgment dated 25/5/2023.
12. Regarding the sixth grounds, I find no fault in the judgment dated 25/5/2023. It complies fully with the requirements of Order 21 rule 4 of the *Civil Procedure Rules* because it contains a concise statement of the case, the points for determination, the decision thereon and the reasons for the decision. Again, I find no error with the trial court.
13. It is my finding that there is no error on the part of the Tribunal in capping the costs. It is a common practice which was started by the Supreme Court of Kenya in Raila 1 Presidential Election Petition in 2013. It has taken root in other courts in Kenya. Considering the value of the subject matter and the number of attendances, I find that the amount awarded to the respondent was quite parsimonious. It would definitely have been higher had it been assessed in the usual manner considering that the reference was disputed. I find no reason to disturb the amount awarded by the learned chair.
14. Coming to the final issue, I find that the Tribunal identified the issues for determination correctly. I am in agreement that there were only two issues of which of the agreements was valid and whether the costs of renovations should be borne by the tenant or the land. All this was ably dealt with by the Tribunal.



15. For the foregoing reasons, I find no merit in the appellants' appeal and I dismiss it with costs to the respondents.

It is so ordered.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 8<sup>TH</sup> DAY OF OCTOBER 2024.**

**M.N. GICHERU**

**JUDGE**

