



REPUBLIC OF KENYA

High Court at Bungoma

Civil Appeal 43 of 2011

GERRY WANYONYI.....APPELLANT

VERSUS

GEORGE MONARI MAISO.....RESPONDENT

### JUDGMENT

#### INTRODUCTION

##### **Primary suit and Parties**

[1] For purposes of the appeal, the Appellant and the Respondent will refer to the Plaintiff (as substituted) and the Defendant in the primary suit, respectively. The initial Plaintiff will however be referred to by his full names, Malde Paresh Gulabchand. The primary case refers to the case appealed from.

##### **Background**

[2] The primary suit is Senior Principal Magistrate's Court at Bungoma Civil Suit No 433 of 2005. It was filed by one Malde Paresh Gulabchand against the Appellant. The plaint was subsequently amended by the order of the court made on 21st April, 2009 and the Respondent was substituted for Malde Paresh Gulabchand. The substitution was on the basis that the Respondent was a holder of a Power of Attorney as an agent of the said Malde Paresh Gulabchand. The substitution and the Power of Attorney is however being challenged in this appeal, and I will therefore not say more about it at this preliminary stage.

[3] The Appellant filed defence and counter-claim on 9th December, 2005. The Respondent filed a Reply to defence dated 13th December, 2005 and there was a joinder of issues between the parties. The primary suit then proceeded to hearing on various dates until it was concluded and judgment delivered on 13th April, 2011.

##### **The Appeal**

[4] The Appellant was dissatisfied by the judgment of the court and the decree thereto and filed an appeal by lodging a Memorandum of Appeal with the court on 10th May, 2011. The grounds of appeal are:-

- 1. THAT the learned Trial Magistrate misdirected herself on the law regarding burden of proof over special damages.***
- 2. THAT having found the receipts produced by the respondent incredible, the Learned Trial magistrate erred in law when she held that the respondent had partially proved his case, for indeed no special damages were proved.***

**3. THAT in awarding Ksh.200, 000/= “as reasonable sum for repairs incurred “the Learned Trial Magistrate erred in law for the claim of repair costs was a special claim and subject to strict proof.**

**4. THAT the Learned Trial Magistrate erred in law and fact, when she held that the appellant was under an obligation to meet additional repair costs, beyond what had been agreed upon.**

**5. THAT the Learned Trial magistrate erred in law and fact, when she relied on a fatally defective Power of Attorney, thus rendering the respondents case a nullity.**

**6. THAT the findings of the Learned Trial Magistrate were against the weight of the evidence on record.**

The Appellant filed submissions in the appeal dated 29<sup>th</sup> August, 2012 and 27<sup>th</sup> September, 2012. The Respondent filed submissions dated 3<sup>rd</sup> September, 2012.

## **EVALUATION OF EVIDENCE**

### **Courts Duty**

[5] This being the first appeal, the court is enjoined by law to evaluate the entire evidence tendered before the trial court and come to its own conclusions. The law however admonishes that the appellate court should be aware that it never heard or saw the witnesses.

### **Plaintiff's Case**

[6] The plaintiff called 5 witnesses.

### **PW1 GEORGE MONARI MAISO on 27.5.2009 testified that:-**

[7] He lives in Bungoma town where he runs a studio. That he knows Malde Paresh Gulabchand- his business partner and employer.

Malde Paresh Gulabchand gave PW 1 a Power of Attorney dated 23<sup>rd</sup> November, 2006 to carry out transactions for him. It was registered in the Labour Office on 24<sup>th</sup> November, 2006 as No. 010/06 on payment of Kshs 250. He produced the receipt for the sum of Kshs. 250 as P EXH.1.

[8] He also knows the Appellant, who was the landlord of Malde Paresh Gulabchand from 18<sup>th</sup> October, 2004. The tenancy agreement was objected to and was not produced. He said that there was an agreement between Malde Paresh Gulabchand and the Appellant requiring Malde Paresh Gulabchand to carry out repairs to wit; erect a fence on the premises; repair the windows; and reinforce the doors. As per the agreement, the Appellant would refund for expenses the cost of the repair the work. The agreement was witnessed by two witnesses, and was produced as P Exh.2. The Appellant also instructed Malde Paresh Gulabchand to carry out repairs in the bedroom where he erected cupboards. He also painted the house, repaired locks on all doors, repaired the toilets in the house, put floor tiles in the house and installed water pipes and a tank for water storage as there was no water. He also repaired the main gate which is made of steel, and paid the electricity after which power was restored.

