



Case Number:	Civil Suit 66 of 2006
Date Delivered:	16 Dec 2014
Case Class:	Civil
Court:	High Court at Mombasa
Case Action:	Judgment
Judge:	Edward Muthoga Muriithi
Citation:	Laxmishanker Kanji Vyas v Firdaus Salim & another [2014] eKLR
Advocates:	Mr. Agwara for Mr. Nyongesa for the Plaintiff Mr. Mgupu for the defendant
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Mombasa
Docket Number:	-
History Docket Number:	-
Case Outcome:	Injunction granted
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

The information contained in the above segment is not part of the judicial opinion delivered by the Court. The metadata has been prepared by Kenya Law as a guide in understanding the subject of the judicial opinion. Kenya Law makes no warranties as to the comprehensiveness or accuracy of the information.

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 66 OF 2006**

**LAXMISHANKER KANJI VYAS ..... PLAINTIFF**

**AND**

**FIRDAUS SALIM ..... 1<sup>ST</sup> DEFENDANT**

**SALIM FARAJ NASSIB ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. The plaintiff herein is a tenant of the residential premises on Plot No. Mombasa/Block XXI/107 situate in Ganjoni within Mombasa (hereinafter “the premises”) which is owned by the 2nd defendant and at all material times managed under a Power of Attorney by the 1st defendant who is a daughter of the 2nd defendant. The dispute before the court is a claim by the plaintiff for declaration that the tenancy is a controlled tenancy within the meaning of the Rent Restriction Act cap. 296 Laws of Kenya and for related declarations and orders on the rent payable and refund of amounts paid over the standard rent. On the other hand, the respondents deny that the tenancy is controlled, the plaintiff having agreed to pay an amount outside the controlled limit of Ksh.2,500/- and further contend that the plaintiff is a difficult tenant who regularly delays in rental payments and therefore seek the termination of the tenancy. The parties called oral testimony respectively by the plaintiff’s son on behalf of the Plaintiff and the defendants both testifying on their own behalf.

**The Plaintiff’s case.**

2. The plaintiff’s case is principally that since the tenancy on the suit premises is protected under the Rent Restriction Act, Cap 296 of the Laws of Kenya, the Defendants were therefore barred from demanding of the Plaintiff any increment in excess of the sum of Kshs.250/- in the absence of the reassessment of and leave of the Rent Restriction Tribunal. The plaintiff claimed that rent for the premises was Kshs.250/- per month exclusive of electricity, water and conservancy charges at some point prior or about 1982, and was gradually enhanced up to Kshs.9,000/- with effect from 1st December 2003. These enhancements are alleged to have been unlawful. The Plaintiff was by a letter dated 13th August 2003 served with a Notice of Termination of Tenancy which required him to vacate the premises on or before 30th September 2003. This was followed by a letter dated 10th September 2003 asking the Plaintiff to vacate on or before 31st October 2003. The plaintiff objected to the notice on the ground that the tenancy was protected under Rent Restriction Act cap. 296.

3. The plaintiff further claimed that in a move to harass the Plaintiff into vacating the premises, the

landlord is purported to have thereafter sought an arbitrary rent enhancement to Kshs.20,000/- per month with effect from 1st January 2004 vide Notice of Increment of Rent dated 13th November 2003. The Plaintiff notified the 1st Defendant by a letter dated 19th November 2003 that he would not comply with the notice of increment on the grounds that the increase was unlawful and unsanctioned by the Rent Restriction Tribunal.

4. The Plaintiff thereafter remained in the premises paying Kshs.9,000/- per month in rent. On 12th January 2006, the Plaintiff forwarded a cheque for Kshs.108,000/- to the Defendants being the rent for January to December 2006 at the rate of Kshs.9,000/- per month. The cheque was according to the plaintiff received without reservation and it was not until 7<sup>th</sup> March 2006 that the Defendant demanded from the Plaintiff Kshs.156,000/- being arrears in rent, in default of which distress for rent was threatened. At this, the Plaintiff objected by a letter dated 11<sup>th</sup> March 2006 stating that he would not comply with the demand for reasons aforementioned.

