



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO.32 1999**

**BARONESS PROPERTIES LIMITED.....APPELLANT**

**VERSUS**

**PETER OTIENO t/a PETROSA GENERAL CONTRACTORS .....RESPONDENT**

**JUDGMENT**

The Appellant was sued in the lower court for loss incurred to the Respondent due to burglary that occurred in the Respondents premises which are subject to a lease agreement reduced to writing. This agreement is exhibited as No.1.

The ground for the Respondents claim was that under the agreement it was an express and or implied term that the Plaintiff would be entitled to peaceful enjoyment without any interruption from the defendant and/or any person rightfully under or in trust for him. The learned Magistrate found that the Appellant was in blatant breach of this agreement by permitting his agents to break and enter into the Plaintiff's office. Firstly the Appellant did not permit the security guards to break into the offices. The appellant had employed guards to protect the whole property and not only the Respondent's offices and this is not the correct interpretation of this clause. The obligation imposed on the landlord is to ensure the lease agreement shall not be interrupted or brought to an end before the expiration of the term by himself or any other person lawfully claiming under him. Not by burglars and other wrongdoers.

The trial magistrate did not notice that under Clause 3 (d) (v) of the lease exempts the Appellant as landlord from any liability for burglary or theft, and other matters specified in that clause. By reasons of the above matters and on the ground that the Respondent suffered loss because of wrongful act of burglary and theft and because no evidence was produced to show that the guards broker into the premises and stole the landlord can not be held liable at all. He is covered by the lease. Liability in matters of criminal nature such as burglary and theft must be proved beyond reasonable doubt before anyone is charged with liability for committing the same. No such evidence was produced before the court.

Of the grounds of appeal I find that the acts complained of being of criminal nature there is no evidence that the appellant authorized the guards to commit them. On the issues of the loss claimed by Respondent there is no evidence produced to support such claims. It is merely by words of the Respondent that the theft of his goods took place. In any case under the terms of the lease agreement as I have said above the Appellant was not bound to compensate the Respondent for such loss or damage. The loss and expenditure allegedly incurred by the Respondent was so incurred for himself but not on behalf of the Appellant.

For these reasons I find the trial magistrate erred in law in finding that the Appellant was liable to the Respondent at all. I therefore allow the appeal, set aside judgment and with costs to the appellant both in the court and court below.

**Dated at Mombasa this 8th Day of March, 2002.**

**J. KHAMINWA**

**COMMISSIONER OF ASSIZE**

Mr. Otieno for Appellant holding brief.