[9] There was another verbal agreement for additional repairs which was witnessed by Ben Matanga and a fundi called Omondi. .

According to PW 1, the Appellant, in his presence, used to inspect the demised premises on plot No. 303 at Namachanja estate within Bungoma town. The Appellant did not raise any objection to the repairs. The materials for the repairs were purchased by Malde Paresh Gulabchand. He produced receipts of the items bought as P Exh.3. They spent about Kshs. 256,250 on repairs and paid a balance of Kshs. 3,476.50 to KPLC under account No. 595229/02 before the power was reconnected. The receipt for payment of electricity bill is marked MFI 4.

[10] A valuation of repairs done was done and a valuation report was prepared for which Kshs. 5,000 was paid. The valuation report and receipt were marked MFI 5 and MFI 6.

The valuation report showed that the repair costs was Kshs. 298,476.50 which money they are claiming from the Appellant. The Appellant was told about the costing but refused to accept the same or discuss the matter with Malde Paresh Gulabchand.

[11] The Appellant then prepared his own figure of Kshs. 94,376. The Respondent then wrote a letter to the Appellant detailing the items bought but he refused to accept it. The letter is produced as P Exh 7. The list of items send to the Appellant is produced as P EXH. 8.

Malde Paresh Gulabchand does not live in the house anymore as he was evicted by Esikony Agency. Distress documents produced as P Exh. 9.

The Appellant has not paid for the repair costs as at 18th May, 2006 when Malde Paresh Gulabchand was evicted. The Appellant had not even served a Notice to terminate the tenancy. Malde Paresh Gulabchand did not have any rent arrears. The Appellant is not entitled to payment of any profit. He prays the court to assist him recover the repair costs, costs of the suit and interest.

[12] In cross-examination, PW 1 said that Malde Paresh Gulabchand occupied the demised premises on 18th October, 2008. PW 1 was employed by Malde Paresh Gulabchand on commission basis. Malde Paresh Gulabchand runs a business in Mumias called Anco Hardware & Households Ltd from where some of the repair materials were bought. The items were delivered on different dates.

The repair took about 3 weeks to complete. The receipts and invoices bear the same date (2nd January, 2005) as the same were prepared after the Appellant disagreed with Malde Paresh Gulabchand. PW 1 however agreed that the Appellant never requested additional repairs in writing. He was not aware that there was an order issued for the eviction of Malde Paresh Gulabchand, who was not personally living on the premises.

[13] In re-examination, PW 1 said that repairs on the house took a long time and he does not know how long. The receipts bear the same dates as invoices and he does not know why that was the case. The individuals who received the money on the receipt are not shown as well as the ones who issued the invoices.

**PW 2 MATANGA ADULT on 9<sup>th</sup> September, 2009 testified that;**

[14] He lives at Kanduyi area in Bungoma town and runs a business of printing and stationery. He said he knows both parties in the suit. He confirmed that he was a witness to agreement dated 18th October, 2004 (P EXH. 2).

According to the agreement the Appellant authorised Malde Paresh Gulabchand to carry out fencing of the compound using iron sheets, he was to reinforce the hind door using steel door, reinforce the windows using metallic bars. The work was done and could see it being done on the premises while passing by.

[15] He also said that there was a verbal agreement between Malde Paresh Gulabchand and the Appellant for additional repairs to be carried out by Malde Paresh Gulabchand which was carried out. These were; replacement of an iron sheet on the roof which was leaking; replacement of part of the ceiling; re-piping the latrine; tilling and replacing locks for the kitchen; floor repairs; plastering the compound was plastered; installing a water tank; painting; gate repairing; and erecting a steel gate was erected. The costs of the repair were not paid as the parties disagreed in the presence of PW 2.