5. On the 29th March 2006, the Defendants proclaimed against the Plaintiff's movable assets in the premises in distress to cover Kshs.232,000/- being rent arrears. The plaintiff filed this suit and interim conservatory orders were issued on 7<sup>th</sup> April 2006. According to the Plaintiff amended on 27<sup>th</sup> April 2012, the Plaintiff seeks:

a. *A DECLARATION that the demised suit premises are protected under the provisions of the Rent Restriction Act, Cap 296 of the Laws of Kenya and that the standard rent payable for the demised suit premises is a sum of Kshs.250/-.*

b. *AN INJUNCTION restraining the Defendants by themselves, their servants or agents and any one duly authorized by them or any one claiming under them from in any manner or otherwise howsoever:-*

i. *distraint against the Defendants' (sic – Plaintiff's) movable property in order to recover the alleged or any arrears of rent claimed to be payable by the Plaintiff to the Defendants for the demised suit premises in excess of the amount of the standard rent for the demised suit premises; and*

ii. *subjecting the Plaintiff, his servants or agents and any one duly authorized by him, to any annoyance or harassment with the intention thereby of inducing or compelling the Plaintiff to vacate the demised suit premises or any part thereof in order to force the Plaintiff to pay any rental in excess of the amount of the standard rent for the demised suit premises;*

i. *A DECLARATION that under the provisions of the Rent Restriction Act, Cap 296 of the Laws of Kenya the Plaintiff is not obliged to pay to the Defendants any rental in excess of the amount of the standard rent for the demised suit premises in the absence of re-assessment of the standard rent by and/or leave of the Rent Restriction Tribunal to sanction any intended increment of rent over and above the amount of the standard rent for the demised suit premises;*

ii. *A DECLARATION that the Plaintiff is entitled to unconditional refund by the Defendants of any amount paid to and received by the Defendants in rental in excess of the amount of the standard rent for the demised suit premises;*

iii. *Costs of and incidental to this suit and interest thereon at 14% per annum until payment in full thereof by the Defendants to the Plaintiff; and*

iv. *Such further and other relief this Honourable Court may deem fit and just to grant.”*

### **The Defendants' case and reliefs sought.**

6. The Defendants' case is that the Plaintiff has been a tenant on the premises since sometimes in the 1970s. The rent for the premises was Kshs.750/- per month in 1987 and then increased to Ksh.1,000/- per month in the 1990s and in 2003 to Kshs.9,000/- per month. In August 2003, the Plaintiff defaulted in payment and was asked to vacate, to which he responded that he did not wish to comply with the notice to terminate the tenancy. He however continued to pay rent on and off at Kshs.9,000/- per month. In November 2003, the rent was increased to Kshs.20,000/- following “the general market trends” but this notice too the Plaintiff declined to heed. The Defendants state that on 13th January 2004, the Plaintiff wrote to the Defendant's advocates indicating that he was willing to pay the rent of Kshs.9,000/- per month. In March 2006, the Defendants through their lawyers instructed Auctioneers to distress for rent, to which the Plaintiff responded by filing this suit on 7<sup>th</sup> April 2006 seeking injunctive orders to prevent the distraint. In June 2012, the Defendants again increased the rent from Kshs.20,000/- to Kshs.30,000/- following the “current rents” in Ganjoni area. For this increase, the Defendants refer to a valuation report by M/s Valueconsult Ltd. dated 13th June 2012 that advises a rent of Kshs.45,000/- per month for the premises. The Defendants further claim to be paying Municipal Rates of over Kshs.8,000/- per year and produced as Dex. 7, a Payment Request for Annual Rates of Kshs.8,670/- for the year 2011.

7. The Defendants contend that the Plaintiff is not entitled to the orders sought for the reason that the proposed “standard rent” of Kshs.250/- per month for the premises is “not possible in this day and age.” The Plaintiff, it is claimed, has not taken any steps to have the rent assessed by the Rent Restrictions Tribunal or sought its intervention in the matter. It is said that the Plaintiff has come to court under false pretense and the whole suit is calculated to shield the Plaintiff from paying rent and frustrate any attempt to terminate his tenancy in default of his paying rent.

