



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**APPELLATE SIDE**

**CIVIL APPEAL NO. 13 OF 2008**

*(From the judgment in Civil Suit No. 333 of 2004 of the Chief Magistrate's Court at Malindi before Hon. D. Ochenja – SRM)*

**NICOLA LIMITED T/A**

**TROPICAL AFRICAN DREAM VILLAGE HOTEL ..... APPELLANT**

**VERSUS**

**NDUNGE MUTUNE MAKENZIE T/A**

**SPA SALON ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal from the judgment of the Senior Resident Magistrate Malindi, handed down on 14<sup>th</sup> March, 2008.
2. The parties herein entered into a tenancy agreement on 1<sup>st</sup> October, 2001 by virtue of which the respondent became the appellant's tenant. The appellant used the demised premises to operate a salon business styled Spa Salon. There was a fire on 3<sup>rd</sup> December, 2001 in the premises which burnt down the salon and the respondent's properties therein. She was allocated alternative premises but on 14<sup>th</sup> January, 2002 she was ordered without notice, to cease operating the business, in breach of the tenancy agreement.
3. She sued for damages and was awarded Shs. 300,000/- in general damages and also specials. The appellants are aggrieved with the award. In their memorandum of appeal filed on 7<sup>th</sup> April, 2008 the appellants raise 16 related grounds of appeal, key among them being grounds 2, 3, 5, 6, 10, and 12 which state:

**“2. The Learned Senior Resident Magistrate erred in law and in fact in failing to hold that the plaintiff was wholly responsible for the loss suffered by her or substantially contributed towards the same.**

**3. That the Learned Senior Resident Magistrate erred in law and in fact in failing to hold that it was the duty of the plaintiff under the terms of the Tenancy Agreement between the plaintiff and the defendant to insure her goods which were in her salon.**

**5. That the Learned Senior Resident Magistrate erred in law in failing to consider or adequately consider the contents of the Tenancy Agreement dated 1<sup>st</sup> October, 2001 entered into by the plaintiff and the defendant.**

**6. That the learned Senior Resident Magistrate erred in law and in fact in failing to hold that the plaintiff had failed to prove negligence on the part of the defendant as alleged and in failing to dismiss the plaintiff's claim with costs.**

**10. That the Learned Senior Resident Magistrate erred in law and in fact in failing to make a finding that the plaintiff did not prove by any or any credible evidence that she was the owner of goods totaling Shs. 145,380.00 pleaded as a special damage.**

**12. That the Learned Senior Resident Magistrate erred in law in awarding to the plaintiff Shs. 300,000.00 as general damages when there was no basis at all for that award.”**

4. The appeal was heard through written submissions of the respective parties. The appellant's submissions take cue from the grounds of appeal. The respondent argues that the appellant was guilty of negligence and that under the tenancy agreement she was covered under the landlords fire policy, and protected against summary termination of the tenancy under the Landlord and Tenant (shops, Hotels and Catering Establishments Act) – (the Act).

5. That consequently she was entitled to special and general damages. As the first appellate court, this court is obligated to re-evaluate the evidence of the trial and to draw its own conclusions while bearing in mind that the trial court had the opportunity to hear and see the witnesses testify (see **Selle vs Associated Motor Boat Company Ltd. [1968] EA 123**).

6. The respondent's evidence was that she took possession of the salon by virtue of a tenancy agreement with the appellant and that she lost her equipment and goods as a result of the fire due to the defendant's negligence. She testified that in breach of the agreement the defendants terminated the tenancy without notice on 14<sup>th</sup> February, 2002. She said that she and other hotel workers did their best to put out the fire but it was “too much” and spread due to blowing of wind. Fire fighters called to the scene came an hour later.

7. On behalf of the appellants one Seifun Mungai (DW1) testified that the cause of the fire was unknown. That it was fierce and difficult to put out. Further that the respondent breached the tenancy agreement by failing to insure salon the business. He denied that she was ordered to leave asserting that she left on her own volition.

8. There was no dispute as to the fire break out and the ceasing of the respondent's operations at the premises in February 2002. With regard to the cause of the fire, the respondent asserted negligence on the part of the appellant. However, it is clear from the evidence of both parties that the cause of the fire was not established. It spread rapidly on the *makuti* roofs of the premises. When she was cross-examined in this aspect the respondent had this to say:

**“The cause of the fire was the chimney. I was told what caused the fire. I heard people shouting “fire fire”. I know what caused the fire...fire started in the kitchen”**

9. Admittedly it was such a fierce fire that the efforts made to put it out failed. Thus the mere break out and spread of the fire, without more, does not constitute negligence on the part of the appellant. DW1 outlined the efforts of workers to stop it. Even the respondent assisted in these efforts. The onus lay with the respondent to prove specific aspects of negligence on the part of the appellant or her agents. She failed to do so, beyond a limp assertions that there was no water at the hotel.

10. Related to this matter was the admitted fact that the respondent failed, despite the clear terms of the tenancy agreement, to take out an insurance cover. She however maintained during cross-examination that she was not in breach. There can be no question of oral misrepresentation in this case as argued by

the respondent's counsel. The respondent stated in her evidence that she read the agreement before affixing her signature thereon and parole evidence contradicting the terms of the said agreement will not avail a party except where there is ambiguity.

11. There is no ambiguity latent or patent in the agreement tendered at the trial. The submission made with regard to the exclusion clauses in the agreement do not assist the respondent who failed to prove negligence on the part of the appellant, and failed to insure her property as required under the tenancy agreement.

12. Special damages must be specifically pleaded and proved. In the trial the respondent did not tender any credible evidence as to the existence and subsequent loss of the items shown in her exhibited list. Surely the receipts did not all perish in the fire. It is curious that the respondent could produce rent receipts and even, her copy of the agreement while claiming that receipts of the goods were lost in the fire. Secondly, she did not produce any bank records to authenticate purchase of the items or even the claim for lost business. I agree with the appellant's counsel that the said claim should have been specifically pleaded as a special damage. The trial magistrate observed in his judgment that the plaintiff's stated daily earnings "were not substantiated hence the court cannot go by the same".

13. The court proceeded however to pluck a figure of Shs.,300,00/- from the air, so to speak and award it as general damages. Even if it was proved that the respondent could not operate her business after the fire or upon being evicted in breach of the tenancy, the trial court had no basis upon which to grant damages amounting to Shs. 300,000/- "for a four month period."

14. It would seem that the respondent's failure to take out an insurance policy as per the terms of the tenancy agreement left her exposed to the vagaries of accidental losses. The respondent's attempt to fix liability on the appellant's appears to me an attempt to escape the consequences of her own default. The trial court's argument that the likelihood of fire was foreseeable to the appellant also applies to the respondent. To succeed she needed to prove that the appellant's negligence caused the fire and/or that she herself had complied with the terms of the tenancy agreement.

15. In the circumstances, this appeal must succeed and is allowed. The judgment of the Lower Court is set aside and substituted with an order of dismissal. In light of the circumstances in which the claim arose and the lengthy period of litigation I do order that each party bears its costs in the original suit and the appeal herein.

Delivered and signed this 26<sup>th</sup> day of **March, 2014** in the presence of Mr. Mwadilo for respondent, Mr. Shujaa holding brief for C. B. Gor for the appellant.

Court clerk – Samwel.

**C. W. Meoli**

**JUDGE**