[16] In cross-examination, PW 2 said the agreement dated 18th October, 2004 was written and was specific on the repairs that were to be done. These were; repair of the fence with iron sheets, replacement of the back door with steel door, reinforcement of the windows with steel. Those were the only repairs as per the agreement.

The verbal agreement was made on 20th October, 2004 at about 11.00 am in the presence of PW 2 and one Mr. Otieno. That agreement allowed Malde Paresh Gulabchand to carry out cementing of the compound. It was on 20th October, 2004.

[17] The Appellant did not say that tiles should be put on the floor. Malde Paresh Gulabchand carried out repairs that would meet his comfort in the house. PW 2 was aware of the law governing the landlord and the tenant, that the Landlord must give written consent on major repairs.

[18] When the repairs were going on, PW 2 visited the demised premises three times. The repairs took about one or two months. Malde Paresh Gulabchand was not personally living on the premises. His brother was living there but PW 2 could not tell if Malde Paresh Gulabchand had sublet the house

The trial court made some enquiries to which PW 2 replied that he was just a witness to the agreement and was therefore passing by to examine the proceedings. He was not however a supervisor.

**PW3 ANDREW OMONDI testified that:-**

[19] He is a contractor and lives at Mashambani Estate in Bungoma district. He knows Malde Paresh Gulabchand who at one time was his client. PW 3 was asked by Malde Paresh Gulabchand to supervise renovation works on a house behind KCB Bank at Bungoma town. The house was dilapidated and repairs were done on it to wit; the gate, fencing, the back door was replaced with steel door, the kitchen sink, wardrobe, curtain boxes, steel door lock and general painting. A fence was erected around the building. The Appellant visited the house on some occasions but PW 3 never spoke with the Appellant. PW 3 was aware that materials were purchased as he used to prepare breakdown of the materials to be purchased. The average amount used on the materials was Kshs. 220,000 and on labour, the average was Kshs. 40,000. .

[20] There were other people carrying out repairs and there was no constant number of repairers as they kept changing depending on the work. A fundi called Justo was a mason and was also doing carpentry.

[21] In cross-examination, PW 3 said he did not know the exact amount paid on the repairs but he estimated it at Kshs. 220,000. But he was not present when any of the payments towards the repairs were paid for the purchase of the materials and for labour. Surprisingly, he did not even recall when he was engaged as a supervisor.

**PW4 JUSTO ESIKHASI ANYOSO testified that:-**

[22] He had worked as a mason, painter and carpenter for 8 years. He knew MALDE PARESH GULABCHAND as he gave him some work to repair the demised premises which according to him is situated behind Co-operative bank. In the month of October, 2004 he repaired the gate, replaced about 5.6 iron sheets from the roof and repaired the staircase. He also repaired the skirting of the wall (lower part of the outer wall); fenced using iron sheets; fixed wardrobes in the house; fitted a sink in the kitchen and laid tiles at the sink and the wall nearby, repaired hinges on the kitchen doors and fixed steel doors and locks.

He also painted both the inside and outside the house and cemented the whole compound. He also talked of other works done by other people. For all his labour, he was paid Kshs.24,000.

[23] In cross-examination, PW 4 said that there was a written agreement between the Appellant and Malde Paresh Gulabchand on the work to be done to wit; repair of the fence, painting the house inside and outside and reinforcing the door with a steel door and windows. But he was not a witness to this agreement. There was no agreement requiring tiles and other repairs to be done. The Appellant knew the repairs were being done.

**PW5 PARESH MALDE testified that:-**

[24] He lives in Bungoma town but runs a business in Mumias. The business is for selling household

goods. PW 3 had given PW 1 a Power of Attorney so that he can be assisting him when he is ailing.

PW 5 had a problem with his ear and was operated on twice. He produced medical documents from Mukumu hospital which were marked as P.Exh. 10. He said he knew the Appellant who was his landlord in respect of the demised premises on plot 303 in Bungoma.