8. The Defendant accordingly prayed:

- a. *That this case be dismissed;*
- b. *For an order that the Plaintiff vacate the suit premises immediately;*
- c. *For the Plaintiff to be compelled to pay all outstanding rent;*
- d. *Costs and interest.*

- i. The Issues for determination were agreed between the parties as follows:
  - a. Whether the demised suit premises are protected premises under the provisions of the Rent Restriction Act Cap 296"
  - b. Whether the Plaintiff is a protected tenant under the provisions of the Rent Restriction Act Cap 296"
  - c. Whether the increment of rent by the landlord amounts to violation of the provisions of Section 9 Rent Restrictions Act Cap 296"
  - d. Whether the distress levied against the Plaintiff was lawful in the circumstances"
  - e. What is the rent payable to the landlord/defendant by the Plaintiff"
  - f. Whether the plaintiff is entitled to the reliefs sought in the amended plaint.

### **Submissions.**

10. Upon hearing the oral testimonies of the plaintiff and the defendants, their respective counsel – Mr. Nyongesa for the plaintiff and Ms Juma for the defendants – made written submissions and judgment thereafter reserved.

### ***The Plaintiff's Submissions:***

a. **Whether the High Court has jurisdiction to hear the matter:** The Plaintiff's written submissions dated 22nd October 2012 were filed on 22nd October 2012. The Plaintiff firstly submits that the jurisdiction of the court to hear the matter was not at all made an issue for due determination at the trial since the Defendant had previously brought it up in the Notice of Preliminary Objection dated 28th July 2007. The objection was heard before Hon. Serگون, J on 23<sup>rd</sup> August 2007 who in the ruling delivered on 2nd November 2007 dismissed the objection. A Notice of Appeal was lodged against the determination on jurisdiction but appears to have since been abandoned as no more has been heard of it. That being the case, the issue of jurisdiction was said to be *res judicata*.

b. **Whether the premises and the Plaintiff tenant are protected under the Rent Restriction Act, Cap 296 of the Laws of Kenya:** The Act under Section 2 (1) (c) and 3(1) applies to all dwelling houses which have a standard monthly rent of Kshs.2,500/= or less as of the 1st of January 1981. The Plaintiff's case is that the premises was let as of that date. It was established that the premises had been let to the Plaintiff prior to 1981 and the initial rent was Kshs.250/=. As of 1987, the rent was Kshs.750/= as

evidenced in the receipts produced. The Plaintiff submits that he was and remains a protected tenant under the Rent Restriction Act since it is not in dispute that the rent payable by the Plaintiff to the Defendant as at 1st January 1981 was less than Kshs.2,500/=. That having been the case, the Plaintiff further submits that the standard rent was not lawfully reviewed through the Rent Restriction Tribunal to exceed Kshs.2,500/=. Furthermore, the Plaintiff submits, the increase in rent effected by the Defendant amounts to a violation of Sections 9 and 10 of the Rent Restriction Act for failing to involve the Rent Restriction Tribunal in its review. The court was urged to recommend criminal prosecution under Section 10 and 21 of the Act for this default.

c. **Whether the distress levied against the Plaintiff on 29th March 2006 was lawful:** On the premise that the premises was/is a protected tenancy, the Plaintiff submits that the distress for rent could only have legally been levied upon leave of the tribunal. As the tribunal was not involved, the said distraint process was unlawful and a violation of Sections 5(1)(i) and 16 of the Act. In addition, the Plaintiff opines that the distress process was deliberately commenced to harass and intimidate the Plaintiff to accede to the unlawful rent increment. The court was asked to consider directing the reimbursement to the Plaintiff of the amounts paid to the Auctioneers and Defendant's advocates in costs for distress for rent.

d. **What is the rent payable to the Defendants by the Plaintiff:** The court was urged to find that the standard rent for the premises still stands as Kshs.250/= being the sum payable as of 1st January 1981, which sum shall remain until such time as the Rent Restriction Tribunal shall be called upon at the instance of the Defendants to re-assess the amount. This is the law, it was submitted, and it must be strictly construed no matter how harsh the result, citing Hon. Madan, J in **LALL VS JEYPEE INVESTMENT LTD (1972) EA 512**.

