REPUBLIC OF KENYA

IN THE HIGH COURT

AT MIGORI

CIVIL APPEAL NO. 27 OF 2015

(FORMERLY KISII HCCA NO. 257 OF 2011)

BETWEEN

BARNABAS GABUNA ARIGA (suing through

ESTHER MONDAY ARIGA holder of

Power of Attorney No. 209/6/08).....APPELLANT

AND

ANTIPAS NDEGE.....1ST RESPONDENT

JAMES KENNEDY MOREKA.....2ND RESPONDENT

KERINA OUKO.....3RD RESPONDENT

ROSEMARY NYANDIGA.....4TH RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Z. Nyakundi,

SRM in Senior Resident's Magistrates Court in Rongo in Civil Case

No. 100 of 2008 dated 15th November 2008)

JUDGMENT

1. This appeal arises from a decision dismissing the appellant's claim for rent arrears and costs of repairs after the termination of the tenancy. I shall refer to the parties in their capacities in the subordinate court for ease of reference. As this is a first appeal, the duty of the court is to review the evidence and reach an independent conclusion as to whether to uphold the decision of the subordinate court bearing in mind that it neither heard or saw the witnesses testify (see ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**). In order to proceed with this task I will set out the facts as they emerged before the trial court.

2. According to the plaint filed before the subordinate court, the plaintiff was the donee of a power of attorney from Esther Gabuna Ariga. He entered into tenancy agreements with the defendants for residential premises situated on Land Parcel No. KAMAGAMBO/KABUORO/1551 registered in the

name of the donor. The plaintiff averred that defendants took possession of the premises on terms that they would each pay Kshs 2,000/- monthly rent.

3. The plaintiff further stated that each of the defendants started defaulting on rent and that while vacating the premises, they engaged in acts of waste, destruction or damage of windows, doors and other fixtures. The plaintiff prayed for the following reliefs against each defendant;

	Rent Arrears	Damages
Antipas Ndege	Kshs. 24,000/- w.e.f from July 2007	Kshs. 16,964/-
James Kennedy Moreka	Kshs. 24,000/- w.e.f from July 2007	Kshs. 30,640/-
Kerina Ouko Omollo	Kshs. 26,000/- w.e.f from June 2007	Kshs. 28,925/-
Rosemary Nyandiga	Kshs. 24,000/- w.e.f July 2007	Kshs. 22,945/-

4. The 1st and 2nd defendants denied that there was a tenancy agreement or that they owed the money claimed or that the plaintiff was entitled to any relief. According to the record, interlocutory judgment was entered against the 3rd and 4th defendants.

5. The plaintiff called two witnesses. PW 1, Esther Monday Ariga, produced the power of attorney appointing her as the agent of her brother who was in the USA. She stated that the defendants had occupied the premises and the two defendants paid rent of Kshs. 1,000/- and that they later started paid rent of Kshs. 2000/- but they stopped and moved out of the house without notice. When she went to the premises she found the steel door and windows removed. She called a contractor to prepare an inventory of the damage. She produced a notice dated 1st October 2007 reference *"Payment/Quit Notice"* informing the tenants that they were defaulting in paying rent and requesting them to clear the rent. She also produced a letter dated 8th October 2007 where the defendants responded by stating that they had not refused to pay the rent and requesting the landlord to make repairs on the premises. She claimed that the defendants had failed to pay for electricity upon vacating the premises. PW 2, Shadrack Ochango Okendo, testified that he worked as a building inspector and that he was requested by PW 1 to examine the suit premises and prepare a report detailing the damage on the property and the cost of repairs. He prepared a report which he produced and which formed the basis of the claim against the defendants.

6. Antipas Ndege, DW 1, testified that he did not enter into a tenancy agreement with the appellant but that he had stayed on the property since August 2003 and vacated the premises in 2008. He stated that the person in charge of the premises at the time was called George and that he paid Kshs. 1,000/- rent until he moved out. He denied that he had any rent arrears or that he left the house in a state of disrepair.

7. DW 2, James Kennedy Moreka, testified that he entered the premises on 5th May 1989 and at the time the property was managed by an agent called George Gisemba. He started by paying rent of Kshs. 500/- until the year 2000 and thereafter he started paying Kshs. 1000/- until April 2008. He denied that he damaged the premises. He stated that the steel doors were fixed at his expense on 15th November 2005. He spent Kshs. 9600/-. He further testified that he installed electricity at his own expense and that on 14th July 2007 he received a notice to vacate the property but he could not leave as he did not have a place to go.

8. DW 3, Samwel Ayodo Ogolla, testified that he was a tenant in the property from 1996 to 2000 and that it was managed by one George Gisemba. He testified that the tenants were paying different rates. DW 1 was paying Kshs. 500/- and DW 2 was paying Kshs. 1000/-. He stated that it is the tenants who installed burglar proof at their own expense. He also testified that DW 1 also sunk a borehole.

9. In the judgment, the learned magistrate dismissed the claim for outstanding rent on the ground that the

tenants had been paying the rent to one George Gisemba and since the power of attorney was dated 3rd January 2008, that the appellant had no authority to demand rent and that the plaintiff had failed to prove the existence of a lease agreement. Regarding the issue whether the property was damaged, the learned magistrate held that since George was not called as a witness, the status of the property could not be ascertained and that the qualification of PW 2 as an expert was not proved hence the court could not rely on his assessment of the state of the premises.

10. The appellant was dissatisfied with the judgment appealed on the grounds set forth in the memorandum of appeal dated 30th November 2011. There are 13 grounds of appeal but the same can be condensed into two grounds; That the learned magistrate erred in holding that the there was no tenancy agreement between the plaintiff and the defendants and that the learned magistrate failed to find that the plaintiff had proved her case on the balance of probabilities.