[25] They agreed that Malde Paresh Gulabchand should erect a fence, provide window reinforcement and expand the steel door. They prepared a written agreement and PW 5 carried out the repairs as per the agreement. During the subsistence of the written agreement, they verbally agreed that he carries out other repairs not in the earlier agreement. Justo and Omondi witnessed the verbal agreement.

[26] The additional repairs pushed the cost up to over Kshs. 200,000 which the Appellant refused to refund, and he acknowledged only Kshs. 90,000. The Appellant was supervising the repairs on the house and did not stop PW 5 from continuing with repair. PW 5 was getting material from Anco Hardware in Mumias which is his hardware. He prays the court to assist him to recover Kshs. 298,000.

[27] In cross-examination, he said he could not remember when the repair work started. He denied he owes any rent arrears. Instead it is the Appellant who owes him and had refused to pay; the reason why he filed a suit in the tribunal but was dismissed.

He is aware a Valuation on repairs was done but he has not seen a report prepared. He further denied that the additional repairs were at his own initiative, or that he had sub let the house to other people. He however confirmed that was making repairs to suit the needs of those who were living in the house. On the repairs on the fence , windows and doors no specific amount was given, and he could not tell the cost of the said repairs.

**PW6 PIUS ISIAH KHAOYA testified that:-**

[28] He was at the time a practising real property valuer in Bungoma and Nairobi practicing in the name of Chrisca Real Estate. In January, 2005 , a client by the name of Mande Parner of box 1030 Mumias gave PW 6 instructions to go and inspect a property where he is a tenant and value the repairs, finishes and actual work he had carried out in the property as a tenant. The property is on file No. BUNGOMA MUNICIPALITY /303.

[29] He valued the property which he says was close to KCB Bungoma. The house had three (3) of cement walls; the internal walls were plastered and painted, and the external wall was rough cast. The roof was pitched and coloured with corrugated iron sheets. The ceiling was new and was of chip boards. The windows were steel as were as the external doors. The internal doors were timber. The floors were concrete. The toilets had the walls finished with ceramic titles. He measured the building physically and found that it measured 1,040 sq. feet and the veranda 72 sq. feet.

The accommodation in the house comprised the living room, 3 bed rooms fitted with wardrobes, kitchen, watch closet and a bathroom fitted with an overhead shower. The condition of the building was good and there was evidence that it had been well rehabilitated.

[30] PW 6 told the trial court that his client had told him that the house was partially complete and he had carried out the following repairs;

1. External wall plastering (rough cast) and internal smooth plastering and painting works.
2. Fitted glass windows.
3. Repaired the floor and fitted ceramic tiles in the wet area (toilet)
4. Did the ceiling proceeding and fitted the ceiling panel and painted them.

5. He fitted ward robes in -the bedrooms and food compartment in the kitchen.
6. Undertook a fresh internal rewiring and prone work.
7. Fitted metal gate and secured the building by fencing it with iron sheets.

[31] He was then to value the entire work done. He calculated the external work plaster at Kshs. 44,000 internal wall plastering and painting valued at Kshs. 134,000+ Flooring the whole house was valued at Kshs. 31,000. Ceiling preceding and paint valued at Kshs. 40,000. Boundary fence Kshs. 12,000 steel gate Kshs. 10,000 External yard and veranda Kshs. 20,000 in total it was Kshs. 291,000 which he rounded down to Kshs 290,000.

He prepared a valuation report which he produced as exhibit P Exh. 5, and a receipt for his fees of Kshs. 5,000 as P Exh. 6.

[32] In cross-examination, he said he is a holder of a degree in Land Economics from the University of Nairobi in 1984. He was instructed by the tenant and not the owner. He was aware that the tenant is required to seek consent of the owner of the building but he had no reason to doubt the tenant had obtained the consent. The tenant told him that he entered into an unfinished house with no glasses on the windows; walls had not been plastered and painted. He said he had not visited the site before renovations. But, the renovations had been done recently.