e. **Whether the reliefs sought should be granted:** The Plaintiff concluded by justifying the grant of the orders sought, citing **MOMBASA GAS SUPPLIES LTD. VS. THE REGISTERED TRUSTEES NATIONAL UNION OF KENYA MUSLIMS OF COAST PROVINCE, CIVIL APPEAL NO. 258 OF 2003** in which the Court of Appeal found that the Business Premises Rent Tribunal has no jurisdiction to grant prayers or issue orders in the nature of an injunction or declaration. The application of this case was based on the comparison between section 5 and 6 of the Rent Restriction Act and Section 12 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. The declarations sought by the Plaintiff were said to be necessary so as to affirm the Plaintiff's rights and claim to remedy under Section 19 the Rent Restriction Act, which would entitle the Plaintiff to recover all amounts paid in excess of the standard rent of Kshs.250/=. It was envisaged that such recovery proceedings would be commenced in the Rent Restriction Tribunal. The court was also referred to the case of **NGANGA KAMAU VS. PATRICE KIIRU, NAKURU HIGH COURT CIVIL APPEAL NO. 89 OF 2001, (2005) eKLR**, quoting Hon. L. Kimaru, J that, "*where the law offers protection to a citizen....it is the duty of the court to uphold such law.*"

k. The Defendant's Submissions were that -

a. The Defendants filed their written submissions dated 3rd September 2012 on even date. First, it was submitted that that the Plaintiff had failed to establish with precision that the rental sum of the suit premises was Kshs.250/= as at 1st January 1981, noting that he who alleges must prove.

b. The Defendants further noted that the rent for the premises had been increased over the years since the Plaintiff took occupation in the 1960s. The rationale behind the Plaintiff's decision to pursue his rights as a protected tenant only now after over 40 years during which the rent increased from Kshs.250/= to

Kshs.750/= to Kshs.1,000/= and to Kshs.9,000/= without complaint was questioned. The Plaintiff was said to be guilty of laches, and as equity aids the vigilant, not the indolent, it was submitted that the equitable relief of injunction could not be accorded to him.

c. On the demand to sums overpaid in rent above the standard rent, the Defendant urged the court to find that it could not make a declaration in the absence of evidence of the total amounts allegedly paid in excess. This burden it was submitted, fell on the Plaintiff to discharge, which he had failed to discharge.

d. Section 5 and 30 of the Rent Restriction Act were cited in response to the submission by the plaintiff that the High Court lacks jurisdiction to grant the orders of injunction prayed for the Plaintiff on account of being a protected tenant. The case of **RENT RESTRICTION TRIBUNAL VS. RAVAL EX PARTE MAY FAIR BAKERIES LTD, HC (1985) KLR 167** was referred to in this regard where the court held that *“one of the powers of the Tribunal is to investigate complaints relating to the tenancy and it has the same jurisdiction and powers in civil matters as conferred upon the High Court including that of granting injunctions.”* The court in that case, it was submitted, also ruled that the standard rent can only be determined by the Rent Tribunal under Section 3 of the Act. The defendant therefore submitted that the court ought not usurp the powers of the tribunal by making a declaration that the rent payable is Kshs.250/= while it has not had the benefit of making a proper assessment to this effect citing the case of **RODSETH VS. SHAW (1967) EA 833** for emphasis.

i. The Defendants filed further written submissions dated 29th October 2012 in response to the Plaintiff's written submissions of 22<sup>nd</sup> October 2012, as follows:

a. **Whether the demised premises are controlled premises:** The Defendants submitted that the Plaintiff's consent to rental increments beyond Kshs.2,500/= decontrolled the tenancy within the scope observed in **ISLAM AHMED SAID VS. KING FEISAL TRUST OF KENYA & ANOR, CIVIL SUIT NO. 330 OF 2010 (2012) eKLR**, although in the cited case, it was the Rent Restriction Tribunal that had assessed the rent above the Kshs.2,500/= threshold, thereby decontrolling it. The Defendants further submitted that the Plaintiff had stopped being a controlled tenant the moment he consented to the rental increments beyond the sum of Kshs.2,500/=. To add to this, the Defendant also cited the Plaintiff's letter of 13th April 2004 indicating willingness to abide by the rent increase to Kshs.9,000/=. The court was referred to Section 120 of the Evidence Act to find that the Plaintiff had by his declaration and acts effectively removed himself from controlled tenancy.