11. Counsel for the appellants, Mr Oguttu-Mboya, submitted that the learned magistrate misconceived the nature and purport of a power of attorney and that the evidence was clear that the defendants were tenants and the fact was not disputed and indeed they admitted that they occupied the premises through their own response to the notice to quit issued by the plaintiff dated 8th October 2007. He submitted that as tenants, the defendants were under a duty pay rent and leave the premises in repair. Counsel contended that the damage to the premises had been proved by PW 2 who was an expert witness.

12. Learned counsel for the respondent, Mr Abisai, submitted that the appellant did not prove the case to the required standard. He stated that the rent due and the time it was owed was not demonstrated and that no rent book was produced to show that the defendants had rent arrears. He contended that the case, being one of special damages, such damages must be particularized and proved.

13. The central issue from which the reliefs sought by the plaintiff flow is whether the defendants were tenants. It is not in dispute that Barnabas Gabuna Ariga was the registered proprietor of the demised premises. The defendants initially dealt with George Gisemba whom they described as an agent. The proprietor later on issued his power of attorney to Esther Ariga. The issuance of the power of attorney did not change the status of the property. The defendants remained tenants and the donee of the power of attorney was entitled to exercise all powers donated by the owner including demanding rent arrears. The learned magistrate therefore erred in holding that there was no tenancy agreement when in fact the defendant occupied the premises and admitted that they were paying rent to an agent of the landlord.

14. Did the appellant prove the arrears of rent in respect of each tenant? Both parties agree that the plaintiff's claim is in the nature of special damages which must be pleaded and proved as has been held in several decided cases including the case of ***Ryce Motors Limited & Another v Elias Muroki*** **MSA CA Civil Appeal No. 119 of 1995 (UR)**. The respondents argued that appellant should have led evidence on the duration the rent was applicable and the amount per month and in view of the fact that she had a caretaker on the ground to collect rent, he ought to have been called to confirm payment of rent.

15. On the issue of rent, the evidence was that by a notice titled *"PAYMENT OF RENT/QUIT NOTICE"* dated 1st October 2007, the appellant sent to the tenants alerting them that 3 months' rent was outstanding as at 1st October 2007. The rent was stated to be Kshs. 2000/- per month. Although only one notice was produced in respect of DW 2, the letter from the tenants dated 8th October 2007 confirms that each tenant received such a notice. The letter signed by all the tenants stated, in part, as follows;

- *Your letter dated 01/10/2007 over the above referenced issue refers.*
- *We, the undersigned tenants have not failed/neglected/ignored and or refused to pay rent as claimed in your letter. It is surprising that you can allege that we are giving problems in rent payment.*
- *We are ready to pay the rents to you given good directions. We are requesting you to fix a date so that we are aware the time of your coming to be ready with the rents. Give us*

specific dates and we can disapprove you.

16. Both DW 1 and DW 2 stated that they continued paying the sum of Kshs. 1000/- until they vacated the premises in April 2008. When cross-examined the appellant confirmed that George was an agent for the purpose of collecting rent. The plaintiff did not provide any evidence regarding the manner in which the rent was paid or tell the court how much was due from when and how much had been paid to the agent or to her. As Lord Goddard stated in ***Bonham Carter v Hyde Park Hotel Ltd [1948] 64 TLR 177;***

> *Plaintiff must understand that if they bring action for damages it is for them to prove damage, it is not enough to write down particulars and so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.*

17. The position which I find in this case is that although there was some amount of rent outstanding, the plaintiff did not prove with particularity how much was due from each tenant. It is definitely not for this court to mine the plaintiff's and defendants' testimony and extrapolate how much was due as rent arrears. That is the plaintiff's burden which she did not discharge.

18. I now turn to the issue whether the premises were damaged and if so whether the appellant is entitled to the cost of the damage as pleaded. Mr Oguttu-Mboya submitted that it was an implied term of the tenancy agreement that the tenant should leave the premises in repair. Such implied term is to be found in **section 54(d)** of the ***Registered Lands Act (repealed)*** provides as follows;

> *(d) where part only of a building is leased, or where a dwelling-house is leased furnished, to keep the leased premises, except the roof, main walls and main drains, and the common passages and common installations in repair;*

19. **Section 55** of the ***Act*** provides that;

> *Where an agreement is contained or implied in any lease to keep a building or a particular part of a building "in repair", it shall, in the absence of an express provision to the contrary, mean in such state of repair as that which a prudent owner might be expected to keep his property, due allowance being made for the age, character and locality of the building at the commencement of the lease;*
>
> *Provided that there shall not read into such an agreement an undertaking to put any building into a better state of repair than that in which it was at the commencement of the lease.*

20. In order to impose liability for repair of the premises and determine the nature and extent of such liability, it was important for the plaintiff to establish the state of the premises at the time of the commencement of the tenancy. The plaintiff did not detail the status of the demised premises at the time the tenancy commenced. She also did not tell the court the damage that had been occasioned in April 2007 when the defendant left the premises. PW 2 went to the premises and prepared his report on 4th August 2008, five months after they had left the premises.

21. In my view and I find, the appellant did not prove that the premises were in disrepair and that the condition in which the defendants were required to put them to was not established. There is evidence from the defendants that they made certain improvements to the property including installing burglar proofing which the experts report did not take into account. For these reasons, I am constrained to dismiss this part of the claim.

22. From what I have stated, this appeal lacks merit and it is dismissed with costs to the respondents.

DATED and **DELIVERED** at **MIGORI this 19th day of June 2015.**

D.S. MAJANJA

JUDGE

Mr Oguttu-Mboya instructed by Oguttu-Mboya & Company Advocates for the appellants

Mr Abisai instructed by Abisai & Company Advocates for the respondents.