### **Defence hearing on 13.10.2010**

#### **DW1 GERRY WANYONYI testified that:-**

[33] He is a famer and lives at Misikhu. He knew Paresh Malde in October, 2004 October. He was his tenant at Plot No. 303 Bungoma Municipality. He said he had a tenancy agreement which the tenant refused to sign it after he entered the house on 18th October, 2004. DW 1 however signed his part of the agreement. The agreement was produced as D. Exh. 1.

The tenant was to pay Kshs. 5,500 per month with effect from 15th October, 2004. They signed an agreement on 18th October, 2004 regarding the repairs on three areas namely; to fence the plot with iron sheets; replace the door with steel door; and reinforce the windows with sullen proof. The agreement was witnessed by George Malisa and Ben Matanga.

[34] There were neither other repairs to be undertaken nor a verbal agreement on additional repairs as claimed by the tenant. He denied any agreement to compensate him for the repairs or consent to the valuation of the property done by Chrisca Real Estates. He was not given notice of the valuation exercise.

The tenant was required to pay electricity as rent does not include power which he paid on three occasions. When DW 1 demanded payment of rent, the tenant refused to pay and filed a case in the Rent Tribunal at Kakamega Case No. 15 of 2007 but was dismissed. Copy of the ruling is produced as D. EXH 2 and an order as D EXH. 3. The tribunal authorised DW 1 to do valuation of the property. The valuation was to be done on 18th October, 2005 and he produced a letter on the subject a D EXH.4. The valuation was done by S.M ONGATI in the presence of DW 1 and the findings were that the rent should be increased from Kshs. 5,500 to Kshs. 8,500. The report is dated 9th December, 2005 which is produced as D.Exh. 5.

[36] Valuation was done by a Mr. Nderitu of Rent Dispute Tribunal on the repairs done by the Malde Paresh Gulabchand as per the agreement between them. The repairs were valued at Kshs. 57,265. He therefore did not understand the basis for the amount of Kshs. 255,000 being claimed.

Before the Malde Paresh Gulabchand entered the house , it was inhabitable. Eight tenants had occupied the house before the plaintiff including Mr. Makali Advocate. As at November, 2007 when Malde Paresh Gulabchand vacated the house, owed arrears in rent of Kshs 272,250. When the costs of repairs are

deducted the balance of rent arrears is Kshs 195,485 which is claimed in the counter-claim. He prays for payment of the said sum plus costs of the suit.

[37] In cross-examination, DW 1 said that the repairs to be done were specific on three (3) items only. They did not verbally agree for additional repairs to be done and he wrote a letter to that effect (referred to P EXH 8). The cost of repairs was not indicated and that is why they went to the tribunal to ascertain that. DW 1 initially arrived at Kshs. 94,376 (Exh. 7), but no amount that was specified in the agreement.

He learnt that the repairs had been done when Malde Paresh Gulabchand presented his bill for repairs. The initial repairs which Malde Paresh Gulabchand was to do were to cost Kshs. 30,000. Malde Paresh Gulabchand was to deduct from rent a sum of Kshs. 3000 monthly and he pays the difference, i.e. Kshs. 5,500 per month to DW 1. Malde Paresh Gulabchand was supposed to attend valuation but he refused to attend.

It is against the foregoing evidence that the trial court on 13<sup>th</sup> April, 2011 delivered its judgment which excited this appeal.

### **ANALYSIS OF EVIDENCE, ISSUES AND THE APPLICABLE LAW**

[38] I will combine grounds No 1, 2, 3, 4 and 6 as they relate to the same subject and may not be dealt with individually without engaging in annoying repetition. The grounds as contained in the Memorandum of Appeal are;

- 1. THAT the learned Trial Magistrate misdirected herself on the law regarding burden of proof over special damages.**
- 2. THAT having found the receipts produced by the respondent incredible, the Learned Trial magistrate erred in law when she held that the respondent had partially proved his case, for indeed no special damages were proved.**
- 3. THAT in awarding Ksh.200,000/= “as reasonable sum for repairs incurred “the Learned Trial Magistrate erred in law for the claim of repair costs was a special claim and subject to strict proof.**
- 4. THAT the Learned Trial Magistrate erred in law and fact, when she held that the appellant was under an obligation to meet additional repair costs, beyond what had been agreed upon.**
- 6. THAT the findings of the Learned Trial Magistrate were against the weight of the evidence on record.**

#### **A claim for special damages**

[39] From the plaint, the substantive claim by the plaintiff is one for cost of repairs totalling to Kshs. 298,476.50. The claim has been specifically claimed and set out in the body of the plaint and in the prayers. This is in accordance with the law on special damages. The question is whether the same was specifically and strictly proved as required by law.