b. **Whether the rent increment was a violation of section 9 of the Rent Restriction Act:** The Plaintiff's payment of the increased rental amounts was submitted to have been an endorsement or approval of the same. On the recommendation for criminal prosecution, it was submitted that the same was uncalled for since the alleged acts had been condoned, aided and consented to.

c. **Whether the distress for rent was unlawful:** The Defendants maintained that the distress levied upon the plaintiff's was lawful as proper notices on the outstanding arrears had been served which the plaintiff failed to adhere to.

d. **What is the rent payable:** The Defendants relied on the valuation report which was unchallenged, indicating that the market value for the premises was Kshs.45,000/- per month. The court was urged to uphold the Defendants property rights under Article 40 of the Constitution. Furthermore, the court was

cautioned that it had not had the benefit of assessing the standard rent as per Section 3(2) of the Rent Restriction Act, and did not have jurisdiction to in any event. Such determination would therefore fall on the valuation report.

e. **Whether the plaintiff is entitled to the orders sought:** The submissions on the Plaintiff's alleged laches of 47 years was repeated, with a citation from the case of **AG VS. ANYANG' NYONG'O & 10 OTHERS, EAST AFRICA COURT OF JUSTICE, APPEAL NO. 1 OF 2009 (2010) eKLR**, that equity eschews indolence. The court was urged to find that the Plaintiff had been part and parcel of the alleged breach (if any) and was guilty of inordinate delay.

### **Determination**

13. The court finds the following crucial facts as established:

a. The plaintiff was a tenant at the 2<sup>nd</sup> defendant's house since 1970 when the latter acquired the house.

b. The rent of the house was less than Ksh2,500/- as at 1981 but the accurate rent as at 1<sup>st</sup> January 1981 could not be verified as the plaintiff asserted that it was Ksh.250 without any proof by acknowledgement receipts. The defendant however showed receipts for the payment of rent at Ksh. 750/- in 1987, 1988 and 1989.

c. By a letter dated 13<sup>th</sup> April 2004, plaintiff agreed to pay Ksh.9,000/- for the premises.

d. Following default by the plaintiff in payment of the Ksh.20,000/- monthly rent demanded, the defendants on 29<sup>th</sup> March 2006 levied distress to recover Ksh.232,000 in rent arrears prompting the filing of the suit. The plaintiff paid the said amount of rent arrears.

e. Thereafter rent has been increased to Ksh.30,000/- which the plaintiff has continued to pay to the date of the submissions in Court.

14. Based on the findings on the facts of the case and the applicable law, the court's determination on the various issues identified and submitted on by the parties as follows:

a. **Whether the demised premises are controlled premises:** It is quite clear that by 1st

January 1981, the rent on the premises met the threshold of being less than Kshs.2,500/-. The premises were controlled tenancies for this reason. However, it is for the Rent restriction Tribunal to determine the standard rent in terms of section 3 of the Rent Restriction Act, and if set at above Ksh.2500/-, the premises would then be said to be an uncontrolled tenancy. For now the tenancy remains the subject of Rent Restriction Act until valid assessment of the rent is done or the parties agree to a rent outside the jurisdiction of the Tribunal. It is clear from section 3 of the Act that the tribunal in assessing the standard rent may utilize other formula other than the rent payable on the 1<sup>st</sup> January 1981 where the conditions listed in the section are fulfilled. Section 3 (2) of the Act provides as follows:

“(2) Notwithstanding anything contained in the definition of “standard rent” -

(a) where the tribunal is satisfied that the standard rent would yield an uneconomic return to the landlord because of -