[40] Judicial authorities are legion that a claim for special damages *must not only be pleaded specifically but also strictly proved*. I do not wish to multiply them except refer to the case of **HERBERT HAHN V AMRIK SINGH COURT OF APPEAL AT NAIROBI CIVIL APPEAL NO 42 OF 1983**. I also find the Black's Law Dictionary, 7th Edition to be useful in its explication of *special damages* as a technical term as well as a specific legal relief that refers to: -

***Damages that are alleged to have been sustained in the circumstances of a particular wrong. They are also referred to as particular damages. To be awardable, special damages must be specifically claimed and proved. Also termed particular damages***

[41] Undoubtedly, a claim and remedy for special damages is a relief on its own which is grantable on defined legal principles. It is not therefore legally or at all supplant-able with any other form of remedy. If substitution were to be permitted, then that would make nonsense of the whole regime for legal redresses.

### **Trial magistrate awarded ‘reasonable sum’**

[42] The trial magistrate entered judgment in the following manner:-

***I therefore enter judgment for the plaintiff against the defendant in the sum of Kshs. 200,000 being reasonable sum for the repair costs incurred***

The trial magistrate correctly observed that there were repairs that were carried out on the demised premises. But since there was no express agreement limiting the cost of repairs to some definite figure, it was critical that the Respondent should have specifically proved the actual cost incurred in order to be awarded special damages prayed or at all. See **HERBERT HAHN V AMRIK SINGH COURT OF APPEAL AT NAIROBI CIVIL APPEAL NO 42 OF 1983**. In the circumstances of the primary suit, an award for *reasonable sum for the repair costs* is not and cannot pass for special damages as known in law. Such a general award would be possible in un-liquidated claim. The Magistrate therefore awarded a relief which had not been claimed whatsoever by the respondent, and was indeed incapable of being awarded in this case given the nature of the claim by the Respondent.

### **Was there proof of special damages?**

[43] The judgment of the trial magistrate made a correct finding on the receipts, invoices and the valuation report produced purportedly in support of the cost of repairs. I quote the relevant parts of the judgment of the trial court below:-

***PW1 said that the amount incurred was Kshs. 256,260. He produced a bundle of receipts to prove that (PEXh. 3) as were as invoices. A look at the bundle of receipts marked LPECH. 3(a) issued by ANCO HARDWARE & HOLDINGS LTD shows that they were all issued on 2nd January, 2005 as well as the invoices produced as PEXH. 3(c). The receipts marked PEXH. 3(b) is not dated and it is not known who issued them.***

***On being asked in cross examination by counsel for the defendant why the invoices and the receipts were written on the same day. PW1 did not give a clear explanation though he said that the items were being purchased from the said hardware, which is owned by the plaintiff, on different dates.***

***The plaintiff did not appear to be sure about the amount incurred on the repairs as sought to rely on the valuation report prepared by CHRISCA REAL ESTATES (PEXh.5) . I however find that the said report cannot show the correct figure on the cost of repairs as the valuer said at page 4 that the plaintiff took over partially completed house and carried out some construction work. That is not the correct position because according to the evidence produced, the house was complete, though it needed some repair.***

***The plaintiff was not keeping his records as soon as he incurs expenses and it is not possible for me to tell the actual repair cost incurred.***

[44] I am also of the considered conclusion that *it is not possible for me to tell the actual repair cost incurred.*

[45] Therefore one cannot understand why the trial magistrate after concluding as she did went ahead and awarded what she thought was *reasonable sum for the repair costs incurred*. The submissions by the Respondent relying on the conduct of the Appellant in justifying the award of reasonable cost is not entirely capable of making the award a substitute for special damages especially where there was no specific amount to which the repairs were to be limited. I am glad the counsel for the Respondent appreciates *that in law special damages must be pleaded and also proved*. But what I am not at all

persuaded about, is the counsel for the Respondent's appreciation of what they call *moderations* the trial court took in the matter as a justification to defy the applicable law; that a claim for special damages *must not only be pleaded specifically but also strictly proved*.

### **Did the Respondent prove case on balance of probabilities?**

[46] There is no dispute that there was a written agreement dated 18th October, 2004 authorising Malde Paresh Gulabchand to carry out some repairs on the house which were limited to:-

1. ***Fencing with iron sheets samba (32 gauge)***
2. ***Replace the hind door with steel***
3. ***Reinforcement on windows***

[47] There is also no dispute that repairs were carried out on the premises. What is in dispute is the extent of those repairs and the cost thereof. The Respondent alleged a verbal agreement for additional repairs between the Appellant and Malde Paresh Gulabchand. The Respondent told the trial court that PW 2 and PW 3 witnessed the verbal agreement, but the testimonies of those two did not support that claim by the Respondent. The trial magistrate then came to the correct conclusion that:-

***The plaintiff has therefore not proved the existence of an oral agreement between him and the defendant authorising him to carry out additional repairs.***

[48] The trial magistrate however proceeded to make a finding:-

***That notwithstanding the defendant did not dispute the fact that the plaintiff carried out repairs which were over and above the repairs agreed upon under the written contract. I presume that the defendant being the landlord was though aware that additional repairs were being done on the house. He did not however take any action to stop the plaintiff from continuing with the unauthorised repairs. Through his conduct, he impliedly bound himself to cater for additional repair costs.***

[49] From the evidence of the Appellant, it is clear that he denied totally that additional repairs were done as alleged. In cross-examination the following is relevant:-

***DW 1 said that the repairs to be done were specific on three (3) items only. We did not verbally agree to do any repairs. We did not put cost of repairs and that is when we went to the tribunal to ascertain that. I came to a figure of Kshs. 94,376 (Exh. 7) The amount is not specified in the agreement. There were no additional repairs. I wrote the letter (Exh.7). (Referring to P.Exh. 8)***

***There was no verbal agreement to make extensive repairs on the house. He learnt that the repairs had been done when Malde Paresh Gulabchand presented his bill for repairs. The initial repairs which Malde Paresh Gulabchand was to do were to cost Kshs. 30,000. Malde Paresh Gulabchand was to deduct from rent a sum of Kshs. 3000 monthly and he pays the difference, i.e. Kshs. 5,500 per month to DW 1. Malde Paresh Gulabchand was supposed to attend valuation but he refused to attend***

[50] Malde Paresh Gulabchand as a tenant of the Appellant and his relationship was governed by the laws on tenant-landlord relationship where such substantial repairs would need the consent of the landlord. Except the alleged verbal agreement, there is nothing to show that consent of the landlord was ever sought for the additional repairs being claimed. In the circumstances, the finding by the magistrate is not well grounded in law when she pronounced that:-

***It therefore follows that the defendant is under an obligation to meet the repair costs as per the written agreement as where (sic) as the additional repairs which were carried out without his express authority.***

[51] The trial magistrate clearly misdirected herself on this issue and reached the wrong decision. There was no factual or legal basis for the trial magistrate to have found that:-

***I find that the plaintiff has partly proved his case on a balance of probabilities.***

The totality of the evidence by the parties and the law applicable in this case, the Respondent failed to prove his case on a balance of probabilities.

### **Award of judgment erroneous**

[52] The finding and the award by the trial magistrate for *reasonable costs* was made without consideration of the claim before the trial court, the applicable principles and law, and was clearly wrong in law. The grounds of appeal number 1, 2, 3, 4 and 6 have been proved. On that basis I hereby set aside the judgment of the trial court entered in favour of the Respondent.