(i) the temporary nature of the construction of the dwelling-house; or

(ii) the short duration of the lease or licence under which the land is held; or

(iii) the fact that the dwelling-house can only be let for a particular period in each year; or

(iv) the fact that it does not yield a fair capital return on the cost of construction and market value of the land as at 1st January, 1981, or that, in the absence of any indication that the purchase price paid by the landlord was excessive, it does not yield a fair capital return on that purchase price, the tribunal may determine the standard rent to be such amount as, in all the circumstances of the case, it considers fair; and

(b) where the tribunal is satisfied that it is not reasonably practicable to obtain sufficient evidence to enable it to ascertain -

(i) the rent at which the dwelling-house was let; or

(ii) the cost of construction; or

(iii) the market value of the land, at the material date,

the tribunal may determine the standard rent to be such amount as it considers fair having regard to the standard rent of comparable dwelling-houses.”

I would agree with the three-Judge Bench of the Supreme Court in India in the case of **MALPE VISHWANATH ACHARYA V. STATE OF MAHARASHTRA, AIR 1998 SC 602**, while dealing with the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 held that the restriction on the right of the landlords to increase rents, which had been frozen as on 1st September, 1940 or at the time of the first letting, was no longer a reasonable restriction and that the said provisions had, with the passage of time, become arbitrary, discriminatory and unreasonable. However, this may more appropriately be the

remedied by legislative rather than judicial intervention.

b. **Whether the rent increment was a violation of section 9 of the Rent Restriction Act:** Section 11 of the Rent Restriction act provides for permitted increases of rent and section 13 provides for the increment of rent with valid notice of the tenant under the Act in terms that

*“13. (1) Nothing in this Act shall be taken to authorize any increase of rent except in respect of a period during which, but for the provisions of this Act, the landlord would be entitled to obtain possession.*

*(2) Notwithstanding any agreement to the contrary, where the rent of any premises is increased, no such increase shall be due or recoverable until, or in respect of any period before, the landlord has served upon the tenant a valid notice in writing of his intention to increase the rent.”*

It was not shown that the landlord's increase in rent complied with the applicable provisions of law, and the same cannot be held to be lawful

c. **Whether the distress for rent was unlawful:** Permission to levy distress for rent is an express power of the tribunal as set out in sections 5 (1) (i) and 16 of the Act. The landlord in a controlled tenancy is duty bound to seek the tribunal's permission before levying distress for rent. Section 29 of the Act provides that a landlord and any agent or servant of a landlord who evicts a tenant without the authority of a tribunal or willfully subjects a tenant to any annoyance with the intention of inducing or compelling the tenant to vacate the premises or to pay, directly or indirectly, a higher rent for the premises shall be guilty of an offence and liable to a fine not exceeding six thousand shillings or to imprisonment for a term not exceeding six months, or to both such fine and imprisonment. The Tribunal has however not fixed the rent payable for the house, and this court is not able to determine the rent so as to conclude that the amount levied for distress of rent arrears was justified or not. Only the Tribunal may, having established the rent payable, find whether rent was in arrears and owing to justify the levying of distress.

d. **What is the rent payable:** The rent currently set for the premises is Kshs.30,000/- per month exclusive of amenities. This rent (nor any other rent increase) has not been challenged before the tribunal. It is the tribunal that has the power to examine and reduce, set or increase rent in accordance with the Act in the event of such disputes. The High Court has no jurisdiction to set the rent payable under any protected tenancy; that is the province of the Rent Restriction Tribunal under section 5 of the Rent Restriction Act. It is not correct that the decision of Seron J. in dismissing a Preliminary Objection on the jurisdiction operates *res judicata* to support a claim to jurisdiction to assess the rent. The learned judge did appreciate that the role of the Tribunal when he ruled:

*“The issues raised include the question as to whether or not the tenancy is a protected tenancy and as to whether the defendant landlord should be restrained from distraining. It is trite law that the Restriction Tribunal does not issue declaratory and injunctive orders. **What I should stress is that the orders sought in the plaint are composite in nature, in that some issues can be heard and determined by the tribunal and in others the tribunal has no jurisdiction.** For example the tribunal has power to order the landlord to refund money paid by the tenant on account of rent, being a sum irrevocable by the*

landlord. I have further perused the defence. In paragraph 4 the defendant states as follows:

*“4. Paragraph 4 of the plaint is denied to the extent that the increment in rent was arbitrary or that the plaintiff was a monthly tenant and the plaintiff is put to strict proof. The defendant avers that the rent was mutually agreed at Kshs.9,000/= and there was no reason for the defendant to get sanction of the Rent Restriction Tribunal and in any case, the plaintiff paid the said sum of Kshs.9,000/= without any reservations whatsoever and or filing any reference with the tribunal.”*

*It is evident from the above paragraph that the defendant is saying that the Rent Restriction Tribunal has no jurisdiction to hear and determine the dispute; it is apparent that the defendant is blowing cold and hot. This is not permitted in law. In the end and for the above reasons I see no merit in the preliminary objection. This court has jurisdiction to hear and determine the dispute. I dismiss the preliminary objection.”*

It is clear that the Learned Judge thought that the High Court had its role in the grant of the injunction sought by the plaintiff while the tribunal had its own jurisdiction under the Rent Restriction Act.

e. **Whether the Plaintiff is entitled to the orders sought:** The plaintiff had for over 30 years recourse to the Rent Restriction Tribunal for the control of the rent, which he failed to exercise. Owing to this, the rent has since the 1980s risen by mutual consent of the landlord and tenant to its present rate. The statute of limitations on actions for a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture or any actions not otherwise provided for is 6 years under section 4 (1) (d) and (e) of the Limitation of Actions Act, Cap 22 of the Laws of Kenya. The plaintiff's claim for refund of any amount paid or received in excess of the amount of standard rent for the premises is a special damage which must be specifically pleaded and proved. It is not clear what the exact rent was as at 1.1.1981, only that it was below Kshs.2,500/- and the Tribunal has not set the rent payable. This claim cannot therefore be determined with certainty as the rent has not been assessed by the Tribunal. The statute of limitations also bars the claim as it relates to the period of rent before year 2000, which is six years before the filing of the suit. As for the amounts paid to the auctioneers and advocates in distress for rent, although receipts have been produced, the same was a special damage which was not specifically pleaded and is therefore not recoverable. Without determining the question which is not before the Court whether the tribunal has jurisdiction to grant orders of injunction I consider that the plaintiff is entitled to protection from eviction from the premises on the ground that until the assessment of rent by the tribunal to a rent outside the jurisdiction of the Rent Restriction Tribunal, the tenancy is still subject to the control of the Act. See section 14 of the Rent Restriction Act.

f. The orders for eviction and for payment of arrears of rent sought by the defendant were not pleaded in any counter-claim, affording the plaintiff an opportunity to respond thereto and the same cannot, therefore, be granted.

g. On the issue of costs, I consider that each side of the dispute could have dealt better with the dispute, each by approaching the tribunal for a determination of the rent, the landlord by seeking the Tribunal's approval before increasing the rent and the plaintiff in seeking an assessment when the rent demanded by the plaintiff was contested. I do not therefore grant costs to either party.

o. Accordingly, for the reasons set out above, I make the following orders on the dispute between the plaintiff and the defendants:

a. **A Declaration that the plaintiff's tenancy on the 2<sup>nd</sup> defendant's house on the suit property**

**Mombasa/Block XXI/107, the suit premises herein, is protected under the provisions of the Rent Restriction Act, Cap 296 of the Laws of Kenya.**

- b. An Injunction against the defendants from evicting the plaintiff from the tenancy house, save in compliance with Rent Restriction Act.**
- c. An order that the rent payable for the house be assessed by the Rent Restriction Tribunal, with liberty to apply.**
- d. Each party to bear its own costs of the suit.**

**Dated signed and delivered on the 16<sup>th</sup> December 2104**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence of: -

Mr. Agwara for Mr. Nyongesa for the Plaintiff

Mr. Mgupu for the defendant

Mr. Mugao - Court Assistant



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)