### **What about the set-off and counter-claim by the Appellant**

[53] The trial magistrate also fell into the same trap in deciding on the set-off and counter claim by the Appellant. The Appellant did not also prove his counter-claim to the required standard of balance of probabilities. The Appellant was claiming for the balance of Kshs. 3,235 on set-off of repair costs assessed at Kshs. 57,265 against rent arrears of Kshs. 60,500.

[54] The set-off is an admission but it is then denied in the same pleading and also by Appellant in his evidence. The Valuation Report which is the basis for the set-off was not even produced as evidence as the maker could not be procured as he had left government service. These events leave the court in an obtrusive situation to give judgment on admission. The Respondent will therefore not benefit from the set-off pleaded by the Appellant.

[55] The appellant also claimed in the primary suit for mesne profits at the rate of Kshs. 5,500 from January, 2006 until delivery of vacant possession of the demised premises. The evidence offered by the Appellant was that rent was revised upwards to Kshs. 8,500 from December, 2005. There was no amendment of the defence to reflect the evidence offered. Further, such claims of rent would require rent book being produced to prove payments and arrears if at all. Since from the record, the claim for rent arrears was denied by Malde Paresh Gulabchand, it needed full proof which was not forthcoming. The total effect of these issues was that the counter-claim was not proved on balance of probabilities. The finding of the trial magistrate was not therefore supported by evidence to the required standard when she concluded that:-

***I also find that the defendant has partly established his set off and counter-claim against the plaintiff on a balance of probabilities.***

I therefore also set aside the judgment of the trial magistrate that awarded the Appellant the sum of Kshs. 60,500.

### **Power of Attorney**

[56] The Appellant has argued that the Power of Attorney appointing the Respondent as the recognized agent of Malde Paresh Gulabchand was fatally defective and a nullity for no stamp duty that was paid on its registration. Ground 5 of the appeal reads:-

***5. THAT the Learned Trial magistrate erred in law and fact, when she relied on a fatally defective Power of Attorney, thus rendering the respondents case a nullity.***

[57] The law is; any document that attracts stamp duty under the Stamp Duty Act, stamp duty should be paid if the document is to be properly taken as evidence in court. This law was accordingly enunciated in the case of **WEETABIX LTD V HEALTHY TWO THOLEM NBI HCCC NO 283 OF 2006**. The

Power of Attorney herein was a general power of attorney for purposes of previous Order III Rule 1 (now Order 9 Rule 1 and 2) of the Civil Procedure and not for purposes of section 116 of the Registered Land Act (now repealed). [58] But in both cases, registration of the Power of Attorney is required if the document is to be admissible in court. Therefore lack of proper registration of the power of Attorney herein would certainly affect the appointment. This is not a mere technicality in terms of Article 159(2) (d) of the Constitution as it confers some legal status on the person as the recognized agent under Order 9 of the Civil Procedure Rules (previously Order III Rule 1). I need to once again reiterate what I said in **BGM HC MISC APPL NO 107 OF 2007 re Ex parte ELECTINA WANG'ONA** that:-

*[39] But the utter misconception that must be avoided is to think that all procedural requirements have been rendered obsolete. In spite of the constitutional admonitions against placing undue regard to technicalities, there is nothing pernicious in observing procedural rectitude provided it is kept under proper constitutional control, and relates to a technicality of a nature that is the Centre piece of administration of justice.*

[59] I find that the Power of Attorney herein was defective. But the substantial justice of the case is that the anomaly was cured when Malde Paresh Glabchand testified in support of his case as PW 5. The defect in the Power of Attorney does not therefore affect the substance of the case.

#### **DECISION OF THE COURT**

[60] The appeal is allowed and the award of Kshs. 200,000 entered in favour of the Respondent on 13th April, 2011 is set aside. The Respondent's counter-claim also fails. Orders issue accordingly.

**Dated, signed and delivered in open court at Bungoma this 21st day of January, 2013.**

**F. GIKONYO**  
**JUDGE**  
**21.1.2013**

In the presence of:

Njalale for Nyamu for the Appellant

Amateshe for Areba for the Respondent

**Court:** Judgment read in open court

before counsels holding brief for the advocates for the parties.

**F. GIKONYO**  
**JUDGE**  
**21/1/2013**